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THE
FEDERAL REPORTER.

VOLUME 48.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

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JUDGES

OF THE

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² Died Sept. 7, 1891.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

MINFORD v. OLD DOMINION STEAM-SHIP Co.

(Circuit Court, S. D. New York. November 7, 1891.)

JURISDICTION OF CIRCUIT COURT—VENIRE.

When the jurisdiction of the circuit court arises only from the fact that the plaintiff and defendant are citizens of different states, suit may be brought, under Act Cong. Aug. 13, 1888, (25 St. at Large, 433,) in the circuit court of the district in which either the plaintiff or the defendant resides; and where the defendant is a corporation organized under the law of another state, but maintaining an office in the state wherein the plaintiff resides, suit may be brought in the circuit court of the latter state.

At Law. Motion to set aside service of process.

Robinson, Bright, Biddle & Ward, for the motion.

McAdam & McAdam and *H. H. Shook*, opposed.

BROWN, J. The plaintiff is a citizen and resident of this district. The defendant is a corporation organized in the state of Delaware, having a place of business in this city, and properly served with process here. The motion is made to set aside the service for want of jurisdiction of the cause, it being contended that under the act of August 13, 1888, (25 St. at Large, 433,) the defendant could be sued only in the state of its incorporation. The previous decisions in this circuit cited in support of the motion do not rest upon the construction of the statute contended for. In *Filli v. Railway Co.*, 37 Fed. Rep. 65, the plaintiff was a non-resident and the railway company was organized in another state. In *National Typographic Co. v. New York Typographic Co.*, 44 Fed. Rep. 711, one of the plaintiffs was a non-resident, as well as the defendants as to whom the dismissal was granted, and proceeded upon other grounds. In the case last cited the circuit judge states that he follows the decisions of Mr. Justice BREWER in *Booth v. Manufacturing Co.*, 40 Fed. Rep. 1, and of SHIRAS, J., in *Myers v. Murray*, 43 Fed. Rep. 695.

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These citations sufficiently show that the point considered was different from the present, for in the last case it was directly adjudged that where the parties stand in the same relation as in the present case the court had jurisdiction of the action, the motion to remand being denied. On referring to the act of congress itself, there seems to me no doubt of the jurisdiction in the present case, since it is expressly provided that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." This is a clear qualification of the language immediately preceding, and authorizes suit in the circuit court of the district where the plaintiff resides, when, as in this case, the jurisdiction is founded only on the fact that the action is between citizens of different states. The provision of the statute itself seems to me so clear that it is unnecessary to refer to the extreme inconvenience of any different construction. Motion denied.

INDEPENDENT DISTRICT OF ROCK RAPIDS *v.* BANK OF ROCK RAPIDS *et al.*

(Circuit Court, N. D. Iowa, W. D. November 9, 1891.)

REMOVAL OF CAUSE—PARTIES—CANCELLATION OF JUDGMENTS.

When a judgment is recovered by a bank against an independent school-district, and the latter issues orders for the payment thereof, which orders the bank transfers to a third person, the transferee claiming to be the owner, the bank, as well as the transferee, is a proper party defendant to a bill to cancel the judgments, and, when a resident of the same state with the plaintiff, the cause is not removable to the federal courts.

In Equity. Bill to cancel judgments on ground of illegality of consideration. Motion to remand to state court.

McMillan & Van Wagenen, for complainant.

J. M. Parsons and James H. Crase, for defendants.

SHIRAS, J. This suit was brought in the district court of Lyon county, Iowa, the purpose of the bill being to obtain the cancellation of two judgments in favor of the Bank of Rock Rapids and against the complainant. From the allegations of the bill, it appears that, after the rendition of these judgments, the independent district issued orders for the payment thereof upon the treasurer of the district, and these orders have been delivered or transferred by the bank to John N. Richards, and the latter-named party now claims to be the owner of the judgments. Under these circumstances, it cannot be questioned that both the Bank of Rock Rapids and John N. Richards are at least proper, if not necessary, parties to a bill brought for the purpose of canceling the judgments and orders drawn on the treasury of the district, for illegality alleged to inhere in the judgments. There is not involved in the bill separable and distinct controversies, there being in fact but one issue, to-wit, are the judg-

ments void for illegality; and, although the relation of the defendants to this issue may be different, in that the bank is the party in whose name the judgment was rendered, and Richards is the assignee thereof, yet the controversy presented by the bill as to both defendants is one and the same, to-wit, can the judgment be vacated for fraud and illegality? There being but one controversy, and the defendants being proper parties thereto, it follows that this court has not jurisdiction, because the Bank of Rock Rapids, one of the defendants, and the complainant are both corporations created under the laws of Iowa, and therefore, for jurisdictional purposes, are deemed to be citizens of Iowa.

Motion to remand is granted, at cost of the defendant John N. Richards.

INDEPENDENT DISTRICT OF ROCK RAPIDS v. MILLER *et al.*

(Circuit Court, N. D. Iowa, W. D. November 9, 1891.)

In Equity. Motion to remand.

McMillan & Van Wagenen, for complainant.

J. M. Parsons and James H. Crase, for defendants.

SHIRAS, J. This cause is remanded to state court, at cost of William Jacobson, for the reason that part of the defendants are citizens of Iowa, and there is not a separable controversy in the case on behalf of Jacobson. See opinion in *Same Plaintiff v. Bank of Rock Rapids*, 48 Fed. Rep. 2.

MORGAN *et al.* v. HUGGINS *et al.*

(Circuit Court, N. D. Georgia. July 6, 1891.)

1. COSTS OF ADMINISTRATION—PLEADING.

When, in a suit in a federal court to annul a will, the administrator, without objection, files an amended answer, alleging that the complainants have attempted by litigation in this and the state courts to have the will declared void, and have thus required large sums to be paid out as counsel fees, costs, and expenses, which are debts against the estate, and that these items are properly chargeable against undivided property, etc., this is sufficient to warrant the court in deciding upon what part of the estate these expenses are chargeable.

2. SAME—CHARGEABLE UPON UNDEVIDED ESTATE.

Where a will names but a single legatee, and the court decides that the devise to him does not carry after-acquired real estate, the costs of the administration and the debts of the estate are chargeable upon such undivided lands, under Code Ga. § 2533, which classes the "necessary expenses of administration" with the debts of the estate, and section 2534, making debts chargeable upon undivided estate when not otherwise specially provided by the will, and when there is no residuary clause.

In Equity. Bill by Morgan and others, as assignees of certain heirs at law of Riley Garrett, to restrain H. H. Huggins, his administrator,

from selling or otherwise disposing of the property of the estate, and praying an accounting. On exceptions to the report of the special master.

*H. H. Perry, P. L. Mynatt, and G. A. Howell, for complainants.
Hopkins & Glenn and Alexander S. Erwin, for respondents.*

NEWMAN, J. When this case was before the court for the construction of the will of Riley Garrett, deceased, it was held that the intention of the testator was to give all of his estate, after paying his burial expenses, to William Augustus Wheelles. 42 Fed. Rep. 869. It was further held that the real estate acquired by the testator subsequently to the making of the will did not pass thereunder. The question now presented for determination arises on the report of the special master, to whom the case was referred for the purpose of ascertaining the amount, value, rents, etc., of the real estate left by Garrett at the time of his death, and the date that he acquired the same. The special master was further directed to report "what sums have been paid out or incurred on account of the costs or expenses in procuring administration, or in administering said estate, in establishing and probating the will, and in litigation in which the estate has been or is involved." The order provided that the court did not then determine what portion, if any, of said costs or expenses should be charged to the real estate. The report of the special master has been filed. After giving the amount of the real estate of the testator, and rents collected for the same, insurance and taxes paid on the same, he finds that the amount of the costs and expenses in procuring the administration and in administering the estate, in establishing and probating the will, and litigation in which the estate has been or is involved, (and assuming that this relates to costs and expenses incurred and paid by defendant, and does not relate to the costs and expenses incurred and paid by H. G. Long, temporary receiver,) is \$10,366.24. It is urged that the pleadings in this case are not in shape to allow the question as to the amount of the necessary costs and expenses of administration, and from what portion of the estate they shall be paid, to be determined. It appears that on October 6, 1889, defendant filed an amendment to his answer, as follows:

"Defendant H. H. Huggins, administrator, etc., further said that complainants have no just or legal claims to any part of this estate. If respondent should be mistaken in this, then he shows as follows: The persons under whom complainants claim and complainants have attempted by litigation in this and the state courts to have the will declared void, and thus defeat all rights under it, and in such attempts have caused large sums to be paid out as counsel fees, costs, and expenses, and these were and are also debts against the estate; and respondent says all these items are properly chargeable against undevised property, if any there should be, which he denies."

My recollection is that this amendment was filed during the argument as to the construction of the will, with the statement that it did not affect the question then before the court; that counsel desired to file it for future use, if it should become necessary. No demurrer or objection of any kind to this amendment appears in the record, and it seems

to be sufficient to raise the question now under consideration, which question seems to be important to the final determination of the rights of the parties as to the subject-matter of the entire litigation. Besides this, the order of reference to the special master embraced this very subject, and that order was taken by consent, as the court understood at the time.

The other question for determination now is as to how and from what part of the estate the costs and expenses shall be paid. Section 2533 of the Code of Georgia classes the "necessary expenses of administration" with the debts of the estate, and states the order in which they shall rank as to payment out of the estate. Section 2534 is as follows:

"All the estate, real and personal, unless otherwise provided by this Code, is liable for the payment of debts. If there is a will, the property charged with the debts should be first applied; next the residuum, or, if there be no residuary clause, the undivided estate; next, general legacies may abate *pro rata*; and, lastly, specific legacies must contribute."

And so it will be seen that in this case, there being no property charged with the debts, the residuum of the estate, if there be such, is next liable, and, if there be no residuary clause, the undivided estate. It must first be ascertained, then, whether or not there is a residuary clause in the will of Riley Garrett. Bouvier defines "residue:" "That which remains of something after taking away some part of it. The residue estate is that which has not been particularly devised by will." Wharton's definition of "residuum" is: "The surplus of a testator's or intestate's estate after discharging all his liabilities." In the case of *Graves v. Howard*, 3 Jones, Eq. 302, the residue of the testator's estate and effects is said to mean "what is left after all liabilities are discharged, and all the objects of the testator are carried into effect." In *Rapalje & Lawrence* there is a distinction in the definition of this term, "residue," when applied to "devises," and to "legacies;" but it is substantially the same as that before given. As is urged by counsel for the administrator in this case, the residuary clause in the will is one which, together with the other clauses of the will, completely exhausts the estate,—disposes of all the property of the estate. The term "residuary clause" seems to contemplate former provisions in the will to carry into effect the wishes of the testator as to the disposition of his estate, and this expression is used to cover all that remains after such former dispositions of property have been carried out. The intention of the section of the Code, evidently, is not to interfere with the wishes of the testator, as expressed, concerning the disposition of his estate; and so, if the testator himself had not, by the will, specially charged any property with the payment of debts, the residuum should be next applied, or, if no residuary clause, the undivided estate. By the decision of this court only the personalty passes to Wheelers, as all the real estate left by the testator, it is understood, was after-acquired, and goes to the heirs at law or their assignees. Now, both under the letter and the evident intent and meaning of this statute, it would seem that the debts of this estate must be paid from the undivided estate, and that, in

this case, embraces the real estate left by Garrett at his death, and acquired subsequently to the making of the will. It has been stated in argument that all this large amount of costs and expenses has been incurred by the administrator in litigation with the heirs at law of Riley Garrett and their assignees, and it is further stated that all this litigation has been determined against these heirs and assignees, and that they, having thus caused this expenditure for costs and expenses, should be required, as the losing party, to pay it. I am unable from the report to determine satisfactorily this question, and it is probably unnecessary, in view of the construction I have given the sections of the Code referred to. In view of the large amount reported by the special master as costs and expenses claimed by the administrator, and of the indefiniteness of some of the items,—especially the last two for \$1,409 and \$1,029,—I think that the special master should be required to report, either upon the evidence already taken, or upon hearing additional evidence, as to whether all or how much of the amount claimed should be allowed the administrator.

Having heretofore concluded, as expressed above, that the pleadings in this case are sufficient to authorize the court to determine what have been the necessary expenses of administering the estate of Riley Garrett, deceased, and how such expenses shall be paid, and, second, that the necessary expenses being, under Code of Georgia, a part of the debts of an estate, the court referred the matter back to the special master to ascertain the necessary expenses of administration which should be allowed him in this case. The special master has made another report in which he states in detail, after having heard additional evidence, the necessary expenses of the administration, giving each item of expense and the vouchers for the same. Of the items alluded to by the special master in his report, the only ones about which I have had any serious difficulty are the expenses of propounding the will of Riley Garrett, and, especially, as to the large amounts of counsel fees paid out by the administrator before the will was finally established. It seems, however, from the evidence, and the receipts and records presented, that, as to the largest part of this expense, namely, the fees of Dunlap and Dorsey, suit was brought for the same against the present administrator, Huggins, and for an amount considerably larger than that for which verdicts were afterwards obtained. It appears that the administrator resisted the payment of these amounts, but was compelled by the result of the suit to pay them. There was another fee of \$1,000 paid to Hopkins & Glenn, which was voluntarily paid by Huggins for services in the litigation over the probate of the will. The special master has reported in favor of all these expenses being allowed the administrator, and there is no evidence whatever to show that they were not paid in good faith to carry out what was believed to be the expressed wish of Riley Garrett as to the disposition of his estate, propounders' views having since been sustained by the courts. I am not prepared to say, while somewhat doubtful about it,

that these items should not be allowed as part of the necessary expenses of the administration.

As to the other exceptions, the court believes the findings and report of the special master to be correct; and, consequently, all the exceptions are overruled, and the report of the special master confirmed.

STEVENS v. FERRY *et al.*

(Circuit Court, D. Washington, N. D. October 26, 1891.)

1. COURTS—JURISDICTION IN FORECLOSURE—LANDS OUTSIDE DISTRICT.

Civil Prac. Act Wash. T. § 48, providing that actions for the foreclosure of mortgages, among others, "shall be commenced in the county or district in which the subject of the action is situated," gives to a mortgagee whose mortgage covers several disconnected tracts of land in different counties and districts the right to foreclose as to all of them by a single suit in any county where one tract is situated.

2. FORECLOSURE OF MORTGAGE—RIGHTS OF MORTGAGOR—DEFECTIVE SHERIFF'S DEED.

Where lands are sold on foreclosure of a mortgage, and the mortgagor does not redeem within the time allowed, he cannot afterwards recover them from the purchaser, or his grantee, on the ground that no valid deed was ever made by the sheriff.

In Equity.

This is a suit to settle a controversy as to the title to certain lands situated near Anacortes, in this state, arising out of the following facts: In the year 1873, the complainant, being then the owner of the lands, as security for a loan of \$2,000, gave a promissory note and a mortgage covering said lands, which were then within the county of Whatcom, and are now in the county of Skagit. Said mortgage also included real estate situated in Thurston county. As the courts of the territory were organized at the times herein referred to, Thurston county was in the second judicial district, and terms of the territorial district court were held at Olympia for a subdistrict embracing Thurston, Lewis, Chehalis, and Mason counties. Whatcom county was in the third judicial district, and terms of the district court were held at Port Townsend for a subdistrict embracing Whatcom and other counties. In October, 1874, a suit was commenced by the owner and holder of the note and mortgage against the complainant, in the district court at Olympia, to recover a judgment upon the note, and for a decree of foreclosure and order of sale of all the lots and tracts of land included in said mortgage. The complainant, Stevens, voluntarily appeared and submitted to the jurisdiction of the court in said cause, and a judgment and decree as prayed for were rendered against him December 17, 1874. In pursuance of said decree the land in controversy was sold by the sheriff of Whatcom county in July, 1875; and the sale was confirmed by an order of the district court at Olympia, December 8, 1875, by which the sheriff of Whatcom county was directed to execute a deed to the purchaser at the expiration of six months from the date thereof, unless the land should be within

that period redeemed. There has been no redemption made or attempted, and the sheriff's deed was made and delivered as directed. The defendants claim to own the land, and deraign their title from the judicial sale under said foreclosure proceedings. In behalf of the complainant it is alleged that the district court at Olympia had no jurisdiction to order or confirm a sale of land in Whatcom county; that the sale was not made subject to redemption, and in other respects the proceedings were not in conformity to the requirements of the statutes of the territory governing execution sales of real estate; that for these reasons the sale was and is void; and, further, that there is no proof of a valid sheriff's deed having been given. Other points raised by facts alleged in the pleadings of the defendants have been discussed, but require no further mention in deciding the case, according to my view of it.

B. F. Dennison and Howe & Corson, for complainant.

White & Munday, Battle & Shipley, Preston, Carr & Preston, and W. Lair Hill, for defendants.

HANFORD, J., (*after stating the facts as above.*) The courts of Washington Territory were created by Act Cong. March 2, 1853, entitled "An act to establish the territorial government of Washington." 10 U. S. St. p. 172. Section 9 of the act contains the following among other provisions:

"The judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. * * * The said territory shall be divided into three judicial districts, and a district court shall be held in each of said districts, by one of the justices of the supreme court, at such times and places as may be prescribed by law. * * * The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be as limited by law; * * * and the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction."

By the sixth section of the act, general legislative power is given to the territorial legislature, and it is not questioned but what its power to define and limit the jurisdiction of the district courts, as to subject-matter, parties, and territory, was ample. The object of the organic act in providing for a division of the territory into districts was to serve public convenience, and divide the labors of the judges. It was contemplated that the business of the people residing in each district would be transacted in the court for that district; that crimes would be cognizable in the court for the district wherein committed; and that citizens would be required to serve as jurors only in the districts including their homes; but it was not intended to so limit the district courts as to make them mere local courts, incapable of taking original jurisdiction as courts of the territory, with power to issue judicial process and mandates, and enforce the same, in all places under the government of the territory. The continued exercise of the power during the entire history of the territorial government, a period of more than 35 years, is sufficient proof that the district courts of Washington Territory were courts of superior and general jurisdiction. It was the constant practice of said courts to issue

warrants, attachments, and executions, and by such process to cause the arrest of persons and seizure and sale of property in counties and districts other than that in which the court issuing the same was held. Such proceedings were authorized by statutes, and the lawfulness thereof cannot be doubted. The case of *Ableman v. Booth*, 21 How. 506, cited by counsel for plaintiff, is authority for the proposition that the process of a state court or judge has no authority beyond the limits of the sovereignty which confers the judicial power; a true proposition, but no more true than the converse of it, that a court of superior and general jurisdiction may, if authorized by the legislature, adjudicate the rights of parties before it as to property, real or personal, situated anywhere within the boundaries of the state, and enforce its decree by a sale and transfer of the title to such property. Under the laws of Washington Territory a mortgage only created a lien, and entitled the mortgagee to have the mortgaged premises subjected to sale under a decree of court for satisfaction of the debt, (Laws Wash. T. 1869, p. 130, § 498; Laws Wash. T. 1873, p. 134, § 496;) hence there could be no proceeding for a strict foreclosure. A suit for a decree of foreclosure is a proceeding *in rem*; as well as *in personam*, and therefore cannot be properly brought elsewhere than in a court having local jurisdiction over the premises. 2 Jones, Mortg. § 1444; *Wood v. Mastick*, 2 Wash. T. 69, 3 Pac. Rep. 612. The important question in the case, therefore, is as to the jurisdiction of the district court which rendered the decree under which the sale of the land in controversy was made, and the decision of that question must be controlled by the provisions of the civil practice act of 1873. The important sections are the following:

"Sec. 48. Actions for the following causes shall be commenced in the county or district in which the subject of the action, or some part thereof, is situated: (1) For the recovery of; for the possession of; for the partition of; for a foreclosure of a mortgage on; or for the determination of all questions affecting the title, or for any injuries to real property." Laws 1873, p. 12.

"Sec. 561. When default is made in the performance of any condition contained in a mortgage, the mortgagee or his assigns may proceed in the district court of the district or county where the land, or some part thereof, lies, to foreclose the equity of redemption contained in the mortgage."

"Sec. 563. In rendering judgment of foreclosure the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt, with interest and costs, at any time before sale, shall satisfy the judgment."

"Sec. 564. When there is an express agreement for the payment of a sum of money secured, contained in the mortgage or any separate instrument, the court shall direct, in the order of the sale, that the balance due on the mortgage, and costs which may remain unsatisfied, after the sale of the mortgaged premises, shall be levied on any property of the mortgage debtor."

"Sec. 565. A copy of the order of sale and judgment shall be issued and certified by the clerk, under the seal of the court, to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and costs, as upon execution; and, if any part of the judgment, interest, and costs remain unsatisfied, the

sheriff shall forthwith proceed to levy the residue of the property of the defendant. The sheriff shall indorse upon the order of sale the time when he received it, and all subsequent proceedings under the said order shall conform, except as hereinafter provided, to the provisions regulating sales of property upon execution." Laws 1873, pp. 149, 150.

These provisions of the statute are in all important particulars the same as a prior act of the territory which was construed by the supreme court in the case of *Hays v. Miller*, 1 Wash. T. 143; holding, in effect, that the object of the law is to avoid a multiplicity of suits, and save expense in the collection of debts secured by mortgages on real estate, and to give the creditor in one suit the full benefit of a double remedy, by enforcing the personal liability of the debtor, and subjecting the mortgaged property to sale, which formerly could only be accomplished by an action at law and a separate suit in equity. I hold, upon the authority and reasoning of that decision, that only a single suit could be maintained at one time to foreclose a mortgage upon land in the territory, and collect the debt secured thereby, even though several distinct and separate tracts of land situated in different counties and districts be included in the mortgage; and, further, that the statute was not intended to have the effect in such a case to delay the mortgagee by requiring him to proceed in detail by separate suits, one at a time, in each county or district, but gave him the right to proceed, in one suit, in a district court for the county in which the land or a part thereof lies, against all the property subject to the lien of his mortgage. In the argument it is admitted that a district court under this statute might in one suit decree a sale of land situated partly in two counties, if the premises be in compact form, as a single 40-acre tract, or any number of legal subdivisions adjoining each other, but not if the lands in different counties are separate tracts. By this rule of construction a mortgage upon a strip of land like the right of way of the Northern Pacific Railroad, for instance, extending across the entire territory, and embracing land in 12 counties, might be subjected to sale under a decree in a single suit brought in either of the counties; and the court authorized to render such a decree would be without jurisdiction to order a sale under a mortgage of a single acre situated in an adjoining county, unless the acre touched other land covered by the same mortgage in the county wherein the court was held. The authorities cited do not require me to recognize any such distinction. In the case of *Holmes v. Taylor*, 48 Ind. 169, the mortgage covered a single 40-acre tract cut into two parts by a river which formed a boundary between two counties. It was held to be necessary, under the statutes of that state, to sell the land in two parcels, and to sell each part in the county in which it was situated; but the right to foreclose the mortgage in one suit, and the jurisdiction of the court sitting in one county to render a decree and order of sale of the land in both counties, were maintained, and the opinion does not give as a reason for so holding that it was water instead of an intervening tract of land which filled the space between the two parts, or even suggest a reason for a different rule in such a case as this one. The case of *Chadbourne v. Gilman*, 29 Iowa,

181, was one wherein several mortgages were in suit, each covering land in a single county, and it is therefore not in point in this case. In the case of *Orcutt v. Hanson*, (Iowa,) 32 N. W. Rep. 482, the suit was against the executrix of the mortgagor's will; the mortgaged premises were situated in the county in which the defendant lived, and in which the estate was being settled in the probate court; the debt secured by the mortgage was payable in a different county, and the suit was brought in the latter county to collect the debt and foreclose the mortgage. The only question decided in that case was one which does not arise in this. *Lomax v. Smyth*, 50 Iowa, 232, is another Iowa case, later than either of the two mentioned above, and is in point. The decision is to the effect that, under a section of the Iowa Code providing that suits to foreclose mortgages must be brought in the county wherein the mortgaged property, or some part thereof, is situated, a decree of foreclosure and order of sale in a suit upon several deeds, each for a separate tract, given as security for a debt, where a defeasance of all the lands by a single instrument had been taken by the mortgagor, brought in a county embracing only lands affected by one of the deeds, was valid and binding as to lands in another county. The decision in *Wood v. Mastick*, 2 Wash. T. 64, 3 Pac. Rep. 612, does not bear on the question at issue to any greater extent than this: It holds that foreclosure suits must be brought in the county or district in which the land, or some part thereof, lies. It does not intimate that more than one suit is necessary where several tracts in different counties are covered by a single mortgage. I hold that in said foreclosure suit the jurisdiction of the district court at Olympia was not partial, and sufficient merely to afford part of the relief to which the mortgage entitled the plaintiff, but it was complete for all purposes.

The mortgage given by the complainant was foreclosed, and the lands in controversy were sold, by proceedings and under process especially provided by the statutes for such a case, and the sale is not void because not made subject to redemption, as provided in the chapter relating to sales of real estate under executions, nor by reason of non-conformity to the provisions of that chapter in other particulars on the part of the sheriff, in executing the process and making his return. The particular provisions of that chapter invoked are wholly inapplicable to the case. *Hays v. Miller*, 1 Wash. T. 145; *Parker v. Dacres*, 2 Wash. T. 445, 7 Pac. Rep. 893. By the statute, the complainant had a right to redeem the property by paying the mortgage debt, with interest and costs, at any time prior to the sale, (Laws 1873, p. 149, § 563;) and by the order of the court the time was extended for a period of six months from the date of confirmation of the sale. He did not avail himself of the right of redemption given to him by law, or the grace extended to him by the court, and, by the sale of the property and lapse of time, all his rights to and interest in the property were extinguished, and the right of the purchaser to have a valid deed from the sheriff became absolute. Whether such a deed has or has not been executed and delivered is a question which is not material in this case, because it does not concern the complainant. He is in no position to litigate with the defendants any ques-

tion as to the validity or sufficiency of the instrument which their grantor accepted from the sheriff as a deed in compliance with the order of the court.

A decree will be entered in favor of the defendants, confirming their title to the land, as against the complainant.

ROBINSON v. ALABAMA & G. MANUF'G CO.

(Circuit Court, N. D. Georgia. July 6, 1891.)

1. TRUST-DEED—FORECLOSURE—NOTICE.

A trust-deed made by a manufacturing corporation to secure its bonds empowered the trustees, on default of interest payments, to sell the property, "if, after notice is served on the president of said company, the same shall remain unpaid for six months after such default." *Held*, that when the trustees sued to foreclose, instead of selling under the power, it was unnecessary to aver the giving of notice of default to the defendant.

2. SAME—SINGLE TRUSTEE'S RIGHT TO SUE—PLEADING.

One of three trustees in a trust-deed is entitled to sue alone for foreclosure when he avers that one of the others is dead, and that the remaining one, at a sale of the property under a decree of a state court, claimed to be interested in the purchase thereof, and "is interested adversely to your orator as trustee of said bondholders."

In Equity. Suit by J. J. Robinson, trustee, to foreclose a trust-deed given by the Alabama & Georgia Manufacturing Company to secure certain bonds. On demurrer to bill.

Abbott & Smith, for complainants.

N. J. & T. A. Hammond, for respondents.

Before LAMAR, Justice, and NEWMAN, J.

PER CURIAM. There are five grounds for demurrer, and for convenience we consider them in inverse order. The first ground thus considered is that "said complainant does not aver when default in the payment of interest on said bonds, or any of them, was made known to the trustees, or either of them, nor that any notice thereof has been served on the president of the said Alabama & Georgia Manufacturing Company, both of which are conditions precedent to the exercise of authority and duty, by said mortgage conferred on said trustees or a majority of them." The language of the trust-deed, so far as applicable to this ground of demurrer, is as follows:

"In order, and in the fullest manner, to provide for the payment of bonds aforesaid, and the interest thereon, at the time and place when and where the same shall respectively fall due and be payable, the said J. G. Robinson, W. C. Yancey, and W. T. Huguley, or a majority of their survivors or successors, are hereby authorized and empowered, should default be made in the payment of said bonds when they fall due, or in the payment of the interest on said bonds as it shall accrue, they, immediately on such default, being made known by the holder or holders of the coupons attached thereto, and if, after notice is served upon the president of said company, the same

shall remain unpaid for six months after such default shall have been made in the payment of said interest or principal, as the case may be, and at the request of any one or more of the holders of said bonds or coupons, and without any other or further authority from the said Alabama & Georgia Manufacturing Company, upon giving 60 days' notice of the time and place of the sale, together with a description of the property, in a newspaper published in Atlanta, La Grange, and West Point, Ga., to proceed to sell at public auction," etc.

—Then providing for the manner of sale, and the application of the proceeds. After alleging default in the payment of the coupons due July, 1890, and January, 1891, and that more than six months had elapsed since the July coupons fell due, and that they still remain unpaid, and that no money was on deposit at the place of payment at the time the said July coupons fell due, and none deposited within six months thereafter, and that all or nearly all of said July coupons remained unpaid, as orator is informed by the holders thereof, the bill proceeds:

"Orator has been notified since the expiration of the six months after the said July coupons fell due, by a majority of seven bondholders in amount, of their election to treat the whole of said principal sum named in the bonds as due under the provisions of said bonds; and orator has been requested to begin proceedings to secure the property pledged for the payment of said indebtedness; and he deems it to the best interest of the holders of said bonds that he should do so."

It will be seen that even if this provision applies in a case where foreclosure proceedings in the court are instituted, instead of the trustees proceeding to advertise and sell as authorized by the trust-deed, the allegation that is lacking is that notice was served upon the president of the company. If the trustee was proceeding to sell the property himself under the authority of the trust-deed, a strict compliance with this provision might be demanded; but, inasmuch as he is proceeding in the courts, asking for a decree of foreclosure, we are of the opinion that the allegation of notice to the president is unnecessary. It is alleged that the Alabama & Georgia Manufacturing Company has ceased to do business and keep an office in West Point, Ga., or elsewhere, for the transaction of business, and that the property covered by the trustees has been sold under the decree of the state court, and bought by parties who, having organized the Huguley Manufacturing Company, are now in possession of the same. It might be argued, if it were necessary so to do, that this condition of affairs would dispense with the allegation of notice to the president, even if it were otherwise necessary; but, in view of the opinion expressed above, further discussion of it is unnecessary.

The other grounds of demurrer may, we think, be considered together; and they are, substantially, that J. J. Robinson, who alone brings this bill, is unauthorized to sue alone. The allegation of the bill is that Yancey, one of the trustees, is dead, and this, it is conceded, disposes of the matter so far as he is concerned. The further allegation is that said W. T. Huguley, defendant herein, and named as one of the trustees for said bondholders, claimed, at the time of said sale, to be interested in the purchase of said property, and now claims also to be interested in

the property and assets of "said Huguley Manufacturing Company. He is interested adversely to your orator as trustee of said bondholders." The sale referred to is the sale under the decree of the state court, before mentioned. While it appears, it is true, from the bill, that the property was sold under the decree of the state court, subject to this trust-deed, it nevertheless, we think, appears from the foregoing allegations that Huguley's interest is adverse to that of the bondholders, and consequently to show his incapacity as a party complainant. It might certainly have been alleged with more definiteness, but, conceding the statements to be true, as the demurrer does, we think his adverse interest sufficiently appears. It may be mentioned that the trust-deed is signed by W. T. Huguley as vice-president and secretary of the Alabama & Georgia Manufacturing Company, so that it would seem that his interest has been adverse to that of the trust created by the deed from the beginning. We think the demurrer should be overruled upon all the grounds contained therein, and it is so ordered.

CENTRAL TRUST CO. OF NEW YORK v. MARIETTA & N. G. R. Co.

(Circuit Court, N. D. Georgia. July 5, 1891.)

CORPORATIONS — CONSOLIDATION — FORECLOSURE OF MORTGAGE — INTERVENTION BY STOCKHOLDERS.

In a suit to foreclose a railroad mortgage, certain persons petitioned to be made parties defendant, alleging that the defendant company was made up by an illegal consolidation of three other companies, in one of which they were stockholders; that they never consented to, or recognized the validity of, the consolidation, and were not bound by it or by the act of the new company creating the mortgage; that the new company "is perhaps concluded by its conduct in the premises from making defense" to the suit; that the original company, of which they were members, had no officer or representative upon whom they could call to make defense for them; and that the counsel for the consolidated company declined to set up the defense which they desired to make. *Held*, that these facts gave no right to intervene as defendants, especially as there was no charge of fraud or collusion, and the proper remedy is by an independent suit.

In Equity. Bill to foreclose railroad mortgage. On petition of intervention.

Butler, Stillman & Hubbard and *H. B. Tompkins*, for complainant.

Abbott & Smith and *C. D. Phillips*, for respondent.

NEWMAN, J. The above-named case is a suit in equity, brought by complainant, as the trustee for certain holders of bonds of the defendant corporation, to foreclose the mortgage made to secure such bonds. On this bill a receiver has been appointed by the court, and the usual injunction restraining interference with him allowed. The receiver is in charge of the railroad, and is operating the same by order of the court. *C. D. Phillips* and others have made application to the court for permission to be made parties defendant in said case, and with leave thereafter to plead or answer as such defendants. The petition is as follows:

“C. D. Phillips, R. F. Maddox, N. S. Eaves, and Henry Wills, who aver themselves to be citizens of the state of Georgia, residing within the said northern district of Georgia, bring this their petition, and show to the court as follows: Each of them is a stockholder in the Marietta & North Georgia Railroad Company, hereinafter called the ‘Railroad Company,’ in the amount of \$9,475, and petitioners were such stockholders at the time of the filing of the bill in the above-stated cause, and at the time the several acts complained of hereinafter took place. The said Railroad Company was incorporated by act of the general assembly of the state of Georgia, approved on the ——— day of ———, 1885, and the several acts amendatory thereof, passed prior to the year 1874. Said company was authorized to build, equip, and operate a railroad from the city of Marietta, in the county of Cobb, on through Cherokee, Pickens, Gilmer, and Fannin, to the North Carolina line. On the 14th of April, 1887, a meeting of the stockholders of said Railroad Company appears to have been held in the city of Marietta, Ga., at which meeting all of the stock was not represented, but simply a majority was represented in person or by proxy. At said meeting the president and secretary of the company were instructed to prepare and execute articles of consolidation between the said Railroad Company and the Georgia & North Carolina Railroad Company, a corporation of the state of North Carolina. This meeting adjourned to assemble on the fourth Saturday of the then present month of April, 1887. In pursuance thereof, the said stockholders met on the 23d of April, 1887. The whole number of shares represented in person and by proxy appears to have been over 39,000; total number of shares 55,717. Petitioners had no notice of either of these meetings, and they have not consented to said meetings, nor to the proceedings had thereat. Petitioners allege that the proceedings of these meetings were void for want of notice. The proceedings of the meetings looking to a consolidation of said companies were likewise void for want of power in said Railroad Company to pass the same without the consent of petitioners. It appears that the said stockholders’ meeting adjourned again to meet on the 13th of May, 1887. At said last-named meeting a resolution appears to have been passed, reciting that two railroad companies had agreed to consolidate on certain terms. Among other things, it is recited that, ‘whereas the railroads of the said two railroad companies are to be connected together, and form a continuous line from Marietta, through Murphy, North Carolina, to some point in North Carolina on the Tennessee line, and that each of said companies is desirous of consolidating its capital stock, property, and franchises with the capital stock and franchises of the other railroad company, so as to form a railroad corporation which shall embrace all of the capital stock, property, and franchises, and have all the power, rights, and privileges, of the said two railroad companies;’ that the name and style of the new company shall be the Marietta & North Georgia Railway Company, and all the property, rights, interests, franchises, and privileges of both companies shall be vested in the consolidated company. Also provides that the capital stock of the consolidated company shall be 1,300,000 dollars. It appears, also, that in order to provide means with which to broaden the gauge of the road, and for further construction, and to retire the bonds already issued, etc., the consolidated company should issue its first mortgage bonds, covering all the property and franchises, to the extent of 16,000 dollars per mile, on that portion of the road from Marietta, Ga., to Murphy, N. C.; and 20,000 dollars per mile on that part from Murphy, N. C., to Knoxville, Tenn.; and to secure the same by a first mortgage on all the property of the company then owned or thereafter acquired. Your petitioners allege that said agreement of consolidation was void, because said Railroad Company had no power to enter into the same without the consent of petitioners; and the said resolution providing for the issuance of bonds and the securing of the same, as

alleged, was likewise void for the want of power in said company to pass the same. Petitioners have in no wise ratified said action of said stockholders. Even if it should be contended that said consolidation was had in pursuance of authority of law, these petitioners submit that the same was done in pursuance of an amendment of the charter, which materially and fundamentally changes the purposes, aims, and objects sought to be attained by petitioners in their subscription to the capital stock of said Railroad Company, and the same is void as to them. It appears, also, that one of the purposes for which the money to be raised by the sale of said bonds was to provide means to extend the road from Murphy, N. C., to Knoxville, Tenn. Petitioners allege that it was and is illegal without their consent to incumber the property of the company in which they are stockholders, to provide means for the building of a road in Tennessee, and they allege that said bonds and said mortgage, in so far as they were executed with a view to create a lien on the property of said Railroad Company for the purpose of building said Knoxville extension, the same are illegal, null, and void as to these petitioners, and other stockholders standing in the same situation with them. These petitioners charge that the plaintiff in this case had knowledge of the want of power in said defendant company to take said mortgage and issue said bonds at the time it accepted the trust, or, if it had not actual notice, it took said deed of trust and said bonds under such circumstances as to charge it with notice. These petitioners have never in any way recognized the validity of said attempted consolidation, nor have they in any way ratified the action of said defendant company in the issue of said bonds and the execution of said mortgage. Your petitioners further show that said defendant company, in still further violation of the rights of your petitioners, did, on the 25th of November, 1890, attempt to consolidate its property, rights, franchises, and privileges with a corporation known as the 'Knoxville Southern Railroad Company,' which is said to be a corporation under the laws of Tennessee. By this attempted union and consolidation all the property, assets, franchises, and privileges of each of said companies was vested in the defendant railway company. This action was had at what appears to have been a called meeting for that purpose, of which these petitioners had no notice, and to which they have never in any wise consented. The board of directors appear to have ratified the action of the stockholders. This last union and attempted consolidation purports to have wrought some radical change in the charter of said constituent companies. Among other changes, the capital stock is increased to 5,500,000 dollars. The principal office is removed from Marietta, Ga., to Knoxville, Tenn. Petitioners allege that said attempted consolidation is void as against them, because they have never consented to it nor ratified it, and they charge that it is void as to everybody, because the said defendant did not have the power to enter into said consolidation. The said Railroad Company, defendant in said cause, is perhaps concluded by its conduct in the premises from making defense to the plaintiff's cause, and from setting up the defense of petitioners herein set forth. The said Marietta & North Georgia Railroad Company is a party to the cause, and it has no officers or agents, nor other representative, upon whom petitioners can call to enter a defense for them in this cause. The said defendant company declines, through its counsel of record in the cause, to file a defense, and set up the invalidity of said various acts set forth herein. Petitioners now come, and move an order admitting them as defendants to the cause, with leave to plead or answer thereto, by way of defense, the facts herein set forth, and such other additional facts as may appear as against the right of the plaintiff to the relief sought."

It will be perceived that these petitioners claim that they were stockholders in the Marietta & North Georgia Railroad Company, which was

in 1887 consolidated with the Georgia & North Carolina Railroad Company, and subsequently, in the year 1890, with the Knoxville Southern Railroad Company, the entire line now being known as the Marietta & North Georgia Railway Company. Without passing in any way upon the merits of the application, the petition is considered now solely upon the right of petitioners to be parties defendant, and to appear as such by plea or answer. As a general rule, a corporation can only appear to defend litigation against it in its corporate capacity, and represented by its properly constituted officers. The exception to the rule may be stated in the language of the supreme court in the case of *Bronson v. Railroad Co.*, 2 Wall. 283:

"In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, the court of equity will, in its discretion, allow a stockholder to become a party defendant for the purpose of protecting, from unfounded and illegal claims against the company, his own interest, and the interest of such other stockholders as may choose to join him in the defense."

—And by Justice BRADLEY in the case of *Forbes v. Railroad Co.*, 2 Woods, 323, in the following language:

"To be allowed to intervene as general defendants and contestants is another and different thing. This can be admitted only upon the ground before referred to, to-wit, having an interest in the results as a stockholder or otherwise, and being able to show fraud and collusion between the plaintiffs in the suit and the officers of the company having charge of its interests. A suggestion in the progress of the suit that an officer of the court is disposed to act fraudulent, or that the court has made an injudicious or erroneous order, will not be sufficient ground to allow such a party to intervene. Indeed, it is questionable whether in any case, where a suit is properly instituted against a corporation, a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as party to that suit, and seek to defend or control the proceedings. An original bill would rather seem to be a proper mode of proceeding."

In the case of *Blackman v. Railroad, etc., Co.*, 58 Ga. 189, the supreme court of Georgia, in disposing of a case brought before it for review, where the application was like the one now presented to this court, and it had been denied by the court below, delivered this brief opinion:

"Except in cases generally provided for by the Code, (section 3374,) stockholders cannot plead or defend for the corporation. That the action is groundless and collusive, and that, for motives of fraud or favor on the part of the officers, the corporation fails or refuses to defend, will make no difference. The stockholders may protect all their rights by instituting a proper action of their own. In conducting suits due regard must be had to the distinction between parties and those who are not parties. A corporation is a separate person from any or all the stockholders. When it is sued alone, they are not before the court; and they cannot interpose in that suit without express statutory authority. In equity, or possibly at law, under our peculiar jurisprudence, they can take measures, by an original proceeding in their own behalf, to prevent the appropriation of corporate assets to fraudulent claims, though such claims have been fraudulently, by the connivance of the corporation or its officers, reduced to judgment. The present case does not fall within the terms of section 3374 of the Code, since the judgment is not

to bind the individual property of the stockholders; and no aid can be derived from the act of 1872, the same being unconstitutional."

It is not claimed in the application now before this court that there has been any fraudulent conduct on the part of the officers of the Marietta & North Georgia Railway Company in reference to the suit of the Central Trust Company; nor is it alleged that there is any fraud or collusion between the complainants and the corporation, or its officers and representatives, but only that the "defendant in said case is perhaps concluded by its conduct in the premises from making defense to the plaintiff's cause, and from setting up the defense of petitioners herein set forth;" and that "the Railroad Company, in which these petitioners claim to be stockholders, has no officer nor representative upon whom the petitioners can call to enter a defense for them," and that "the counsel of record for the Railroad Company declines to set up the defense which these petitioners desire to make." The suit to which these petitioners desire to become parties defendant is against the new corporation, the Railroad Company. Assuming that the effect of the consolidation was to make petitioners stockholders in the new corporation, and that the officers of the Railroad Company are their representatives, and that it is incumbent upon them to properly represent the interest of these petitioners, no such bad faith on the part of the corporation or its officers is shown as would justify the court, under what seems to be the recognized rule, in allowing petitioners to intervene as defendants, and file defenses, to this suit against the corporation, and any rights they may have can be asserted otherwise. As stockholders in the old corporation, which they allege has not been legally consolidated with or merged into the new corporation, the argument against their coming into this litigation would be even stronger than if they had been stockholders in the defendant corporation, and no such previous conditions had existed or changes occurred. As to any rights which they claim as such stockholders, asserted to be connected with and to the property which is the subject-matter of the suit, and in the hands of the receiver of this court, they are not remediless, and they should in a proper proceeding be heard, of course. But their prayer to be made parties defendant cannot be granted. This application must be denied, without prejudice, however, to the rights of the petitioners to institute a proper proceeding for the assertion and ascertainment of any rights they may have in connection with the property in the hands of the court and embraced in the suit.

GLENN v. PRIEST, (two cases.)

SAME v. DORSHEIMER.

(Circuit Court, E. D. Missouri, E. D. October 7, 1891.)

1. EVIDENCE OF FORMER JUDGMENT—PLEADING—GENERAL DENIAL.

Under the Missouri Code of Procedure a former judgment of the court is not admissible in evidence under a general denial, but must be specially pleaded.

2. LIMITATION OF ACTIONS—RUNNING OF STATUTE—CALLS FOR STOCK SUBSCRIPTIONS.

Limitation does not run as against subscriptions of capital stock, payable when called for, until a call is made.

3. CORPORATIONS—SUBSCRIBERS FOR STOCK—LIABILITY FOR CALLS—ASSIGNMENT OF STOCK.

Under the laws of Virginia, a subscriber for the stock of the National Express & Transportation Company is liable for the full par value thereof when called for by the company, although he has previously made a *bona fide* assignment of his shares.

In Equity. Suit to recover the second assessment upon the stock of the National Express & Transportation Company. As to the suits for the first assessment, see 23 Fed. Rep. 695, and 24 Fed. Rep. 536. On motion for new trial. For prior report, see 47 Fed. Rep. 472. Overruled.

Thomas K. Skinker, for plaintiff.

W. H. Clopton, for defendants.

THAYER, J. Two questions are presented by the motions for new trial which have been filed in these cases. In the case against Priest as executor of Taylor it is insisted that the judgment rendered by this court on March 12, 1884, in the suit to recover the first assessment on decedent's stock, should have been admitted in evidence as a bar to the suit on the second assessment, although it was not specially pleaded. I am satisfied, after an examination of the authorities cited, that the position taken is untenable. Before the adoption of the Code of Procedure it was the practice in this state, as well as in many other jurisdictions, to permit a judgment to be given in evidence under the general issue, (*Offutt v. John*, 8 Mo. 120;) but at the present time, and since the adoption of the Code, the better opinion is that a judgment cannot be given in evidence, either to support the defense of former recovery or to show that a given question arising in a suit has been adjudicated in a previous suit between the parties, without being specially pleaded. The difference between the general issue at common law and a general denial under the Code is well marked, and has been frequently noted. Bliss, Code Pl. §§ 323, 324. The general issue was sometimes regarded as tantamount to a denial of all liability, and under that plea almost any matter could be given in evidence which tended to show that the defendant was not liable. On the other hand, the office of a general denial under the Code is merely to put in issue material allegations of fact contained in the petition or complaint, and under the latter plea only such matters can be given in evidence as tend to disprove facts stated in the complaint. *Northrup v. Insurance Co.*, 47 Mo. 435; *Musser v. Adler*, 86 Mo. 445. In the case last cited the court say:

"The general denial puts in issue the facts pleaded in the petition, not the liability. The facts from which the law draws the conclusion of non-liability must be pleaded in the answer when they are not stated in the petition."

I do not understand that the decision in *Garton v. Botts*, 73 Mo. 274, is opposed to the rule stated in the two cases first cited. The question chiefly mooted in *Garton v. Botts* was whether a judgment, when offered in evidence without being pleaded, and without being objected to, was conclusive, or was evidence that a jury might, in its discretion, disregard, because it had not been pleaded by way of estoppel. It will also be observed from a careful examination of the case in question that, as the issues were made up, the judgment in all probability was properly admissible in evidence, even if it had been objected to, because it tended to contradict material facts stated in the petition. My conclusion is that under the Missouri Code a judgment must be specially pleaded before it can be admitted in evidence, when the purpose of offering it is merely to show that the matter in issue is *res judicata*. If a judgment in a former suit between the parties tends to disprove material facts stated by the plaintiff in his petition, a different rule obtains. But in the present case the judgment offered had no such tendency. It was offered for the purpose of showing that one of the issues arising in this case had been tried and decided in a previous suit between the parties on a different cause of action, and that the plaintiff was concluded as to that issue by the previous decision. The record in question was properly excluded.

2. In the cases of *Priest* and *Dorsheimer* the point is made that, inasmuch as they transferred their stock in the National Express & Transportation Company many years ago, the statute of limitations began to run in their favor from the date of such transfer, and that they cannot be held liable for stock assessments made in 1880 and 1886. With reference to this contention it is sufficient to say that the court understands this question to be in effect settled by the decisions heretofore referred to and cited. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. Rep. 867,—both decide that statutes of limitation do not run against subscriptions to capital stock, payable as or when called for, until a call is made. It has also been held that under the laws of Virginia a person who subscribed for stock in the National Express & Transportation Company could not divest himself of his liability to pay its full par value when called for by the corporation, even by a *bona fide* assignment of his stock on the stock-books of the company. *Morris v. Glenn*, 87 Ala. 628, 7 South. Rep. 90; *Hambleton v. Glenn*, 72 Md. 331, 20 Atl. Rep. 115; *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. Rep. 129. These decisions, as it appears to me, place both the assignor and the assignee of stock in precisely the same attitude with respect to stock assessments. Both are liable to pay assessments when they are made, until the full par value of the stock has been called in; and the statute of limitations does not run in favor of either until a call has been made. I have examined the *Case of Portsmouth Banking Co.*, L. R. 2 Eq. 167, to which my attention was called, but it appears to contain nothing in opposition to these views. That

was a case in which the liability of a shareholder for debts contracted by the corporation before and after he ceased to be a stockholder was involved. The principles upon which the decision turned have no application to the case at bar. Motions overruled.

JAFFEE et al. v. JACOBSON et al.

(Circuit Court of Appeals, Eighth Circuit. October Term, 1891.)

SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—FAILURE OF CONSIDERATION—ADOPTION OF CHILDREN.

A bill for specific performance of a contract alleged that complainants' uncle, a man of large means living in Denver, Colo., being married and childless, expressed a desire to adopt complainants, the two children of his deceased sister, who were then living with their father in Posen, Prussia, and opened a correspondence with their guardian expressing this desire and purpose, and asking the guardian to secure the consent of their father that complainants should be surrendered to him with full dominion and control, as if he were in fact their father; that the guardian did open negotiations with the father, who refused to consent unless some pending litigation between him and complainants in regard to the interest of the latter in their mother's estate was first settled; that thereupon the uncle procured the guardian to settle the same by relinquishing all of complainants' claims, promising that in consideration thereof, and of the father's consent, he would, upon his death, leave to complainants one-half of his estate; that, the settlement being completed, the guardian received charge of complainants, and removed them from their father's custody, leaving one of them with its grandmother in another town, there to remain until the grandmother's death, and taking the other to his own home, all as directed by the uncle in America; that, on hearing of the settlement, the uncle directed his brother to proceed from America to bring over the other complainant, whom he desired as soon as possible to come to Denver; that before his brother's departure from America the uncle died; and that the defendant, his widow, took possession of his entire estate, and refused to recognize complainants' interest therein. *Held*, that no case for specific performance was stated, as it was apparent that the main consideration for the uncle's agreement was the pleasure and mutual benefits which he expected to result from the establishment of the relation of parent and child between himself and complainants as members of his household, which consideration was never realized.

Appeal from Circuit Court of the United States for the District of Colorado.

Suit by Regina Jaffee and Helena Jaffee against Annie W. Jacobson and others for the specific performance of a contract made by her husband, Eugene P. Jacobson. Bill dismissed. Affirmed.

STATEMENT BY THAYER, J. In this case the circuit court for the district of Colorado sustained a general demurrer both to an original and amended bill of complaint, and subsequently dismissed the cause, complainants having declined to plead further. The substantial averments of the bill may be stated as follows: Eugene P. Jacobson, the husband of Annie W. Jacobson, the appellee, in August, 1878, was a lawyer of large means residing at Denver, Colo. Though married for many years, he was at the time childless. The complainants, Regina and Helena Jaffee, were his nieces, being children of a deceased sister. They were then quite young, and resided at Posen, in the kingdom of Prussia, under the care, as it seems, of a guardian by the name of Samuel Bernstein,

their mother having died but a short time previously. The bill then proceeds to aver as follows:

"That, soon after the death of their mother, their uncle Eugene P. Jacobson expressed a strong desire to adopt these complainants as his own children, he being childless and without expectation of ever having any children of his own blood; and to that end the said Eugene P. Jacobson personally solicited their guardian, Samuel Bernstein, and father, while in Europe in 1879, to procure these complainants for him, and immediately thereafter, for said purpose, did enter into correspondence with said Samuel Bernstein, the uncle of complainants, and their guardian under the will of complainants' mother, which said correspondence covered a period from the month of September, 1879, to late in the month of March, 1881; that in said correspondence said Jacobson represented to said Bernstein, complainants' guardian, that he, the said Jacobson, was very desirous of adopting these complainants as his own children, because he and his wife, the defendant Annie, were childless, and because of the love he bore to the deceased mother, his sister, and constantly urged said Bernstein to obtain the consent of complainants' father to surrender complainants to him, so that he, the said Jacobson, might have the control and dominion of complainants as though he were their father, and provide for and take care of them as his own children; that in the last letter written by the said Jacobson to the said Bernstein, which was on the 24th day of February, A. D. 1881, said Jacobson requested said Bernstein, if he procured the consent of the father of these complainants as aforesaid, to take said children from the care and control of their said father, and place the complainant Helena, who was then an infant only three years old, with her grandmother, the mother of said Eugene P. Jacobson, and leave said complainant with her said grandmother until the death of her the said complainant Helena's grandmother, or until he, the said Jacobson, otherwise directed; and to take the complainant Regina from the custody and control of her father, if he so consented, and prepare her for the voyage to America which he, the said Jacobson, was then arranging, or about to arrange, for having the said complainant Regina come to Denver as soon as possible after her father had so consented as aforesaid."

It is then stated, in substance, that in the year 1879, at the time of Col. Jacobson's visit to the old country, litigation had arisen between the complainants and their father, relative to the division of the mother's estate, of which the children claimed a portion equal in value to \$4,000, and that the father was not willing to relinquish his parental control over the complainants, or consent to their coming to America, until such litigation was settled to the father's satisfaction. It is next averred:

"That in about the month of February, 1881, said Jacobson, in order to procure the consent of the father of complainants in the matters and things aforesaid, directed and requested the said guardian, Bernstein, to settle and compromise the suit between the father and these complainants, by waiving and surrendering all rights which these complainants had had or might have in their deceased mother's estate, or which they had or might have against their said father, to him, the father, at the same time he, the said Jacobson, promising and agreeing that if, by settling the said litigation in the manner aforesaid, said Bernstein shall obtain the consent of complainants' father to give complainants into the charge and care of him, the said Jacobson, he would, upon his death, leave to these complainants his entire estate, except that portion thereof, to-wit, the undivided one-half interest, which under the laws of the state of Colorado at that time was and ever since hitherto had been the widow's absolute interest in the estate of her deceased husband;

* * * that their said guardian faithfully performed and carried out said directions and instructions in the premises given by the said Eugene P. Jacobson, and did settle the litigation hereinbefore referred to between complainants and their father, dismissing said suit and surrendering to complainants' father all claims which these complainants had or might have against him, and all interest which they had or might have in their mother's estate, and did obtain in consideration thereof the consent of complainants' father to all and singular the matters hereinbefore stated, which were by the said Jacobson required, and did thereby obtain possession of complainants for said Jacobson on the 25th day of March, A. D. 1881, and immediately removed complainants from the town of Posen, where they had theretofore resided, to the town of Inowrazlau, where complainants' said guardian resided, and did place the complainant Helena in the care and custody of the mother of him, the said Eugene P. Jacobson, as by him directed, where she remained until the death of said mother, in about the year 1887; and complainants' said guardian immediately advised said Eugene P. Jacobson of all his doings in the premises."

The remaining portions of the bill show that Col. Jacobson, on being advised of what had been done, directed his brother, who lived in Wisconsin, to proceed to the old country and bring the complainant Regina to his home in Denver; but before his brother left the country on such mission Col. Jacobson died, and neither of the complainants ever in fact became members of his household. At his death the deceased left an estate of the value of \$115,000, consisting largely of real estate in Denver and Gunnison county, Colo. Mrs. Jacobson, after the death of her husband, took possession of all his estate, and is still in possession of it, claiming it as her own under the laws of descent of Colorado; and has declined, and still declines, to recognize the validity of her husband's promise to leave to the complainants the undivided one-half thereof. Complainants, therefore, pray for the specific enforcement of the alleged promise, and that they may each be decreed to be the owners of an undivided one-fourth of the real estate of which the said Col. Jacobson died seized and possessed.

R. S. Morrison and Geo. H. Kohn, for appellants.

E. T. Wells, H. M. Furman, and Thomas Macon, for appellees.

Before CALDWELL, NELSON, and THAYER, JJ.

THAYER, J. We find it necessary to determine in the first instance upon what consideration the promise rests which the circuit court was asked to specifically enforce. There is an evident attempt made in the amended bill to make it appear that Col. Jacobson promised to leave his nieces one-half of his large estate if Bernstein, their guardian, merely obtained their father's consent to give them into his charge and custody; that the obtaining of such consent by the settlement of pending litigation between the children and their father, was the sole consideration upon which their uncle's promise was based; and that, as such consent was obtained prior to Jacobson's death, therefore the whole consideration for the promise sought to be enforced has been duly rendered and received. We are wholly unable to take that view of the case, even as it is stated in the amended bill. The complaint as amended shows that the promise counted upon is extracted from conversations and letters of Col. Ja-

cobson concerning family matters, and undoubtedly the latter were written with that freedom which usually characterizes correspondence on such subjects. It also appears that he represented in the course of the same correspondence, that he was desirous of adopting the complainants as his own children, because he and his wife were childless, and because of the love he bore their mother, his deceased sister. We think it manifest, therefore, from the face of the bill, construing it, as we must, in the light of these facts, that the consideration moving Col. Jacobson to promise to leave the complainants one-half of his estate, was not merely the consent obtained by the guardian from the father that he might have their custody, but certain benefits and advantages that were to accrue to him after his nieces came into his custody.

It must have been obvious to Mr. Bernstein, the guardian, as it is to us, that the promise in question was based upon the understanding that one or both of the complainants should become members of Col. Jacobson's household, and for a certain period (dependent, of course, upon the duration of his own and their lives) should assume, with respect to himself and his wife, the relation of parents and children, with all that that relation implies. It was of no advantage to Col. Jacobson, as the guardian must have known, that the father's consent was obtained that he might have their care and custody, unless one or both of them were actually placed in his custody and became members of his family, yielding to him in the mean time such service, affection, and obedience as a dutiful child ordinarily yields to its parents. It was the pleasure and mutual benefits which the deceased expected would result from the establishment and continuance of that relation until his death, that induced the deceased to promise to leave to his nieces an undivided one-half of his estate. We are accordingly of the opinion that the bill shows that the substantial consideration upon which the alleged promise rests was not rendered in Col. Jacobson's life-time. He died before either of the children became members of his family, before either of them emigrated to this country, and before he acquired any actual or legal control over their persons.

Viewing the case in that light, we have next to determine whether a court of equity should specifically enforce the alleged contract, and we are all agreed that this question must be answered in the negative.

We concede the law to be that a court of equity will specifically enforce a promise to leave to another the whole or a definite portion of one's estate as a reward for peculiar personal services rendered, or other acts done by the promisee, which are not susceptible of a money valuation, and were not intended to be paid for in money, provided the consideration has been substantially received at the promisor's death; and it is no objection to the enforcement of such a contract that it was entered into with a third party for the promisee's benefit, if the latter has acted under it and executed it. Such seems to be the substance of the rule fairly deducible from the authorities cited, and relied upon by appellants' counsel. *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Van Dyne v. Vreeland*, 11 N. J. Eq. 371; *Sutton v. Hayden*, 62 Mo. 102; *Sharkey v. Mc-*

Dermott, 91 Mo. 648, 4 S. W. Rep. 107; *Haines v. Haines*, 6 Md. 435; Pom. Cont. § 114, and citations. But we are of the opinion that a court would not be justified in decreeing specific performance in a case like the one at bar, where by reason of his untimely death the promisor did not in fact enjoy any of the pleasures, benefits, or advantages which he hoped to realize from the society, companionship, or services of his nieces. We find no precedent for decreeing specific performance under such circumstances. In all of the cases called to our attention in which relief was afforded, it appears that the promisees had substantially discharged the obligations which they had severally assumed. In most, if not all, instances they had lived in the promisor's household as members of his family, and had rendered faithful and affectionate services for a long period of years. It was not possible, therefore, to administer adequate relief, otherwise than by decreeing specific performance. For the reasons thus indicated, that the bill does not show such a substantial discharge by the complainants, during Col. Jacobson's life-time, of the obligations which the agreement contemplated were to be discharged, as will justify the specific enforcement of the alleged promise, the demurrer was properly sustained, and the decree dismissing the bill is affirmed.

MERCHANTS' & FARMERS' BANK v. AUSTIN *et al.*

(Circuit Court, N. D. Alabama, N. D. October 27, 1891.)

BANKS AND BANKING—COLLECTION OF DRAFT—OWNER'S RIGHT TO PROCEEDS IN RECEIVER'S HANDS.

A bank which collects a draft sent to it by another bank for that purpose, with directions to remit the proceeds to a third bank for the owner's account, does not thereby become a trustee, so that the fund can be followed into the hands of a receiver, although it had become mixed with the other cash of the bank before his appointment; especially when it appears that the business was carried on, and money paid out, for several days after the collection was probably made.

In Equity. Bill by the Merchants' & Farmers' Bank against Richard W. Austin, as receiver of the First National Bank of Sheffield, and others, to recover the proceeds of a draft collected by the latter bank for the former. Heard on submission for final decree.

W. H. Bogle, F. Roulhac, and Jo. H. Nathan, for complainant.

David D. Shelby, for defendants.

BRUCE, J. The complainant bank, of Macon, Miss., became the owner of certain bills or drafts drawn at sight by one E. D. Slater on Howell & Co., of Sheffield, Ala. These bills were sent by the complainant to the First National Bank of Sheffield at Sheffield, Ala., for collection. There were seven of them, dated from the 7th to the 15th of November, 1889, aggregating in amount the sum of \$17,412.25. These bills were sent to the First National Bank of Sheffield about the

time of their dates, with instructions (except as to one of them) to remit to Chemical National Bank, New York, to the credit of the complainant bank. The bills were received by the defendant bank, and it is alleged and claimed to be shown by the evidence that the bills were collected by the defendant bank, which, however, is denied in the answer of Austin to the bill; and the defendant bank drew its drafts for the amount of the bills upon W. L. Moody & Co., bankers, of New York, which drafts were not paid, but were protested for non-payment; and on the 25th of November, 1889, complainant bank, through its agent, demanded payment of the defendant bank, which it failed and refused to make; and on the 29th day of November, 1889, the defendant bank suspended, and never resumed. On the 23d day of December following, Richard W. Austin was, by Hon. E. S. Lacey, comptroller of the currency, appointed receiver of the defendant bank, and took possession of its assets, on the 2d day of January, 1890. He states in his deposition, and it is not questioned, that when he took charge there was a total of \$684.46 on hand, all of which were cash items, except \$110.95, which was money or actual cash in currency. He says the total amount of assets was—good, doubtful, and worthless—\$347,709.98; liabilities, \$235,733.23.

The theory of the bill is that the relation of the complainant to the defendant bank was not that of debtor and creditor, nor that, even, of bank and its depositor, but that there was a trust relation subsisting between them; that the complainant bank sent the bills in question to the defendant bank, and employed it as its agent or bailee to collect and remit according to specified instructions; that the defendant collected the bills, and, in violation of its instructions and duty in the matter, mingled the proceeds with the mass of assets of the bank; and the prayer of the bill is for a decree for the amount of its claim, and interest, against the Sheffield bank, making the amount of the claim a first lien on all the assets in the hands of the receiver, superior to that of the general creditors of the bank, and that the receiver be required to pay said claim in preference to the general creditors of the bank. Defendant Austin, in his answer, says:

"It is not true that the proceeds of the said collection passed into the hands of said receiver. It is not true that the said receiver now has, or ever had, the proceeds of said collection."

The first question to be considered is one of fact, rather than of law, and is whether it is established by the proof that the bills in question were collected by the defendant bank, and that, instead of remitting the proceeds of such collection to the Chemical Bank of New York for credit of complainant bank, the defendant bank kept the proceeds of the collection, and turned them over with the other assets to defendant Austin, receiver, and so, as claimed, misappropriated said funds by mingling them with the general assets of the bank, and failing to remit as instructed, or to provide for the payment of the exchange drawn on W. L. Moody & Co., of New York. There is no unqualified statement of the witness Benham, who was the cashier of the defendant bank at the

time, that the bills were paid to his bank in actual money. They were paid, as he testifies, by the checks of Howell & Co.; but neither he nor any other witness says that these checks were actually paid to the defendant bank. He testifies that all the bills were paid by the checks of Howell & Co.; that three of the checks, aggregating \$4,635.12, were on the defendant bank, one on the Bank of Commerce of Sheffield for \$720, and the other three on the First National Bank of Florence. He says, in reply to cross-interrogatory 7:

"It may be proper to state here that at the time Howell & Co. paid the drafts by checks on First National Bank of Sheffield, as heretofore stated, his account was overdrawn from two thousand to six thousand dollars."

In answer to interrogatory 6, he says:

"I don't remember telling him [Bogle] there were no funds on hand to pay the claim; but, as a fact, the bank did not have at any one time sufficient funds on hand to pay this claim."

H. C. Howell testifies that he did business under name of Howell & Co.; that the bills were paid by checks of Howell & Co. on the Bank of Florence, except one for \$750 on the Bank of Commerce of Sheffield. He says: "The original drafts are in my possession, but I decline to attach them, as they are my voucher for these payments." See answer to second direct interrogatory.

The bills in question, then, were paid by Howell & Co.'s checks, whether on the banks, as Howell states, or as Benham states, is not clear; nor is it clear that the proceeds of the collection of the bills were ever actually paid into the defendant bank. Benham does say he collected the drafts, and remitted the same as instructed, and that the "money received was put into the general cash;" but this leaves it in doubt whether the money, or at least a considerable portion of it, was ever actually passed into the defendant bank. But conceding that the money was collected, and put into the general cash of the defendant bank, then what does the evidence show as to what became of it? Or, rather, does the evidence show that the money or its proceeds, or the proceeds in the form of any new investment, passed into the hands of the receiver, Austin?

There is no evidence in the record tracing any of the complainant's money or its proceeds into the hands of Receiver Austin; and, that being so, can the complainant bank, under the rules of law applied to this class of cases, recover as claimed? The general rule is that a *cestui* can follow trust property, but not when mingled with other property so as to be undistinguishable. 2 Morse, Banks, 590; *Case v. Beauregard*, 1 Woods, 126. In 2 Pom. Eq. Jur. § 1058, the rule is there stated:

"No change in the form of the trust property effected by the trustee will impede the rights of the beneficial owner to reach it, and to compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated."

"Moneys collected on a draft by an insolvent bank, acting as collecting agent, cannot be collected in full when the ear-marks or means of identity are gone." Wait, *Insolv. Corp.* § 659. In a recent case

(*Bank v. Goetz*, 27 N. E. Rep. 907) the supreme court of Illinois state the rule thus:

"The doctrine is that trust funds can only be pursued when they can be clearly distinguished from the other property held by the trustee, or by those representing him;" citing authorities.

Many cases and much authority have been cited by the counsel of the respective parties in this case, which it is not deemed necessary to examine at length. But the cases of *Bank v. Armstrong*, 42 Fed. Rep. 193, and of *Bank v. Dowd*, 38 Fed. Rep. 172, are much in point, and sustain the rule as stated *supra*. It is claimed, however, that the doctrine and rule on the subject have been modified by the decisions of the supreme court of the United States in recent cases, and that in cases of this kind the complainant is not required to trace the money, property, or proceeds into the hands of the receiver, but only to show that it, in one form or other, passed with the mass of the assets of the bank into the receiver's hands; as it is phrased in one or more of the cases, that it was put into the bag, and then the court will take it out of the bag, or will hold the whole contents of the bag as trust funds, at least until the trustee shall show that what he claims is no part of the particular fund claimed. In the case of *Peters v. Bain*, 133 U. S. at page 693, 10 Sup. Ct. Rep. 361, the court says:

"Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful conversion a priority of right over the other creditors of the possessor."

The case then under consideration by the court was not like the case at bar. It was a case where the individual partners in a private bank were also directors in a national bank, and by reason of their position became possessed of a large part of the means of the national bank, which they used in their own business. They assigned all their property to trustees for the benefit of their creditors. The national bank also suspended, and went into the hands of a receiver. On the face of it, there would be conflict between the trustees in the deed of assignment, whose assignors had become possessed, as the court states, of a large part of the means of the national bank, which they used in their own business, and the receiver of the national bank, which had been defrauded by its directors for their own benefit. The suit was by the receiver in that case, and his contention was sustained as to property shown to have been purchased with the moneys of the bank; but he claimed also property purchased with moneys which were not identified as belonging to his bank; and the court says, on page cited *supra*, in reference to that claim:

"The difficulty of sustaining the claim in the present case is that it does not appear that the goods claimed, [by the receiver,] that is to say, the stock on hand, finished and unfinished, were either in whole or in part the proceeds of any money unlawfully abstracted from the bank."

And on pages 678, 679, 133 U. S., and page 357, 10 Sup. Ct. Rep., in same case, the court say:

"Some of the money of the bank may have gone into the fund, but it was not distinguishable from the rest. The mixture of the money of the bank with the money of the firm did not make the bank the owner of the whole. All the bank could in any event claim would be the right to draw out of the general mass of money, so long as it remained money, an amount equal to that which had been wrongfully taken from its own possession, and put there. Purchases made and paid for out of the general mass cannot be claimed by bank unless it is shown that its own moneys then in the fund were appropriated for that purpose."

If, then, a receiver of a national bank, in a suit in which he is complainant, must trace and show that the money of his bank was used in the purchase of specific property, when the suit is against the receiver will a different rule be applied? Or will not the complainant be required, as in the case cited, to show not only that the money went into the complainant bank, but that it is still there, or, if used in the purchase of specific property, that the new investment is in the hands of the receiver? So that this case is really against the contention of complainant in the case at bar. Other cases are cited and relied on to support what is claimed to be the new or modified rule. In one of these cases (*McLeod v. Evans*, 66 Wis. 401, 28 N. W. Rep. 173, 214) the rule is there stated. We do not understand that it is necessary to trace the trust fund into some specific property in order to enforce the trust. If it can be traced into the estate of the defaulting agent or trustee, this is sufficient. The complainant insists that the case at bar falls within this rule, and the line of authorities cited in support of it; that is, that it is shown that the complainant's money was paid into the bank, which afterwards suspended, and was mingled with the general assets now in the hands of a receiver; and therefore, without showing more, he is entitled to the right of a preferred creditor of the bank.

It is claimed that this rule is supported by the supreme court of the United States in *National Bank v. Insurance Co.*, 104 U. S. 54, when the court says:

"There is no difference between investments in the purchase of lands or chattels or loans or money deposited in bank; * * * for equity will follow the money even if put into a bag, or an undistinguishable mass, by taking out the same quantity."

The facts in the case, however, show it very unlike the case at bar. It is the statement of a general principle of equity, which has little, if any, application to this case. There are no doubt cases where a court of equity will follow money even if put in a bag, and take out the same quantity as was wrongfully put in, but the rule in the case of *McLeod v. Evans*, cited *supra*, goes beyond this, and must do so to sustain the case at bar. There the proposition is not simply to take out money, as in *National Bank v. Insurance Co.*, but that it is not necessary to trace the fund into specific property, but only into the estate of the defaulting agent or trustee, which it is insisted has been done in this case. The ground on which this rule seems to be based is that the fund which has been misapplied goes to increase the *corpus* of the trust-estate, and swell the assets, and that to take the same quantity out of the general assets

of the estate would leave all that the general creditors are entitled to, and would not therefore injure them. In the case of a trust-estate in the hands of an agent or trustee, from which nothing was going out, and from which nothing was abstracted, and no opportunity for loss, and to which something had, by misapplication of the agent or trustee, been added, it may be assumed that in such a case the rule as claimed might well be applied. But that is not the case, or a question such as we have under consideration here. When the bills in question were collected by the defendant bank, which was doubtless insolvent at and before that time, its doors were not then closed, but the business was carried on up to the 29th; and we have a statement of the witness Benham, cashier, as to the business of the bank each day from the 21st to the 29th November, when the doors were closed; and, in answer to cross-interrogatory 6, among other things he says:

"I paid out small checks until the bank closed; for, if I had refused their payment, there would have been a run on the bank at once, and my cash would have been diminished accordingly."

In the light of this and other testimony, it scarcely admits of doubt that the collections made by the defendant bank on complainant's bills, whatever they may have been as to amount, between the date of the collections and the 29th, when the suspension took place, were paid out on the small checks he speaks of. It may be said the bank got the benefit of these payments of checks, because that was the cancellation of just so much indebtedness; but is it shown that the payments were not made on overdrafts by insolvents, and how is it shown that the accounts on which checks were drawn and paid were not the proceeds of discounts of insolvent paper, or something of that kind? This bank failed and suspended. There must have been a cause for it. On the letter-heads the capital stock is stated to be \$100,000; paid-up and undivided profits, \$20,000. In answer to cross-interrogatory 5, Benham, cashier, says:

"It is true that over \$50,000 was invested in bank building, furniture, and lots. It is true that one Woodson owed the bank between \$48,000 and \$50,000,—overdrafts, about \$23,000; notes, about \$15,000."

And in answer to direct interrogatory 6, after giving an account of the business of the bank from November 21st to November 29th, when the bank closed, he says:

"Balance to start with, [that is, on the 29th,] \$8,023.19; credits in cash-book, \$73,584.30; disbursements or debits, as above, by cash-book, was \$81,203.58; leaving a balance of \$403.91."

Then follows an explanation as to how the books were kept, too long for insertion here, and he concludes his answer by saying:

"The large amount of disbursements and receipts on November 29, 1889, arises from the large amount of offset entries, in which Charles D. Woodson overdrew his personal account, and had a greater portion of the amount placed to the credit of other accounts."

The witness does say, in answer to fourth interrogatory:

"I don't know that the bank suffered any losses after these papers were sent by complainant to the bank."

And there is no direct proof of the losses of the bank, or when they occurred. It is not even in proof that the estate of Charles D. Woodson, the president of the bank, was and is insolvent, though it is in proof that his notes to the bank and his overdrafts to the amount of about \$50,000 are unpaid, and are now in the hands of the receiver, Austin. Benham says: "I did not know it [the bank] was insolvent at the time, because I was not aware of facts which have since come to my knowledge." It is, no doubt, difficult, in cases of this kind, to determine the time at which a bank becomes actually insolvent beyond the just hope of recovery; but the evidence here is not alone the allegation of hopeless insolvency contained in the bill, and not denied, but other evidence in the record shows that at and prior to the time the bills were received by the defendant bank for collection its affairs were in a critical condition, and that, whatever may be said as to the other officers and directors of the bank, at least the president, Woodson, knew its actual condition to be that of hopeless insolvency. Not only so, but, on the very day the bank closed, Woodson overdrew his personal account, and credited the amount to other accounts. See testimony of Benham, cited *supra*. Whatever this and other testimony may mean,—for some of it is neither full nor definite in statement,—it is clear that Woodson not only knew, but in violation of his trust, and for his own benefit, contributed to the failure and suspension of this bank.

This is not a case for the application of the rule invoked here by the complainant. To recur to the illustration of the trust-estate being in the bag, and that a court of equity will put its hand into the bag, and take out the same quantity as that which, by a misapplication, the trustee put in. This bag is not shown to have been closed and inviolate, but it appears that the money was going out as fast as it was put in, and the collection of complainant's bills did not in fact increase the general assets of the bank, but, rather, that they were part and parcel of the funds which were lost in the wreck of the bank. In the case of *Railroad Co. v. Johnston*, 133 U. S. 577, 10 Sup. Ct. Rep. 393, the court says, quoting with approval:

"A banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business, and receive the money of his customers, and, although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequences of his own act to cheat and defraud all persons whose money he receives, and whom he fails to pay, before he is compelled to stop business."

In the light of this authority, the officer responsible for continuing the business of this bank after hopeless insolvency had supervened, which must have been known at least to the president of the bank, was committing a fraud in receiving the money of innocent depositors and others ignorant of its true condition. The complainant bank was the victim of this fraud, as well as others, who had all been alike misled and deceived by the apparent solvency and good credit of the bank. But, in a legal or moral point of view, was the fraud any deeper or more flagrant upon the complainant than upon the other creditors of the bank?

It is insisted that the relation of the complainant and defendant bank was that of principal and agent; that the complainant bank, by its instructions to collect and remit, never agreed, by any implication, to stand on any other than a strictly fiduciary relation; and that such relation is a different one, and one of higher trust, so to speak, than the relation of a depositor or other debtor of the bank. We have seen that the authorities do not sustain this distinction as a ground for a preference in the distribution of the general assets of a broken bank; and, upon principle, can such a preference be maintained? It is common, every-day business for banks to employ each other as collection agencies; and they perform this duty in no exceptional way, but in the same manner in which they do the general business of the bank. A bill is collected by a bank, and the proceeds mingled with the general assets, so as to be entirely undistinguishable, and with no ear-marks or means by which it can be identified or traced into any new investment. The bank breaks. Now, on what principle does he stand on other or higher ground than he who, with faith in the solvency of the bank, deposits his money and loses it? The contention here is not supported either by sound reason or authority.

Another question is made and argued in the case. It is that section 5236 of the Revised Statutes of the United States, in chapter 4, in reference to the dissolution and receivership of national banks, stands in the way of complainant's contention here. If, however, the views expressed are correct, they are decisive of the case, and this question need not be discussed. The bill is dismissed, with costs.

CENTRAL TRUST CO. OF NEW YORK v. MARIETTA & N. G. Ry. Co., (HIA-WASSA Co., Intervener.)¹

(Circuit Court, N. D. Georgia. July 6, 1891.)

RECEIVER OF RAILROAD COMPANY—PURCHASE OF ROLLING STOCK.

Where the property of a railroad company is placed in the hands of a receiver, and rolling stock is found on the railroad, placed there by another corporation, the principal stockholders in which are also controlling stockholders in the railroad company, and the rolling stock is claimed by the corporation placing the same on the road, and no contract of sale is shown, *held*, that the receiver should be authorized to purchase the same and pay the value of the rolling stock when the property went into the receiver's hands.

In Equity. Bill to foreclose a railroad mortgage.

Butler, Stillman & Hubbard and *H. B. Tompkins*, for complainants.

Hoke & Burton Smith, for intervener.

NEWMAN, J. When the Marietta & North Georgia Railway was placed in the hands of a receiver by order of this court there was on the

¹Reversed in circuit court of appeals, 48 Fed. Rep. 850.

road a considerable amount of rolling stock, and as to certain engines and cars the Hiawassa Company, by intervention, brought a claim of ownership. The evidence shows that the manufacturers of the engines and cars sold the same to the Northeastern Improvement Company. The contract between the manufacturers and the Northeastern Improvement Company was a conditional sale, the manufacturers reserving title. There was some question as to execution of papers and record, but that is immaterial here. There appears to be a balance of purchase money on two engines due the makers of the same, which will be controlled and protected in the decree. The rolling stock in question was found, as stated, on the Marietta & North Georgia Railway when the receiver of the court went into possession of the same. It was placed on the road by the Northeastern Improvement Company. No contract of purchase by the railway company was ever made. It was simply placed on the road by the improvement company, without contract whatever with reference thereto. George R. Eager was the contractor to build the Marietta & North Georgia Railway. He was the president and largely interested in the Northeastern Improvement Company. While not himself an officer of the railway company, he and his friends, he states, controlled a majority of its stock. It appears further that the Hiawassa Company was in some way an offshoot of the Northeastern Improvement Company. When the special master, in a former report made to the court, reported in favor of the Hiawassa Company as to its ownership of this property, and recommended, as the property was indispensable to the operation of the road, the purchase of the same by the receiver, the court, in view of the above-stated facts as to Eager's relationship to the corporation in interest, and his further relation to the matter as contractor to build the road, referred the question back to the special master for a thorough investigation and report as to the relation of these corporations to each other, and Eager to them all. The second report made by the special master, now under consideration, finds nothing in the matters alluded to and the relations of the parties to affect the honesty and fairness of the transaction. He finds them to be distinct persons in law, and the evidence taken by him sustains this view, and shows that, while Eager occupied the relation stated to all the corporations, careful accounts were kept between them as to all their dealings; and, so far as can be ascertained, shows that the legal principles applicable to different individuals under the same circumstances should be applied to parties in interest here. The question is, when rolling stock is placed upon a railroad without any contract whatever in reference thereto, and the railroad allowed to use the same in its ordinary operations, is it a sale? If, from the facts stated, the delivery of this property amounted to a sale, it is conceded that the act of the legislature of Georgia of 1889, in reference to conditional sales of property to railroads, and requiring record of the contract within six months in order to make it a valid contract as to third parties, has not been complied with, and the intervener here would have no other rights than that of a general creditor for the value of the property.

The contention for the Central Trust Company, which opposes the claim of the intervener, is that where rolling stock is placed on a railroad, and the railroad proceeds to use the same as its own in its daily business, sending it from one railroad to another, it implies necessarily an intent to sell; that, the rolling stock becoming a part of the railroad itself, and absolutely essential to its operation, no mere contract of bailment will be implied, but a contract of sale. The superintendent of the railroad at the time the rolling stock in question was placed on the same, who is now receiver of the court, testified before the special master that none of this property belonged to the railroad, and Eager testified that it belonged to the Northeastern Improvement Company until it was sold by it to the Hiawassa Company. To hold that this property is the property of the railway company it is necessary to do it upon the presumption arising from delivery and possession, as stated above. No price was ever agreed upon between the railway company and any one else as the sellers of the same. No agreement was ever made on the part of any of its officers to buy the same. The transaction lacks those essential elements of a sale, and such evidence as there is to throw light on the subject I think negatives the idea of any intent to sell or to purchase. The Central Trust Company, the trustees for the bondholders under the mortgage executed in 1887, contends that its mortgage, which embraces not only the property of the railroad in existence at the time, but after-acquired property as well, has attached to the rolling stock in question, and by its counsel the foregoing objections were presented. The lien of the mortgage could only attach to property "acquired" by the railroad, and some title must vest in the railway company of course, in order that the mortgage should cover it. I am unable to find any such title vested in the railroad company under the facts, and presumptions that arise from facts, as would authorize me to hold that any title has been acquired by the railroad company to this property.

The special master has, in his second report, found the value of the property at the time the railway went into the hands of a receiver, and reports that as a proper amount to be paid by the receiver for the same. This report is in conformity with the views of the court as to the time and manner of finding the amount to be paid for this property by the receiver on the purchase of the same, which it is conceded is necessary in order to carry on the operations of the railroad. All the exceptions must be overruled, and the report confirmed.

GROSS v. GEORGE W. SCOTT MANUF'G Co. *et al.*

(Circuit Court, N. D. Georgia. July 6, 1891.)

1. ACTION TO SET ASIDE DEED—WANT OF EQUITY—DEMURRER.

A bill to compel defendants to reconvey to plaintiff land which formerly belonged to him is not demurrable for want of equity from the mere fact that it shows that plaintiff conveyed the land to C., who then conveyed to defendants, where plaintiff seeks relief on the ground that defendants secretly employed and paid C. to purchase the land, knowing at the time that he was plaintiff's agent to sell, and that plaintiff relied on him for information and advice as to the value of the land.

2. SAME—FALSE REPRESENTATIONS.

The bill alleged that the land was of great value for the phosphate therein; that defendants stated to C. that they did not want to buy the land for phosphate purposes, which statement C. repeated to plaintiff; and that defendants knew this statement was not true, but their object in making it was to deceive plaintiff as to the true value of the land. *Held*, that these allegations are sufficient, as against a demurrer, to show that defendants knew of C.'s statements to plaintiff, and caused them to be made.

3. SAME—DILIGENCE IN BRINGING SUIT.

There is no lack of diligence shown on plaintiff's part when the bill alleges that those transactions did not come to his knowledge until October, and the suit is brought in November.

4. SAME—TENDER—EXCUSING FAILURE.

Failure to allege tender of the purchase money before suit is not fatal to such bill, where it does allege that tender was not made because plaintiff believed it would be unavailing, and that he is ready to repay the money with interest upon the execution of a deed to him by defendants.

5. PARTIES—NON-JOINDER—INHABITANTS OF ANOTHER DISTRICT.

The bill is not demurrable for non-joinder of the agent, C., who is a resident of a different district from defendants. Rev. St. § 737, provides that non-joinder of parties who are not inhabitants of nor found within the district shall not constitute matter of abatement, though the judgment rendered shall not conclude them, and Equity Rule 47 authorizes the court to proceed without parties, otherwise necessary, who cannot be joined because they are out of the jurisdiction of the court.

In Equity. On demurrer.

Bill by Charles H. Gross against the George W. Scott Manufacturing Company and the De Soto Phosphate Mining Company to compel a reconveyance of land.

Bisby & Rinehart, for complainant.

Candler, Thomson & Candler, for respondents.

NEWMAN, J. The case made by the bill is substantially as follows: Charles H. Gross, complainant, is a citizen of the state of Pennsylvania. The George W. Scott Manufacturing Company and the De Soto Phosphate Mining Company, defendants, are corporations organized and existing under the laws of the state of Georgia, and citizens of that state. That complainant was in October, 1889, the owner of certain lands on Peace river, in the state of Florida. That one John Cross, a resident of the state of Florida, had been continuously for several years prior thereto, and was at that time, complainant's agent to protect and make sales of said lands; under a general contract, he received 10 per cent. of the proceeds of the sales, when other terms were not specially agreed upon; and that complainant relied upon said Cross in these respects. That about the 7th day of October, 1889, Cross

came to Philadelphia, where complainant resided, and stated that the Scott Manufacturing Company desired to buy lands from complainant, and offered \$2.50 per acre for the same. Complainant inquired if there were phosphates on said lands, but Cross represented that the Scott Manufacturing Company desired the lands for other purposes. Complainant, having been accustomed and obliged to rely upon his agent for information in regard to said lands, acted thereon, and, on the faith of his representations, contracted to sell the same at \$2.50 per acre. Thereupon, at Cross' direction, complainant made him a deed to the lands, received his check for the purchase price, and paid Cross 10 per cent. of the amount as commission. The inquiry complainant made of Cross was material and important, and upon the existence or non-existence in said lands of phosphates depended in a large degree their value. That prior to this sale phosphates had been discovered on lands on Peace river of a very valuable character, which was well known to Cross and to defendants. Complainant did not know until six months after the sale that the lands contained any phosphates, and complainant avers said lands were rich in phosphates, and were worth from \$25 to \$100 per acre at the time of the sale, and some of the land worth over \$100 per acre. That the George W. Scott Manufacturing Company, through its president, George W. Scott, and other officers, had before the said sale employed Cross to purchase said lands of complainant under contract to pay him for his services and expenses while attending to the same; and that said company did pay Cross' expenses from Florida to Philadelphia, and compensation in money, while engaged in negotiating the purchase. That said company knew that Cross was complainant's agent to sell the land, and that complainant relied upon him as such, and for information concerning the value of the lands. Complainant did not know until October, 1890, of this arrangement between Cross and defendant. That the Scott Company engaged the services of Cross for the purpose and with the intent of influencing him to act in its interest, and to disregard his duties to complainant, and such was its effect. On the 12th day of October, 1889, Cross made the Scott Manufacturing Company a deed to certain lands, embracing a part of the land conveyed by complainant to Cross, and on the 13th day of November, 1889, made a deed to said company to certain lands, including the remainder of the land conveyed by defendant to Cross, and on November 21st the Scott Manufacturing Company conveyed to the De Soto Phosphate Company part of the land conveyed by complainant to Cross, (which is described, but is immaterial here.) The two defendant corporations are composed, substantially, of the same members and stockholders. That the directors and other officers are substantially the same persons. The phosphate company had been for a year before 1889 mining phosphates on Peace river and vicinity. The Scott Manufacturing Company had been for some years manufacturing fertilizers in Atlanta, Ga. That the two companies are, in interest, the same, though separate corporations. That the phosphate company knew that Cross was complainant's agent, as stated, when the Scott Company employed

him, and knew of the fraud on complainant, and acquired its interest with a knowledge of such fraud. Long before October, 1889, defendants' officers and agents had been examining lands on Peace river, and purchasing phosphate lands for their purposes, or to sell. Before Cross' visit to Philadelphia, the president of the manufacturing company, or some other officer, gave Cross a description of complainant's land which the company wished to purchase, and secretly employed Cross to purchase the same as low as he could. The defendants and Cross knew before they bought the land that they contained phosphates, and that their actual market value was many times greater than the amount paid therefor. When Cross was employed by defendants, as stated, their officers and agents represented to Cross that they wanted the land to control the use of the river, and for other purposes, and did not want them for phosphates; which statements were false in fact, and made to deceive complainant, and conceal from him the value of the land; and complainant was deceived, and, relying upon Cross, made no further inquiry. That the legal title of said land is still in the defendants. That complainant is ready and willing to pay the defendant the George W. Scott Manufacturing Company the amount paid complainant for the lands, with interest thereon, with the execution and delivery of the deed to complainant, and complainant would have made tender thereof to said company before filing this bill but for the belief and conviction that such tender would not have been accepted. Complainant tenders in the bill to the defendants the full amount of purchase money received for the land from Cross, with legal interest thereon, and offers to pay the same in any manner or time that the court may decree, upon reconveyance of the land unincumbered, in the same or in as good condition as when conveyed to defendants. Discovery is waived except as to 14 interrogatories which were propounded to the defendants. The prayer is for an order and decree that the defendants convey, by good and sufficient deeds of conveyance, the lands described, and for an account of all the phosphates and phosphate ores, if any, taken from said lands, and for damages, if any, to the land, and for such other and further relief as to the court may seem just to make. There is also prayer for injunction, which has not been insisted upon. The demurrer is upon two grounds: *First*, that there is no equity in the bill; *second*, that John Cross is a necessary party to the bill. The first ground of the demurrer, that there is no equity in the bill, is subdivided in the argument, and in the brief filed by counsel, and urged, upon four grounds:

"*First*, because it appears from the bill that complainant dealt with and conveyed the land to Cross, and did not deal with or convey to defendants. Nor is it alleged that defendant companies, or either of them, knew of any of the representations Cross made to complainant."

The whole case made by complainant in this bill is grounded upon the facts that the defendants secretly employed Cross as their agent, and paid him as such, to purchase the land, knowing at the time that he was the agent for complainant to sell the land, and that complainant relied on him for information and advice as to the value of the land and

the price of the same. The fact, therefore, that complainant conveyed the land to Cross would seem to be immaterial, in view of the general allegations of the bill and the other facts set up. As to the position that it is not alleged that defendants knew of Cross' representations to complainant, the allegation in the bill is that defendants stated to Cross "that they did not want to buy the lands aforesaid for the phosphate that was on them, or for phosphate purposes," and then "that said Cross repeated said statements and representations, in substance, to complainant," and, further, "that defendants knew they were not true, and that the principal object of defendants in making such statements and representations was to mislead and deceive your orator, and to conceal from him the true value of this said land." It would seem from this that the defendants not only knew of the representations made by Cross to complainants, but caused them to be made.

It is next insisted that—

"There is no allegation of fraud on the part of defendants in procuring title to them, or either of them, but that they procured title to be made to Cross. Where relief is asked on the ground of fraud, the bill must state the case with certainty and definiteness. It must allege specific acts and language. A general charge of fraud is insufficient, nor is it enough that fraud might be inferred."

I think this subdivision of the first ground of the demurrer has really been disposed of in what has just been said, and need not be repeated here. The allegations seem to be sufficiently specific and definite. All the acts complained of seem to be fully set out, and, as said before, the basis of the case made for relief is that the Scott Manufacturing Company employed Cross as its agent, knowing at the time that he was the complainant's agent, and influenced him to disregard his duty to complainant.

It is said next that no diligence is shown by complainant to protect his rights. The statement in the bill on that subject is that—

"Orator avers that it did not come to his knowledge until six months after the execution and delivery of the deed [alluding to the deed made by complainant to Cross] that the land thereby conveyed contained any phosphate."

And afterwards in the bill—

"That orator avers that he did not know until the early part of October, 1890, that said John Cross had received, or had agreed to receive, from said company, its officers or agents, any compensation for his services rendered in buying said land, or his expenses while attending thereto, or was otherwise in the employ of said company, its officers or agents, to perform service to it or them inconsistent with his duties as your orator's agent."

The bill was filed November 3, 1890; so that, certainly, no lack of diligence is apparent.

Further objection urged to the bill is that it does not allege tender of the purchase of land. The statement in the bill on this subject is as follows:

"Your orator avers that he is ready and willing to pay to the defendant the manufacturing company the consideration money paid your orator for said lands, with interest thereon, upon the execution and delivery of a deed of

conveyance thereof to your orator, and avers that he would have made a tender thereof to said company before filing this bill but for the belief and conviction that such tender would not have been accepted. And your orator hereby tenders to the defendants the full amount of purchase money, aforesaid, received for said lands from the said Cross, with legal interest thereon, and hereby offers to pay the same in such a manner and at such times as this honorable court may decree, upon the reconveyance thereof to your orator, unincumbered, and in the same or as good condition as when they were conveyed to the defendants, and to abide by such other conditions as this honorable court may deem just and equitable."

It would seem that complainant offers to do equity, and to repay the purchase money of the land with interest. If complainant should, on the final hearing, appear to be entitled to the decree, this matter can be fully controlled, and full justice done to defendants, in this respect, in the decree and judgment of the court. I do not understand the rule to be that tender back of the purchase money in a case like this is absolutely essential for maintaining either a bill in equity or proceeding at law. It is a matter that is controlled very largely by the circumstances of the case; and I would be unwilling in this case to turn the complainant out of court for lack of a former tender, when all the rights he may have in that respect can be fully protected, and his claim for a repayment allowed in ample measure.

The second ground for demurrer, namely, that John Cross is a necessary party to the bill, seems to be controlled by the statute, the equity rule, and the decisions on the subject. The bill states that John Cross, at the time of the transaction referred to in the bill, resided in the state of Florida, and it is to be presumed that he still resides there. Section 737, Rev. St. U. S. is as follows:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Equity Rule 47 is as follows:

"In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such case the decree shall be without prejudice to the rights of the absent parties."

There are three classes of parties to a bill in equity: *First*, merely formal, although proper, parties; *second*, those having an interest in the controversy, and whose interest and absence from the bill being called to the attention of the court, it will require to be made parties before de-

ciding the case, if within its jurisdiction, but if not within its jurisdiction, the court will administer such relief as may be in its power between the parties before it; *third*, indispensable parties, without whom the court will not proceed with the case at all. *Shields v. Barrow*, 17 How. 130; *Barney v. Baltimore City*, 6 Wall. 284.

The prayer of the bill in this case, as has been stated, is for a conveyance by defendants to complainant of the land in controversy, and for an account of phosphates, if any, taken from, or damages to, the land. Now, can the right of complainant to have this decree be determined without Cross as party? According to the bill, the deed made by complainant to Cross, and by Cross to defendant, was merely formal, and for convenience in getting the title into defendants. While it seems he would be a proper party, the court is not prepared to say that his presence is indispensable to granting the relief prayed for. It appears that Cross acted only as an intermediary between complainant and defendant, and that the real substantial issue is between the present parties to the bill. Conforming to the statute and equity rule above quoted, and to the decisions of the supreme court on the subject, this is a case in which the court should proceed with the parties before it, and the demurrer on this last ground cannot be sustained. Fos. Fed. Pr. § 50. See, also, *Conolly v. Wells*, 33 Fed. Rep. 205, in which the decisions of the supreme court on the subject are collated. The demurrer in this case will be overruled.

CHAMBERLAIN v. BITTERSohn.

(Circuit Court, D. South Carolina. November 4, 1891.)

WRITS—SERVICE OF PROCESS—EFFECT OF AMENDMENT.

When, on defendant's special appearance and motion to set aside the complaint for variance from the summons, the court allows the summons to be amended so as to state that on default of answer plaintiff "will apply to the court," whereas before it read, "will take judgment against you," the order allowing the amendment is sufficient notice to defendant, and the original service will not be set aside because the copy served did not conform to the summons as amended.

At Law. On motion to set aside service of the summons.

Mitchell & Smith, for plaintiff.

Northrop & Memminger, for defendant.

SIMONTON, J. In this case the defendant, having been served with copy summons and complaint, employed an attorney. Becoming dissatisfied for some reason, he changed his attorney, and employed the gentleman who made this motion. When the present attorneys undertook the case, they entered a special appearance for the purpose of a motion to set aside the complaint "for irregularity, in that it does not conform to the summons." This motion was heard on 21st of October, and

an order was made permitting an amendment of the summons in the particulars stated hereafter. On 27th October last the plaintiff's attorney, in writing, informed the attorney for the defendant that the summons had been amended in the words ordered by the court. The amendment consisted in this: The notice following, and contained in the summons, had stated that, in default of an answer to the complaint annexed thereto, plaintiff "would take judgment against you." In lieu of these words, which were stricken out, were inserted the words, "will apply to the court." The motion now is to set aside the service of the summons on the defendant herein as defective for the reason that the copy does not conform to the original as amended. In other words, the plaintiff amended the summons in the record. This amendment caused a variance between it and the copy which had been originally served upon defendant. Because of this variance the defendant contends that the summons should be set aside. The copy summons served upon the defendant must be an exact reproduction of the original summons. Its office is to let him know that a complaint has been or is to be filed against him, so that he may defend or not, as he may be advised. In the present case the copy summons had fulfilled its office. Upon service of it the defendant came in, and, standing upon his summons, moved that the complaint be dismissed, because it did not correspond with the summons; that is to say, the summons called for an answer to the complaint. The defendant alleged that no answer could be required because of the defect, and that the complaint should be dismissed. His motion was heard and considered. The defect was recognized. The complaint was not dismissed. The court allowed an amendment of the record, and the defect was cured. This being the case, the complaint stands, and the defendant must answer it or go by default. No further summons is necessary, nor is it necessary to serve any amended summons in the same action. The defendant did not require any notice of the change in the phraseology of the summons. The order of this court, made in a proceeding in which he was the active party, gave him full notice, and all that that order effected was the correction of the record. The defendant shall have until the rule-day in December next to make such defense as he may be advised.

CHAMBERLAIN v. BITTERSOKN.

(Circuit Court, D. South Carolina. October 24, 1891.)

1. SUMMONS AND COMPLAINT—VARIANCE—NOTICE.

Under United States circuit court rule 5 for the district of South Carolina, requiring a notice to be served in all cases with the summons and complaint, stating, except where the demand is for a liquidated sum, that, on failure to answer, plaintiff will apply to the court for the relief demanded in the complaint, a notice served with a complaint and summons for trespass on lands is fatally defective when it states that on failure to answer plaintiff will "take judgment against you for the relief demanded in the complaint." *Chamberlain v. Mensing*, 47 Fed. Rep. 202, followed.

2. SAME—AMENDMENT OF PROCESS.

But as the notice refers to the complaint, which is served with it, thus giving notice of the nature of the relief demanded, defendant could not have been prejudiced by the defect; and the notice may be amended, under Rev. St. U. S. § 948, permitting amendment of process when the person against whom it is issued will not be prejudiced thereby.

At Law. Action for trespass on land.

Mitchell & Smith, for plaintiff.

Northrop & Memminger, for defendant.

SIMONTON, J. This is a motion to set aside a complaint, in that it does not conform to the summons. The summons, served with complaint, is in the usual form, with this exception. It concludes with these words: "If you fail to answer this complaint within the time aforesaid, the plaintiff will take judgment against you for the relief demanded in the complaint." Under our rule of court, when the complaint is upon a liquidated demand under contract, the plaintiff can, on failure of answer, take judgment. In all other cases he must apply to the court for the relief demanded in the complaint. And the summons contains the notification to him of the category in which his suit falls. The complaint is for a trespass on land. If it be not answered, plaintiff cannot take judgment. But he must apply to the court for his relief. The summons and complaint do not conform, and the defect is fatal. *Chamberlain v. Mensing*, 47 Fed. Rep. 202. The defendant, upon the intimation of this conclusion, asks leave to amend his summons. In the case just quoted no such motion was made, and the point was not decided. A strong intimation of an opinion against it was given. I now have full opportunity of considering the authorities, and will discuss and decide it. Every court possesses the discretion of allowing any amendments in the pleadings in a pending case. This power is exercised in furtherance of justice. "Perhaps," says MARSHALL, C. J., "the legal discretion which thus exists acknowledges no other limit than is necessary for the purposes of justice and for the restraint of gross and inexcusable negligence," (*Calloway v. Dobson*, 1 Brock. 119;) or, as it is put by PARK, J., in *Taylor v. Lyon*, 5 Bing. 333: "Amendments are now generally allowed at every stage of the pleadings for the advancement of justice. The question usually is, will any injustice be done by what is proposed? If not, the amendment is allowed." Section 948 of the Re-

vised Statutes of the United States permits the amendment by the court of any process returnable to or before it when the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues. If there be no summons, or if the summons misleads, or tends to mislead, the defendant, or to put him off his guard, or if the amendment works a surprise upon him, or if there be nothing in the record to amend by, the amendment should not be allowed. Such are the cases quoted by counsel for defendant: *Dwight v. Merritt*, 4 Fed. Rep. 616,—where the summons had not the seal of the court, nor the signature of the clerk, and so was not in fact a summons; *Brown v. Pond*, 5 Fed. Rep. 34; *U. S. v. Rose*, 14 Fed. Rep. 681—where the summons issued for the recovery of a penalty did not have upon it indorsed the statute imposing the penalty, as is required in the New York practice, and there was no complaint served with the summons explaining it. In the case now before us, the summons admitted in the motion to be a summons has the seal of the court and is properly tested. It calls attention to the terms of the complaint filed with and attached to it. It requires an answer thereto, specifying the time and place for the service of such answer. So the defendant is in no wise misled or surprised. He knows exactly the nature of the wrong with which he is charged. He cannot have been misled or injured by the erroneous assertion that, on his failure to answer, judgment would be taken against him. Nor can the amendment injure him whereby this is changed into the assertion that, in such event, application will be made to the court for the relief sought. Had he been served with a summons only, the case would have been different. But the complaint, a part of the record, served simultaneously with the summons, not only gave him clear notice, but also furnishes something by which the summons can be amended. *Randolph v. Barrett*, 16 Pet. 141. This amendment, being allowed pending a cause, requires no notice. Leave is granted to plaintiff to amend the summons as indicated. See *Semmes v. U. S.*, 91 U. S. 24; *Tilton v. Cofield*, 93 U. S. 164.

EMMONS v. UNITED STATES.

(Circuit Court, D. Oregon. November 2, 1891.)

ASSIGNEE.

Under the act of 1837, (24 St. 505,) the assignee of a claim against the United States may sue thereon in his own name.
(Syllabus by the Court.)

At Law.

Mr. Zera Snow, for plaintiff.

Mr. Franklin P. Mays and Mr. Charles E. Lockwood, for the United States.

DEADY, J. This action was commenced on September 30, 1889. It is brought to recover \$1,230, paid the United States land-office at Ore-

gon City as purchase price and fees on three several entries of timber land under the act of June 3, 1878.

In the amended petition it is alleged that the parties making these entries believed at the time that the lands were unfit for cultivation, and chiefly valuable for timber; that afterwards the commissioner of the general land-office set aside and canceled said entries on the ground that said lands, or the major part of them, were fit for cultivation when the timber was removed, and restored them to the public domain; and that subsequent to said cancellation the final certificates issued to the purchasers in said entries, and the claims thereon arising against the United States were duly assigned to the plaintiff, who now holds the same.

There is a prayer for judgment, coupled with an offer to surrender the certificates as the court may direct.

The cause was heard before the district judge for Washington on a demurrer to the petition, who, on April 18, 1890, sustained the demurrer on the ground that, while the United States is liable in an action by the entry-man, an assignee cannot maintain the same; and, further, that the petition should show a surrender of the certificates, or account for them.

The plaintiff had leave to amend his petition in regard to the surrender of the certificates, which he did on May 8, 1890; and on the same day filed a petition for rehearing on the question of the right of the assignee to sue.

The petition was granted, and the cause heard on a demurrer to the amended petition.

Section 1 of the act of 1853 (10 St. 170) provides "that all transfers and assignments" thereafter made of any claim against the United States shall be null and void, unless made after the allowance of the same and the issue of a warrant for the payment thereof.

The court of claims was established in 1855. 10 St. 612. The act was silent on the right of an assignee of a claim to sue thereon. In 1877 the supreme court, in *U. S. v. Gillis*, 95 U. S. 407, held that the act of 1853 applied to suits in the court of claims, and this ruling has been adhered to.

On March 3, 1887, an act was passed (24 St. 505) enlarging the jurisdiction of the court of claims, and giving the circuit and district courts concurrent jurisdiction therewith, within certain amounts.

Section 1 of this act defines the jurisdiction to be of all claims arising in a certain manner, "in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable."

The right of an assignee to sue has not been passed upon by the supreme court since the passage of this act.

The right to sue the United States, in respect to any claim on which it is liable, under the act of 1887, either in a court of law, equity, or admiralty, as if it were "suable" generally,—as a private person,—certainly includes the assignee of such claim.

The assignee of a claim against the United States is the "party" to whom the claim belongs. He owns it; and, being such owner, he is entitled, in my judgment, to redress against the United States, as if it "were suable," not by the assignor or original holder alone, but generally, as if the United States were a private person.

The court is as competent to deal with the claim in the hands of the assignee as in those of the assignor. Proof of the assignment is the only additional circumstance in the case, and that is a very simple matter.

U. S. v. Jones, 131 U. S. 1, 9 Sup. Ct. Rep. 669, was a suit under the act of 1887 by an assignee. The objection was not made in that case, and it appears to have been taken for granted, that the assignee could maintain the suit if the assignor could.

Sooner or later this question must be decided by the supreme court, and it may as well be in this case as any other.

My impression is that under the act of 1887 the assignee may sue the United States, in respect to the claims mentioned therein, as if it were a private person, and I will give judgment accordingly.

FINANCE CO. OF PENNSYLVANIA *et al.* v. CHARLESTON, C. & C. R. Co. *et al.*

In re HART.

(Circuit Court, D. South Carolina. November 2, 1891.)

ATTORNEY'S LIEN—MISUSE OF PAPERS—RIGHT OF INSPECTION.

An attorney in possession of papers of a railroad company upon which he has a lien for legal services cannot be compelled to permit an inspection thereof by the company's attorney, or to deliver them up to the court, upon a suggestion that he is now retained by persons bringing suits against the company upon causes of action arising out of transactions with which he was professionally connected while counsel for the company, and that his possession of the papers relating thereto would give him an undue advantage, when no particular suits are specified, and the attorney denies that he is prosecuting any action to which the papers in his possession relate either directly or indirectly.

At Law. In the matter of the suggestion of counsel for D. H. Chamberlain, receiver, against James F. Hart, Esq.

A. T. Smythe, for receiver.

C. E. Spencer, for respondent.

SIMONTON, J. James F. Hart, Esq., was for many months general attorney for the Charleston, Cincinnati & Chicago Railroad Company. His connection with the company in this capacity ceased 30th June, 1891. At the time he so ceased to be its attorney he had in his hands papers belonging to it, obtained by him in his official capacity. These he claims a lien upon until his arrears of salary, amounting to several thousand dollars, have been paid. The present proceeding is based upon the statements that the said James F. Hart is the attorney for persons

bringing actions against the said Charleston, Cincinnati & Chicago Railroad Company for causes of action arising out of transactions with which he was professionally connected as counsel for the company during the continuance of that relation; that in the prosecution of said suits he would have great advantage in holding in his possession papers of the railroad company received by him as its counsel, and intended to be solely for its advantage; that an inspection of these papers by the receiver and his counsel is necessary for the proper conduct of their cases by them. The answer of Mr. Hart to a rule issued against him upon the filing of this suggestion admits that he was the attorney for this road, and that many papers belonging to it came into his hands while he was such attorney, and he declines to surrender them until he is compensated for his service. He adds that his services were rendered to the railroad company, and that from February 28, 1891, to July 1, 1891, he represented the present receiver; "that on 30th June, 1891, the receiver decided to dispense with the further legal services of respondent, and so notified him in writing, a copy of which is annexed to his return." He denies that he has, or ever had, any writing, paper, or document having relation, directly or indirectly, to any action which he has been retained to prosecute, or is now prosecuting, against said company. He ends with a prayer for the protection of his lien.

There can be no doubt that an attorney has a lien upon the papers of his client which are the result of his labor, or come into his hands professionally, and that he can retain them until his fees are paid. 1 Jones, Liens, 122. The cases which have rewarded the research of the counsel differ somewhat upon the question whether, during such retention, the client or the succeeding attorney can inspect them. The weight of authority is in favor of the affirmative. *Ross v. Laughton*, 1 Ves. & B. 349; *Commerell v. Poynton*, 1 Swanst. 1. Both cases are much shaken by *Lord v. Warmleighton*, Jac. 580; *Newton v. Harland*, 4 Scott, N. R. 769. But see, in support of them, *Colegrave v. Manley*, 1 Turn. & R. 400; *Heslop v. Metcalfe*, 3 Mylne & C. 186; *Cane v. Martin*, 2 Beav. 585; *Wilson v. Emmett*, 19 Beav. 233. But none of these cases permit the inspection of papers, except when a particular suit was in progress, and the papers pertained to that suit. In the present instance, no case is specially named. A general description is used, to-wit, cases in which he had acquired knowledge as attorney for the company, and which he now brings against the company. The respondent denies that any one case of this kind exists. There is nothing then upon which the court can proceed. It may be well to say that, notwithstanding the recognition of the lien claimed by an attorney, this court will not permit such a lien to be used as charged in this suggestion, happily by mistake, as it appears. If it be shown to the court that such a misuse of papers is threatened, contemplated, or made, they will be at once impounded and lodged with the clerk. The rule is discharged.

AMERICAN MORTG. CO. OF SCOTLAND, Limited, v. HOPPER.

SAME v. CROW.

(Circuit Court, D. Oregon. November 2, 1891.)

1. PRE-EMPTION CERTIFICATE.

The land department has no authority of its own motion to set aside or cancel the final certificate of a settler under the pre-emption law. *Smith v. Ewing*, 11 Sawy. 56, 23 Fed. Rep. 741; *Wilson v. Fine*, 14 Sawy. 224, 40 Fed. Rep. 52,—followed.

2. ACTION OF EJECTMENT.

A legal estate in the plaintiff is necessary to the maintenance of an action of ejectment under the law of this state; but actual possession at the time of the ouster complained of is a sufficient estate against a mere intruder.

3. SAME.

A purchaser from a pre-emptor, who has obtained a final certificate, has not such a legal estate in the land, and cannot, apart from the fact of possession, maintain an action to recover the possession thereof from any one.

(Syllabus by the Court.)

At Law. These actions were submitted to the court together, without the intervention of a jury, upon an agreed state of facts.

Mr. William B. Gilbert, for plaintiff.

Mr. J. J. Balleray, *Mr. Raleigh Stott*, and *Mr. W. L. Boise*, for defendants.

DEADY, J. It is alleged in the complaints that the plaintiff is a foreign corporation, formed under the laws of Great Britain, and that the defendants are citizens of Oregon; that it is the owner and entitled to the possession of the S. E. $\frac{1}{4}$ of section 22, in township 3 N., of range 31 E., Wallamet meridian, and of the S. W. $\frac{1}{4}$ of section 4, in township 2 N., of the same range; that the defendant Crow wrongfully withholds from it the possession of said S. E. quarter section, and the defendant Hopper does the like with reference to said S. W. quarter section, each of which exceeds in value the sum of \$2,000.

The answers contain a denial of the ownership of premises by the plaintiff, and an allegation that the defendant Crow is the owner of said south-east quarter section, and Hopper of said south-west quarter section.

It is admitted that Jesse Fulford entered said south-east quarter section at the proper land-office under the pre-emption law, and received his final certificate therefor on August 31, 1882, and thereupon conveyed the same to W. C. Smith, who mortgaged it to the plaintiff on the same day as security for a loan of money; that on September 10, 1885, the plaintiff commenced a suit in the proper state court to foreclose said mortgage, and such proceedings were had thereon that the property was sold to the plaintiff, who received a sheriff's deed therefor on October 12, 1887; and that the money loaned to Smith was loaned in good faith, and without notice of any defect or deficiency in his entry, and the money paid thereon had not been returned.

That on May 7, 1885, the defendant Crow applied at the land-office to enter said south-east quarter section under the homestead law; that

the register and receiver, in the contest which ensued on such application, decided in favor of Crow, and canceled Fulford's entry, and on August 24, 1886, the commissioner of the general land-office affirmed said decision.

That Crow was not made a party to said foreclosure suit, and at the commencement thereof was in possession of said south-east quarter section under said homestead entry, which he afterwards—October 31, 1888—commuted by a cash entry.

It is also admitted that George W. Waddle entered said south-west quarter section under the pre-emption law, and received his final certificate therefor on August 12, 1882; that on September 1, 1882, said Waddle mortgaged the same to the plaintiff as security for a loan of \$850; that on September 10, 1885, the plaintiff commenced a suit to foreclose said mortgage in the proper state court, which resulted in its becoming the purchaser thereof, at sheriff's sale, and receiving a deed therefor about October 24, 1887.

That the money furnished Waddle was loaned in good faith, without notice of any defect or deficiency in his entry, and the money paid thereon was not returned.

That on May 7, 1885, the defendant Hopper applied at the proper land-office to enter said south-west quarter section under the homestead law; that the register and receiver, in the contest which ensued on such application, decided in favor of Hopper, and canceled Waddle's certificate, and on August 30, 1886, the commissioner of the general land-office affirmed said decision.

That Hopper was not made a party to the foreclosure suit, and at the commencement thereof was in possession of said south-west quarter section, under said homestead entry, which he afterwards—January 5, 1889—commuted by a cash entry.

On this state of facts it is contended that the plaintiff cannot recover in these actions, because (1) it has no interest in the property by reason of the cancellation of the department of the entries under which it is claimed; and, (2) admitting that such cancellation is void, it has no legal estate in the property.

As to the first point, I adhere to the opinion expressed in *Smith v. Ewing*, 11 Sawy. 56, 23 Fed. Rep. 741, and *Wilson v. Fine*, 14 Sawy. 224, 40 Fed. Rep. 52, that such cancellation is beyond the power of the department, and therefore void. See, also, on this point, *Stimson v. Clark*, 45 Fed. Rep. 760. The supreme court has never decided the exact point, but the tendency of its rulings is to the effect that the department cannot of its own mere motion set aside a final certificate, valid on its face. See *Cornelius v. Kessel*, 128 U. S. 461, 9 Sup. Ct. Rep. 122.

These are actions at law to recover the possession of real property. The law of the state provides (Comp. Laws 1887, § 316) that "any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession * * * by an action at law." As was said in *Wilson v. Fine*, 14 Sawy. 38, 38 Fed. Rep. 789: "This is substantially the common-law action of ejectment, minus its

once useful fictions; and is, * * * by virtue of section 914 of the Revised Statutes, the rule of procedure in this court." To maintain this action the plaintiff must have some sort or degree of a legal estate in the land, as well as a present right to the possession,—something more than an equity or a right in equity to have such estate.

In *Wilson v. Fine*, *supra*, I held that an actual possession of land at the time of the ouster complained of was a sufficient legal estate therein to enable a party to maintain the action against a mere intruder,—a person with no better title.

The defendants, in my judgment, are mere intruders; but the plaintiff does not appear to have ever had possession of these lands. As mortgagee it was not entitled to possession, and does not appear to have had it in fact. The entry-men under whom it claims do not appear to have remained in possession after receiving their certificates. They did not appear at the contest. Whatever right the plaintiff has it must enforce in equity.

The findings of the court will be that the plaintiff has no legal estate in the premises sought to be recovered, and can take nothing by its actions.

OSBORNE v. CHICAGO & N. W. RY. Co.

(Circuit Court, S. D. Iowa, C. D. November 9, 1891.)

1. CARRIERS—INTERSTATE COMMERCE LAW—LONG AND SHORT HAULS—JOINT TARIFF RATES.

A railroad company cannot justify itself in charging a greater compensation for a shorter than for a longer haul, under substantially similar conditions, contrary to the provisions of the interstate commerce law, (Act Cong. Feb. 4, 1887, § 4,) on the ground that the rate is fixed by a joint tariff agreement with other roads.

2. SAME—COMPUTATION OF RATES.

Nor can it do so because the result comes about by reason of the selection of different points on the line as a basis for computing rates, so as to charge one rate over one part of the road and a different rate over another part.

3. SAME—POWERS OF COMMISSION.

Under the interstate commerce law the power of determining whether a railroad company is relieved from the operation of the long and short haul clause lies solely with the interstate commerce commission; and in an action for damages in a federal court for a violation of that clause, when no authority from the commission is shown, the company cannot claim that it was justified in so doing by reason of the existence of a secret cut rate among competing roads, whereby a large part of the traffic naturally tributary to it was diverted.

4. SAME—"SIMILAR CIRCUMSTANCES AND CONDITIONS"—PROVINCE OF JURY.

Whether the "circumstances, and conditions" under which a railroad company has charged a greater compensation for a shorter than for a longer haul over the same line were "substantially similar," within the meaning of the fourth section of the interstate commerce law, is a question for the jury.

5. SAME—MEASURE OF DAMAGES.

In an action by a shipper against a railroad company for charging a greater compensation for a shorter than for a longer haul, in violation of section 4 of the interstate commerce law, the measure of damages is the excess in the rate charged for the shorter haul over that for the longer haul, multiplied by the number of hundred pounds shipped by the plaintiff.

6. SAME—DAMAGES—WHO LIABLE—ACTION OF TORT.

As the right of action given by the law is one for damages, as for a tort, any railroad company which makes the overcharge is liable for the full amount of the damage. 48 F. no. 1—4

ages, notwithstanding that it has shared the illegal freight with another road under a joint tariff agreement.

7. SAME—INTEREST—PROVINCE OF JURY.

It is the province of the jury, under the act, to determine whether interest shall be allowed on the amount of the overcharge which they have found.

At Law. Action for damages for violation of the long and short haul clause of the interstate commerce law.

C. C. & C. E. Nourse, for plaintiff.

W. C. Goudy and Hubbard & Dawley, for defendant.

SHIRAS, J. (*charging jury orally*.) The issues presented in the case on trial before you arise under the provisions of the act of congress passed February 4, 1887, and commonly known as the "Interstate Commerce Law." As you know, the congress of the United States, for the purpose of regulating the business carried on by the common carriers of persons and property by means of railways, or by a combination of railways and water travel, has passed this act, which regulates, in certain particulars, the carrying on of the passenger and freight business that exists between the different states and territories of the United States. The law, by its provisions, applies to interstate commerce; that is, commerce that is carried on between the states and territories of the United States. Section 2 of this act in substance prohibits the charging or collecting from any person or persons a greater or a less compensation for services rendered in the transportation of passengers or property than is charged or collected from others for the transportation of similar property, under substantially similar circumstances. Section 3 of this act makes it unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any person, company, firm, corporation, or locality over others, or to any particular description of traffic. Section 4 of this act in substance makes it unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of a like kind of property, under substantially similar circumstances, for a shorter than for a longer distance over the same line, in the same direction; the shorter being included in the longer distance, it being provided, however, that, upon application to the commission appointed under the provisions of this act, such commission may authorize the carrier to charge less for the longer than for the shorter distance, and in this way relieve the carrier from the operation of the provisions of section 4 of this act.

In the case now under consideration the plaintiff claims that the defendant company violated the provisions of this act, and particularly the fourth section thereof, in that the company required him to pay a larger sum for the transportation of certain grain, to-wit, corn and oats, from the town of Scranton, a station on the defendant's line of railway in the state of Iowa, to the city of Chicago, Ill., than the company was then charging for shipping the same kind of grain from Blair and other points in the state of Nebraska to Chicago, the latter being the longer distance. In the schedule attached to the petition the date of each shipment made by the plaintiff is set forth, with the number of pounds shipped, and

the rate charged, to-wit, 18 cents per hundred pounds, and the answer admits the statements thus made to be correct. On behalf of the plaintiff, it is claimed that the rate thus charged him was greater than that in force over the line of defendant's road upon shipments made from Blair and other Nebraska points, and plaintiff has introduced evidence tending to show the rates charged from Blair and other points in Nebraska, and the excess thereof over the rates charged to plaintiff for shipment of the like kind of grain from Scranton to Chicago. On behalf of defendant, it is denied that the rates charged for the transportation of grain from the points named in Nebraska in fact exceeded that charged to plaintiff upon the shipments from Scranton, and defendant has introduced evidence tending to show the rates in force at the different times included in the controversy, and further claims that the rates in force from Blair and other points in Nebraska were the result of a joint tariff adopted by the Fremont, Elkhorn & Missouri Valley Railway Company and the Sioux City & Pacific Railway Company and the defendant railway company, and further pleads that the circumstances in existence in Nebraska were dissimilar from those existing in Iowa at the time the shipments in question were made, because there existed upon certain lines of railway running to St. Louis, Mo., and Beardstown, Ill., and thence connecting with lines reaching the eastern seaboard, a secret cut rate upon grain shipments, which resulted in diverting from the defendant's line running through Iowa to Chicago a large part of the business which properly belonged to it, the same being sent from the points in Nebraska over the southern lines, and that it was to meet the competition thus created, that the so-called Nebraska tariff was put in force.

So far as the matter of the rates from Blair and other points in Nebraska to Chicago being established by means of joint tariff arrangements between the defendant company and its connecting lines extending into Nebraska, that will not defeat the plaintiff's right of recovery, if the facts show that the defendant company was charging a greater sum for the like service, at the same time, and under the like circumstances, for a shorter than a longer haul in the same direction, over the same line on which it was carrying the grain shipped from Nebraska, under the rates fixed by the joint tariff. What I mean to say is that if, from the evidence in this case and the instructions which shall be further given you by the court, you shall find that the Chicago & Northwestern Railway Company had, by the entering into a joint tariff with the Fremont, Elkhorn & Missouri Valley Railroad Company and the Sioux City & Pacific Railroad Company, aided to put in operation tariff rates, whereby corn and oats could be shipped from Blair and other points in Nebraska, under the like circumstances and conditions as the corn and oats shipped from points in Iowa, through Iowa, to the city of Chicago, and that by the doing thereof a larger sum was charged for a shorter haul than for a longer haul over the same line in the same direction, then the Chicago & Northwestern Railway Company, by joining in that tariff, and by aiding in putting it in operation, has rendered itself liable to be called to

account by any one who has suffered damage by reason of the Chicago & Northwestern Railway Company's charging that person a larger sum for the shorter than for the longer haul; in other words, companies cannot escape the duty and obligation that is placed upon them by the provisions of the interstate commerce law by entering into joint tariffs. Railroads have the right to enter into these joint tariff arrangements. The business of the country could not be carried on, probably, at least, not with any success, unless it was done, and they have a perfect right to do it; but when they do do it, the duty and obligation is on them to observe the provisions of the interstate commerce law in making and putting into operation these joint rates. It is just as much a violation of the law to charge a larger sum for a shorter than for a longer haul, under substantially similar circumstances, if it is done by the operation of a joint tariff, as it would be if it was done by the operation of a single tariff by a single road.

Again, it appears in evidence that, in making out the various tariffs or schedules of rates which have been put in operation from time to time, different points upon the defendant road have been taken, as I understand the testimony of the witnesses, as the basis used in establishing the rates. By way of illustration: They will figure from a certain point, like East Clinton, on the Mississippi. They will take that as a basis, or they will take Chicago as a basis, for figuring on. They may take Turner Junction as a basis for figuring on, or they may take Rochelle as a basis for figuring on. Now, that is a matter for the railway companies to decide for themselves, for their convenience in making out the different schedules of rates. But, whatever basis or whatever point they may take as a basis for establishing rates, the duty and obligation is upon them that they shall not, by this means, evade the provisions of the law. They cannot, by shipping to some point arbitrarily fixed by themselves, by naming the points where they shall cause their cars to be billed to, make a reduction by charging a rate to that point, and from there another rate to another point,—they cannot in that way escape the consequences of the result of that arrangement, if it puts an undue burden upon any shipper. By way of illustration: Here is the Chicago & Northwestern Railway, that runs from Missouri Valley, through to Chicago, and through Turner Junction and Rochelle, we will assume. Now, then, if the Chicago & Northwestern Railway Company, in making out its tariffs, takes Turner Junction, or Rochelle, or any other point on the way to Chicago, as a point to figure from, it may do that; but it cannot, by doing that, justify itself in charging shippers in Iowa a greater sum for taking produce through to Chicago than it charges other parties shipping from Nebraska; that is to say, the duty and obligation, as I have already said to you, is on them not to make any unjust discrimination, or give any undue preference, to shipments made from special points or localities, or any undue preference to the shipments of one individual over another, nor of one kind of business over another. The general theory of the interstate commerce law is that, as near as it can be done, all localities and all

individuals substantially similarly situated, shipping freight over the same line of road in the same direction, under substantially similar circumstances, shall have the same or properly proportioned rates; in other words, there must be no undue preference given to one individual over another, or one locality over another. It is just as much a violation of the law to do that by any method of adopting different points, and billing cars to one point, and then to another point, on the line, as it would be a violation of the law to simply charge a greater sum for a less service of hauling from one point to another.

The plaintiff sets forth his cause of action in two counts in the petition. In both counts he charges that on certain dates that are named in the accounts that are attached to the petition he forwarded certain grain (corn and oats) from Scranton, a station upon the line of the Chicago & Northwestern Railway, through to Chicago, and that he was charged at that time a rate greater than the rate which the railway company was giving to its patrons or to others at Blair and other points in Nebraska, a point which is at a distance greater than is Scranton from the terminal point, Chicago. Now, as I understand it, the question that you have to determine, under the evidence in the case, is whether that statement is true. Is it true that, upon any one or more of the shipments that are set forth in the schedule annexed to the petition, the plaintiff was required to pay a greater sum than was being charged at that time by the defendant, the Chicago & Northwestern Railway Company, for performing the like service for the transportation of other grain of the same kind (corn and oats) from points in Nebraska, over the same line, in the same direction, passing through Scranton to the city of Chicago? Evidence has been introduced in the case upon which the court has been asked to submit to the jury for your determination, as a matter of fact, whether the defendant railway company was not justified in making the reduction of rates, by reason of the fact that it appeared, as it is claimed under the evidence, that there had been what was called a "secret cut rate" put in operation in Nebraska, which affected business upon the line of the Fremont, Elkhorn & Missouri Valley and the Chicago & Northwestern Railways; the result of this better rate being to cause quite a large portion of the business that would naturally be tributary to the Chicago & Northwestern line to go south, by way of St. Louis and Beardstown, and in that way, through St. Louis and these southern points, to the eastern seaboard. Under the ruling of the court upon the question of law, although a rate of that kind may have existed, it is the view of the court that that question cannot be determined by this court and jury. The consideration of questions of that kind—of the right of the railway company to be excused from the duty and obligation that is placed upon it by the fourth section of the interstate commerce law—is, by the express terms of the law itself, conferred upon the interstate commerce commission. As you know, there is a body of commissioners provided for by this interstate commerce act, and the fourth section of this act, by its express terms, in a proviso that is therein contained, places upon the commission the duty, and gives them the authority, to investigate

and determine whether there are such facts and circumstances surrounding a railroad at a given time as would justify the commission in authorizing the railway company to charge a greater sum for a shorter than for a longer haul over the same line, in the same direction, under otherwise substantially similar circumstances. In the view that the court takes of it, this court and jury cannot determine that question, which, by the law, the commission are authorized to determine. Whether the railway company was justified by a cut rate, making what was called in argument "illegitimate competition," and circumstances of that kind which grow out of the handling and management of the railroad business of the country, by other competing lines, and its effect upon the business of the defendant company, in the judgment of the court, is a question that cannot be submitted to you. Questions of that kind are for the judgment and determination of the board of commissioners appointed under this act, and the courts and juries, when they are called to act upon particular cases arising under this act, where it is claimed that the law has been violated, are only authorized to determine the question whether, in the service rendered, the character of the property, its conveyance, and other facts which inhere in the carrying of the freight upon the particular line which is charged with the wrong-doing, there existed dissimilar circumstances and conditions, relieving the company from the charge of collecting a larger rate for the shorter haul over the same line, in the same direction, and under otherwise substantially similar circumstances and conditions. Now, then, if the railway company had been authorized by the commission to do that, then they could plead and prove that fact, and it would then be the duty of the court to instruct the jury that that would justify the railway company in making the larger rate for the shorter distance; but no such action has been taken by the interstate commission. They have not been called upon to act, and they have not authorized the railway company to charge a greater sum for the shorter than for the longer distance.

Under the circumstances I have detailed before you, as I view it, this court and jury cannot authorize the railway company to make such charge, or justify it after it has been done. There is no evidence in this case that the railway commission has ever passed upon the question, or authorized the railway company to charge a greater sum for the shorter than for the longer distance; therefore, the question comes down to this: Does the evidence satisfy you that at the time when the Chicago & Northwestern Railway Company transported the oats and corn set forth in the schedules attached to the petition from Scranton, Iowa, to Chicago, Ill., it had in force and operation a tariff rate whereby it did, either by itself, or in conjunction with the other roads that have been named in your hearing, transport the like produce (corn and oats) from points in Nebraska over this same line, the Chicago & Northwestern Railway, in the same direction, to Chicago, Ill., at a rate less than it was charging for the like services to the plaintiff? Now, if it did do that,—if there was any reason sufficient to influence the Chicago & Northwestern to put a lower rate in operation in Nebraska,—it had a

right to do it, and had a right to fix this rate in competition with any secret rate to which it might be subjected in Nebraska, either directly or indirectly, through the operations of the competition that was brought to bear upon the roads connecting with the defendant line, the Fremont, Elkhorn & Missouri Valley and the Sioux City & Pacific; but if, by reason of that competition, or for any other reason, the Chicago & Northwestern Company did enter into a joint arrangement with these companies, in which it fixed this lower rate, then, under the law, it was charged with the duty of not charging a greater sum to Iowa shippers for the shipping of the like produce—the like grain—over its line of road to Chicago, under substantially similar circumstances and conditions, because that was the shorter distance. And if it were in fact proven that it did charge a greater sum to Iowa shippers on the like produce, and for the like service, it would establish a violation of the fourth clause of the interstate commerce law, because it would be charging a greater sum for hauling a shorter, than for hauling a longer distance, under substantially similar circumstances.

Now then, gentlemen, it is for you to determine, under the evidence in this case, whether or no the produce that was forwarded by the plaintiff from Scranton was of the same kind that defendant forwarded under its tariff from Blair, Neb. The court can take judicial notice of distances, and instruct you that the distance is greater from Blair, Neb., to Illinois than from Scranton, Iowa, to Illinois, and it is for you to determine, if there is any dispute in the evidence, whether the Nebraska grain passed over the same line (the Chicago & Northwestern) that the freight did in going from Scranton, Iowa, to Chicago, Ill. Is there anything, then, in the evidence, as it is submitted to you, that would justify you in finding that there was any dissimilarity in the circumstances and conditions under which the defendant railway company forwarded the freight of the plaintiff from Scranton, Iowa, and under which it forwarded the produce, (corn and oats,) coming within this schedule or tariff of rates when it received the same from these connecting lines in Nebraska? As I have already said to you, the law, under this fourth section of the statute, requires that for similar services, rendered under similar circumstances, it shall not charge a greater sum for a shorter than for a longer haul over the same line, and in the same direction. Has the plaintiff, upon whom is the burden of proof, satisfied you, by a fair preponderance of the evidence, that as to any one or more of these shipments that are set forth in the petition the defendant company did in fact charge a greater sum for hauling from Scranton the oats and produce of plaintiff than it charged for the like services from Blair, Neb., at the same time? If so, and if there is nothing in the evidence of the circumstances surrounding the transportation of this grain over the line of defendant's road that would justify defendant in making a larger rate from Scranton than from Nebraska points, then the company has charged a greater sum for making a shorter than a longer haul of the like property, under like circumstances, and in so doing has violated the interstate commerce law.

There is a dispute between the parties as to the rates that were charged as to some of these shipments. That is a matter for you to determine under the evidence; and if you find that, in fact, the Chicago & Northwestern Railway Company did not make any discrimination, and was not charging the plaintiff for conveying his property from Scranton a larger rate from Scranton, Iowa, to Chicago, than it charged at the same time from Blair, and other points in Nebraska, to Chicago, then the plaintiff has failed to make out his case, and your verdict must be for the defendant. If, on the other hand, you find on this issue for the plaintiff,—in other words, if you find that the Chicago & Northwestern Railway Company did charge more for the transportation from Scranton to Chicago than it was charging at the same time for the transportation of like property, under like circumstances, from Blair and other points in Nebraska,—that would justify you in finding upon that issue for the plaintiff, and we then come to the rule of damages.

The rule of damages under both counts of the petition is the same: First ascertain what the rate was that was fixed for the transportation from Blair, and other points in Nebraska; that is, the rate per hundred pounds. Then find what the rate was that was in fact charged per hundred pounds to the plaintiff for forwarding the oats and corn from Scranton to Chicago. The difference between these two, if there is any, is the damage per hundred pounds that was caused to the plaintiff. Now, the schedules attached to the petition show the number of hundred pounds that is claimed to have been transported, and it is admitted in the answer that these were transported as shown, so there is no dispute on that point. Take the number of hundred pounds that you find were transported, and take the difference, if any, between these rates per hundred pounds, and, by mere multiplication of one by the other, you will find the amount of damage. It may be required that you make this computation more than once, because it is claimed that the difference was less at times than at other times, and that is for you to determine under the evidence. Take the number of hundred pounds of these shipments, as they are set forth in the schedules attached to the petition. Ascertain the rates fixed by the tariff that you find defendant at that time had in force from Nebraska. Take the difference between that and the rate actually charged the plaintiff, if there is any, and the difference is the damage per hundred pounds that has been caused the plaintiff. You understand, gentlemen, that it is the damage to the plaintiff that is to be considered. It is not a question of how much the defendant railway company may have received. When joint rates are made, the shipper has nothing to do with that; he has no control over that. His privilege is to deliver his freight that is to be transported to the railway company, and, if it comes under the operation of a joint rate, it is not a matter of any moment, as between him and the railway company that handles his freight, what particular share or portion of the rate that is actually paid on the shipment any particular railroad received. If two or more railway companies, entering into a joint tariff arrangement, shall so carry it out as to cause a damage to the shipper,—as, by way of illustration,

charging him under the joint tariff three cents or five cents more than they ought to have charged him,—it is not a question in which the shipper is interested, when he sues to recover, to know what particular division may have been made of the five cents thus illegally charged. The shipper would have a right to look to all of the railways, or to any one of them, which had aided in committing the wrong, by receiving from him a larger rate than he ought to have been charged. If, by the effect of a joint tariff of rates the Chicago & Northwestern Company aided in putting in operation, the plaintiff was charged for shipping his grain from Scranton five, or six, or one cent more than they ought to have charged him, the plaintiff is entitled to recover in this action the amount of the overcharges he has paid, regardless of what division may have been made, or whether there was any division, between the different companies putting the joint rate into operation; because it is not a suit to recover back the amount the defendant company may have received, but it is an action sounding in tort for damages, wherein the shipper seeks to recover the damages claimed to have been caused him by charging an illegal rate. The unlawful overcharge is the element on which the claim for damages is based.

Under the law, it is within your province to determine whether or not interest shall or shall not be paid on the amount of overcharge, if you find any. If you find that the plaintiff has been overcharged upon particular shipments, it is not a matter in which the law determines whether interest shall be given or not. In some cases founded on breach of contract, the parties may be entitled to recover interest; but in cases for damages sounding in tort, (and this is a case of that kind,) it is within the province of the jury to award interest or not. If, in order to fairly compensate the plaintiff, in your judgment, he should receive 6 per cent. interest, it is within your power to award it.

ATCHISON, T. & S. F. R. Co. v. WILSON.

(Circuit Court of Appeals, Eighth Circuit. October Term, 1891.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE TRACKS.

While plaintiff's intestate and other railroad hands, engaged in reconstructing a piece of wrecked track, were removing wreckage by means of a derrick-car, the derrick unexpectedly swung to the north, and upset the car, and killed the intestate. The ground at the place of the accident was softened by prolonged rains, and there was evidence that immediately after the accident the north rail under the car was found to be several inches lower than the south rail, though there was no curve in the track, and that the consequent slant was sufficient to cause the derrick to swing as it did. Some witnesses testified that only three ties were laid under each rail; others that there were ten or twelve. *Held*, that such a slant of the track, whether due to careless construction or to the sinking of the north rail after it was laid, is such a defect as constitutes negligence on the part of the railroad company, and the question of its existence was properly submitted to the jury.

2. SAME—FELLOW-SERVANTS—VICE-PRINCIPAL.

The railroad company cannot escape liability for such negligence on the ground that it was the negligence of the intestate's fellow-servants, when the company's road-master was present, and in charge of the whole work of reconstruction.

3. DEATH BY WRONGFUL ACT—ACTION BY WIDOW—EVIDENCE—AGE OF OFFSPRING.

In an action against a railroad company, brought under Rev. St. Mo. § 4425 *et seq.*, by a widow for the death of her husband while in its employ, evidence of the ages of the children of the marriage is admissible; for on his death the widow becomes responsible for the care of the children. *Tetherow v. Railway Co.*, 98 Mo. 84, 11 S. W. Rep. 810, followed.

4. SAME—MEASURE OF DAMAGES—LOSS OF HUSBAND'S SOCIETY.

But in such an action under that statute, the loss of companionship or society of the husband is not an element of damages, and it is error to instruct that the jury may consider such loss in estimating the damages. *Schaub v. Railway Co.*, (Mo. Sup.) 16 S. W. Rep. 924, followed.

In Error to the Circuit Court of the United States for the Eastern Judicial District of Missouri.

Action by Mary A. Wilson against the Atchison, Topeka & Santa Fe Railroad Company for the death of her husband, a section hand in defendant's employ. There was judgment for plaintiff, and defendant brings error.

Gardiner Lathrop and *Ben Eli Guthrie*, for plaintiff in error.

B. R. Dyart and *John F. Mitchell*, for defendant in error.

Present, CALDWELL, NELSON, and HALLETT, JJ.

HALLETT, J. In the month of April, 1890, a freight train was wrecked at or near Salt river, in Macon county, Mo., on a line of railroad owned and operated by the plaintiff in error. In the evening of the same day a large force of men was assembled at the wreck for the purpose of clearing the track and repairing it as speedily as possible. These men were employes of the company, of various occupations, collected from the line of the road. It was not the practice of the company to keep men for the business of removing wrecks, but in such an emergency men were called from all branches of the service as occasion might demand. For the most part they were section-men, and with them came the division superintendent of the road, William E. Costello, the road-master, Charles A. Lehman, and the train-master, William B. Scott. It is not clear whether any of these officers had general supervision of the entire force and of all the work to be done at that time and place; and, in the view we take of the case, it is not important to determine that question. It is enough to note the fact, clearly established by the evidence, that in repairing the track, or reconstructing it in a manner to be presently noticed, the work was under the supervision of the road-master, Charles A. Lehman, who was present and attending to that duty. Circumstances were not favorable to the work in hand. Rain had been falling for several days, and was still falling, and the ground was very wet, soft, and muddy. The work could not be completed in daylight, and it was necessary to carry it on through the night, with the aid of lanterns and bonfires, as might be possible under a wet sky. The place of the wreck was a high embankment or fill, 20 feet or more above the level of the adjacent land, and the borrow-pits below held more or less water. The width of the embankment was not much greater than the track, so that there was not much room for building a temporary track around the wreckage, or removing the old track to accomplish the same thing. The general course

of the road at that place is east and west, and about 180 feet of track west of the bridge over Salt river was displaced and torn up. Upon looking over the ground, and considering the work to be done, Lehman decided to move the track two feet south of its original position on the embankment. In doing this, part of the wreckage would be avoided, and the remainder would have to be removed as the work progressed. To this work Lehman appointed Eaton, foreman of section 14, and gave his personal attention to other matters; but he says he returned twice or three times during the night "to see how the track was being repaired, and if everything was safe." The work of relaying the track in this manner was carried on through the greater part of the night, until at length some trucks from a freight-car were found lying across the north rail of the original track, which it was necessary to remove. After several unsuccessful efforts to remove them, Costello, division superintendent, came upon the ground and suggested to McCormick the use of the derrick or wrecking-car. McCormick had been trying to remove the trucks by means of a cable attached to a locomotive, and with men using crow-bars and possibly other appliances. He described himself as "car-repairer and wrecker-inspector," and he had been for some time in charge of the derrick or wrecking-car used on this occasion. More than any other person on the ground he seems to have had some special duties, in connection with his car, in the removal of wrecks; but he had not, so far as shown in this record, more than one man in his charge, and up to that time, on this occasion, he had worked with his own hands in common with other employes of the company. He was superior to the others only in his knowledge of the use of the wrecking-car, and in having charge of it when it was in action. McCormick assented to the use of the wrecking-car, and it was brought up for the purpose of removing the trucks. It then stood on the last rails of the new track laid by Eaton, which at this point were about 12 or 15 inches south of the rails of the old track. The trucks which were to be removed were partly on the northerly side of the new and old tracks, but in front of the wrecking-car. The plan was to raise them sufficiently so that they could be moved south of both tracks when suspended on the swinging boom of the derrick. For that purpose several men were called to assist McCormick in pushing the trucks to the south, when they should be lifted above the tracks with the aid of the derrick. Other men mounted the car, by Costello's command, for the purpose of working the derrick, and in due time the trucks were elevated above the tracks as was proposed. But, contrary to all expectation, McCormick and the men who had hold of the trucks were unable to control them, and the trucks went north rather than south; the wrecking-car was overturned; and James W. Wilson, one of the men employed in working the derrick, fell under the trucks of that car and was killed. Wilson was a sectionman from section 14, and his foreman was Asbury Eaton. This action was brought by his widow, upon a statute of the state of Missouri, (Rev. St. § 4425 *et seq.*) to recover damages resulting to her from his death, and she had judgment in the circuit court.

Referring, now, to the acts of negligence charged in the complaint, and the evidence at the trial on that subject, the prominent question of fact in the case is the condition of the new track on which the wrecking-car stood at the time of the casualty, and whether it was well built. Several witnesses testify that immediately after the car was overturned the north rail was observed to be two to four inches lower than the south rail, and those who deny the statement seem not to have given much attention to the matter. If such was the fact, it may have been due to carelessness in construction in placing the rails in that position, or to the sinking of the north rail under the weight of the wrecking-car. In the latter case, the result would indicate that the rails were not adequately supported by ties. One witness testifies that only three ties were laid under each rail; others say four to six were laid; and still others give varying numbers, up to ten or twelve.

Whether the north rail was first laid lower than the other, or sunk in the mud under the wrecking-car, if in fact it was lower than the other immediately after the casualty, it was obviously a fault in construction. The track was straight at that point, and therefore there was no reason for placing one rail higher than the other, as is usual on curves. It is to be observed, also, that the new track was not intended for temporary use in removing the wreckage only, but was for the general traffic of the road during the following day, and perhaps longer. Under all the circumstances prevailing at the time, the duty of the company to restore the track as speedily as possible, and for that purpose to go on with the work at night, through rain and mud, no one will contend that the company should be held to the same care in building its track as would be demanded under more favorable conditions. Nevertheless, some care was necessary to make a track adequate to the support and safe passage of trains, not alone in the interest of the public, who were using the road extensively, but also in the interest of the employes of the company who should be sent over the road. With certain well-understood qualifications, which it is not necessary to define in this connection, a servant is as fully entitled to a safe track as any traveler over the road. If the track was in fact defective, and by the use of more ties or in any other way it could have been made safe for the wrecking-car, the duty of the company in that regard is clear and unmistakable. It seems to be conceded that the north rail, being lower than the other, would operate to deflect the load on the derrick in the manner and to the extent which actually occurred; so that it was a material question for the jury to consider whether the north rail of the new track was first placed lower than the south rail, or, not being so placed, whether it sunk under the wrecking-car, and thus caused the load on the derrick to swing to the north and overturn the car.

But, if this be allowed, we are urged to declare that the new track was laid by fellow-servants of Wilson, for whose negligent acts the company cannot be charged at the suit of one of their number. But our vision is not so limited, since we are bound to find the directing mind of the company, and that is a matter of no embarrassment in this instance.

The road-master, who, by the title and proper function of his office, had full authority over the track and the manner of building it, was there in person, and, as he says, vigilant and active in the discharge of his duties. No other officer could represent the company better or more fully in the matter of constructing the track, and the company could not do the work at all unless by the agency of a natural person. We are therefore authorized to say that the company was present in such form and degree as is possible to a corporation, when this track was laid, within the principle declared in *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, and thus became responsible for all that was done or omitted at that time.

The circuit court did not err in declining to instruct for plaintiff in error, or in submitting to the jury upon the evidence the issue as to the condition of the railway track as the probable cause of Wilson's death.

As to the issue upon the use of the wrecking-car, the writer holds that it was improperly submitted to the jury, and that the fifth instruction asked by plaintiff in error ought to have been given by the court. But this court is unable to agree on this proposition, and declines to express an opinion upon it.

Two other questions, affecting the measure of damages, are presented in the record, upon which we have sought only to ascertain what construction has been given to the statute by the supreme court of Missouri. The first arises out of the admission of testimony as to the number and ages of Mrs. Wilson's children. When it was learned that the children were of an age to support themselves, the testimony was abandoned by counsel for plaintiff below. But it was not withdrawn from the jury, and counsel for plaintiff in error insist that it had weight with that body. If so, the supreme court of the state has held that, in an action by a wife for the death of her husband, such evidence may be received, for the reason that on the death of the husband she becomes responsible for the care of the children. *Tetherow v. Railway Co.*, 98 Mo. 84, 11 S. W. Rep. 310. And this must be accepted in federal courts as the meaning of the statute on which the action is based.

Error is also assigned on the charge of the court that the jury might consider the loss which defendant in error sustained in consequence of being deprived of her husband's society. In two cases reported from the supreme court of Missouri before this action was tried, it was held that such damages were properly allowed in an action by a husband for an injury to his wife. *Blair v. Railroad Co.*, 89 Mo. 335, 1 S. W. Rep. 367; *Furnish v. Railway Co.*, 102 Mo. 669, 15 S. W. Rep. 315. In the absence of other expression from that court, it might well be assumed that the same rule would obtain in an action on the statute by husband or wife. Since this case was tried, however, an opinion of that court has been published which distinctly declares that, in an action on the statute by a wife for the death of her husband, nothing shall be allowed for loss of society. *Schaub v. Railway Co.*, (Mo. Sup.) 16 S. W. Rep. 924.

As already pointed out, the earlier cases were common-law actions for injuries to the wife, and it is not to be assumed that the last case is in

conflict with the others. On the authority of the *Scharb Case*, and because it seems to be in accord with the current of authority elsewhere, we feel bound to declare that the law of Missouri is and has been that, in an action on the statute of that state by a wife for the death of her husband, the loss of companionship or society of the husband is not an element of damages, and therefore there was error in the instruction mentioned. The judgment of the circuit court will be reversed, and the cause will be remanded for a new trial.

WOODS *et al.* v. LINDVALL.

(Circuit Court of Appeals, Eighth Circuit. October Term, 1891.)

1. MASTER AND SERVANT—DEFECTIVE STRUCTURE—SUFFICIENCY OF EVIDENCE.

In making a railroad fill, a trestle was built beyond the end of the fill to carry out the dirt-cars for dumping, each car containing a cubic yard of dirt. The trestle was made of bents, consisting of two poles with a cross-piece spiked to the top, the feet being held together by cross-bracing. Six bents, varying from 21 to 24 feet high, had been erected beyond the end of the dump, and stringers had been run across the first 5, but were not secured unless by a small rope tied round the cap. The tops of the bents inclined slightly towards the fill, and they were not braced against each other, or supported longitudinally in any way. Under the direction of the foreman, plaintiff and others were engaged in running out a stringer, which was 32 feet long, to reach the last bent, which was about 26 feet away, and just as they lowered the end of it onto the cap the whole structure fell, injuring plaintiff. Several civil engineers testified that such a structure was unsafe. *Held*, sufficient evidence to warrant the jury in finding that the structure was not built with a due regard to the safety of those working upon it.

2. SAME—VICE-PRINCIPAL—FOREMAN OF RAILWAY CONSTRUCTION.

A foreman who is in charge of a gang of workmen engaged in construction work on a railroad, with full power to hire and discharge men and direct them when and where and how to work, is a vice-principal, notwithstanding that he occasionally lends a hand in the actual manual labor.

3. RES ADJUDICATA—DISMISSAL AFTER PLAINTIFF RESTS.

St. Minn. c. 66, § 262, subd. 8, provides that a civil action may be dismissed by the court without a final determination on the merits, "where, upon the trial and before final submission of the case, the plaintiff * * * fails to substantiate or establish his claim or cause of action," etc. *Held*, that, under the decisions of the state courts as shown in *Craver v. Christian*, 34 Minn. 397, 26 N. W. Rep. 8; *Andrews v. School-Dist.*, 35 Minn. 70, 27 N. W. Rep. 303; and *Conrad v. Burdwin*, 44 Minn. 406, 46 N. W. Rep. 350,—a dismissal on defendant's motion, after plaintiff has rested, on the ground that he has failed to establish a cause of action, is not a judgment on the merits such as will prevent the bringing of a new suit.

HALLETT, J., dissenting.

47 Fed. Rep. 195, affirmed.

Error to the Circuit Court for the District of Minnesota.

Action for damages for personal injuries brought by August Lindvall against John Woods and Stephen B. Lovejoy, partners as Woods & Lovejoy. Verdict for plaintiff. Defendants appeal. Affirmed.

STATEMENT BY CALDWELL, J. This action was brought by the defendant in error to recover for a personal injury alleged to have been received through the negligence of the defendants. The issues were a general denial and a plea of former adjudication. Upon the conclusion of the evidence, the defendants moved the court to instruct the jury to

return a verdict for the defendants, on the ground that the plaintiff had failed to make out a cause of action against the defendants, which motion was denied. This ruling is assigned for error.

The facts of the case, as disclosed by the bill of exceptions, are in substance as follows:

The plaintiffs in error, who were defendants below, were railroad contractors engaged in the construction of a railroad bed for the St. Paul & Duluth Railroad Company for a distance of some 10 or 12 miles. The work consisted in constructing a road-bed by making cuts in hills and in filling low places. The defendants, about New Year, 1888, started in on the work at three different places, with three separate crews. One of the crews was under the charge of one Aleck Murdock, and the work by it to be performed was cutting down a hill near Gladstone, Minn., and filling a long stretch of low country below said hill. Another crew, under one Woods, a brother of one of the defendants, was at work from the other side of the hill in an opposite direction; and the third crew, a mile or two distant, was under the charge of one Mahoney. The work in charge of Aleck Murdock was performed as follows: At the base of the hill a trestle-work was erected, consisting of 10 trestles, all raised at the same time, built of square timbers, and consisting of trestle-bents from 2 to 5 feet high, on which were laid stringers. On these stringers were placed ties, to which were bolted iron rails, thus constituting a track on which to run out "Petler" dumping-cars filled with dirt in the cut, which dirt was dumped at the end nearest the hill, until a sufficient fill was produced. The stringers were not in any way fastened to the trestles, nor were there any longitudinal braces between the bents. After the first 10 bents had been filled up with dirt, the work proceeded in the same manner, except that from that time to the day of the accident only 1 or 2 bents were raised at any one time; and as the work progressed the trestle-bents became higher, until they, on the day of the accident, were from 21 to 24 feet high. There was also this difference, that instead of square timber round timbers were used, about 10 to 12 inches at the bottom and 7 to 8 inches at the top. The caps of the trestle-bents were also round timbers surfaced on the top for about 5 inches. These caps were from 8 to 10 inches through. They were fastened to the legs of the trestle with spikes. At the ends the caps were also surfaced below for about 5 inches. The distance between the legs at the ground was about 13 feet; at the top, about 2 feet. The caps were about 6 feet long. There were no longitudinal bracing or bracings of any kind between the different trestle-bents, but the legs of each trestle-bent were held together by cross-bracing. On top of the caps were placed, at 2 feet distance from each other, 2 stringers of 8x10 sawed timbers, and of different lengths, some 16 feet and some 32 feet. When the 16-foot stringers were used the distance between the trestle-bents was about 12 feet. When the 32-foot stringers were used the distance was about 27 feet. The stringers were not laid so as to buttress one against the other, but so as to overlap one beside the other. The stringers were not bolted or spiked to the caps, nor were they provided with chucks on either side of the caps, nor

were there any bolts driven in them on either side of the caps, nor were they fastened in any way to the trestle-posts, except that the person who had charge of the building of the trestles and their erection, after the 10 first trestles had been built, was in the habit of tying with the hand a three-quarter or one-inch rope around the stringer and the cap, which Murdock had observed. He had no orders either from defendants or from Murdock to do this. He used no other force except his hands with which to tighten or tie the ropes. On top of these stringers, but not spiked or fastened to them, were then laid ties and rails in the same manner as was done on the first 10 trestles erected, the rails spiked to the ties, and the rails fish-plated at the end, 30-foot rails, 40 to the foot. At the time of the accident there was a continuous track of about 400 feet from the cut. When the fill was completed the stringers were taken out and used for further trestles, and the ties were then made to rest on the dirt. At the time of the accident about 35 or 40 trestle-bents had been erected at this particular place under the charge of Mr. Murdock, by one Johnson. The men working at this place under Murdock consisted of different sets of men. One set of men, about 20 or 30, worked in the cut digging out the dirt and filling the cars. One set of men were to drive the teams which hauled the cars from the cut to the dump and back. One set of men, consisting generally of 4 or 5 men, worked at the dump or the end of the fill, unloading the cars and evening the dirt, shoveling and tamping under the track. One man, Johnson, built the trestles, and raised them and put them in position, placed the stringers, and laid on them the ties and track, with the assistance of other men furnished him on his request by Murdock. Of all these different men, —both those in the cut, on the dump, the teamsters, and the trestle-builder, —Murdock had the charge and control. He hired and discharged the men under him; directed the work, how it should be done and when it should be done; ordered the men working under him to go to any different place when he so desired. Nobody else gave any orders to any of the men, and they were all bound to obey his orders and directions. He went from the cut to the dump and on the trestle-work, back and forth. He did not work himself, unless to show the men how the work should be done, but occasionally took hold to help the men out. The defendants both resided at Minneapolis, about 20 miles away from the place. During the progress of the work defendant Lovejoy was never there. Defendant Woods visited the works two or three times a week, but stayed only for a short time, —sometimes a few minutes and sometimes an hour or more. He did not give any orders to the workmen, nor direct them in any manner. If any orders were given by him, they were given to Mr. Murdock. Murdock set Johnson to work to build trestles when the work first commenced, soon after New Year. The first 10 trestles were raised by Murdock with Johnson's assistance. All the subsequent trestles were raised by Johnson on Murdock's orders. The trestle-work was built for temporary purposes; the bents to remain in the fill, but the stringers to be taken out. Immediately before the commencement of the work at Gladstone, Murdock had had charge of a

similar work in Lowry and Douglas Hill, in Minneapolis. While working at these hills under Murdock, in the fall and winter before and shortly before going to Gladstone, Johnson, who had been working at oiling and fixing cars, was by Murdock set to work building trestles. Before setting him to work Murdock asked him if he was good at bridge building. Johnson told him he did not understand anything about it at all. Johnson was not a carpenter. He had not learned the trade of a carpenter. Murdock then set him to work building trestles in Lowry and Douglas Hill, where Johnson built altogether six or seven trestles. Johnson had had no experience in trestle building before the six or seven trestles in Douglas Hill, and those he then built were all that he had built before, except that he had helped build a stable for the horses and a camp for the men before he was put to work at building and raising the trestles on the works near Gladstone.

In April, 1888, plaintiff came out to Gladstone and applied to Murdock for work. Murdock told him that he could go to work on the dump. His duties in working on the dump were dumping cars, shoveling dirt, and tamping up the track; that is to say, to fill up dirt under it and under the ties. His duties did not call him any further out on the trestle-work than to the edge of the dump. He worked for defendants from April 2d till April 20th, when injured. He had nothing to do with the building of the trestles, or with erecting the trestle-work, or with the placing of it in position, or in placing the track, and the only assistance he ever gave to this work was one morning a few days after he came to the works, when he, at the request of Johnson, helped to shove out a couple of stringers. On the morning of the accident, when the men came to work, there were two trestle-bents standing. The one nearest to the dump was covered with dirt one-half way up the legs, and the dirt ran on a slope from that bent down about one-half way to the next bent. The stringers running from the bent standing one-half way up in the dirt to the bent wholly covered up were 32-foot stringers. The stringers from the bent partly covered with dirt to the bent outside were 16-foot stringers. Johnson helped shoveling on the dump when he had nothing else to do with building or raising trestles. The morning of April 20th Johnson was on the dump with the dumpmen filling up dirt under the ties where it had sagged away during the night, when Murdock came down with the men from the cut for the purpose of digging a trench between the two last trestles then standing. There were then four more trestle-bents already built and lying on the ground. When Murdock came down with his men from the cut in the morning he told Johnson to raise the remaining trestles and put them in position. Johnson, with the assistance of plaintiff and Peterson, then first took out the long stringers lying between the bent entirely covered with dirt and the bent standing in the dirt one-half way up, and in place of these long stringers put in 16-foot stringers; resting with one end on the dirt at the upper end of the dump.

The ropes with which the long stringers were tied to the cap were untied, and probably not tied on after the short stringers were put in. He thereafter, while plaintiff remained on the dump leveling the dirt and filling up under the ties and the track, with the assistance of one Peterson, went to work to raise three more trestle-bents, which was done by aid of block and tackle; one of the teamsters driving his team up the track, and thus aiding in raising the trestles. After each trestle was raised Johnson and Peterson laid stringers on them as heretofore described, without fastening them in any way whatsoever, unless they were tied with ropes as heretofore described. The same men thereupon laid the ties and track onto the stringers. The stringers used for the first two trestle-bents erected that morning were short stringers. None of the trestle-bents erected that morning were provided with longitudinal bracing; nor were there any chucks on the stringers or any bolts on either side of the cap; nor were the stringers bolted or nailed to the caps; nor were the ties bolted or nailed to the stringers. All of the trestle-bents erected that morning were leaning in towards the dump. The one furthest from the dump about eight inches or one foot; the next one about the same; the next one about one foot and a half; and the next one about two feet or two feet and a half. Johnson cannot remember whether any of the stringers on the trestle-bents erected that morning were tied with ropes, but plaintiff saw ropes tied on one or two pairs of them on one side, when he went out with the stringers as hereinafter stated. At this time there were then five trestle-bents standing, one of which was covered with dirt one-half way up, and all the other wholly uncovered. None of the trestle-bents were provided with footings, nor were they dug into the ground, but were placed on top of the ground, except one; one leg whereof, on account of a slant in the ground, was partly dug in. There was then only the sixth trestle left on the ground. Johnson placed the lower part of this trestle about 22 or 24 feet away from the last trestle standing; placed sticks in front of the legs, and fastened the rope and tackle in the cap which was lying furthest away from the trestle-work, and caused it to be raised in this way, by aid of horse-power; having first secured the cap with a guy-rope to a stick placed some distance ahead.

This last trestle was heavier than the others, and was provided with a footing. Up to this time the plaintiff had taken no part in the work of building or placing in position the trestles which were erected that morning, nor in shoving out stringers on them, nor in placing the ties or track on them, but had been busy at the dump shoveling and tamping, and had paid no attention to the work on the trestle beyond him. About this time Murdock, whose crew from the cut had got through digging the trench, and who had taken his men back into the cut, came down on the dump, where plaintiff and Peterson were then standing, shoveling. The long stringer which Johnson had taken out at the end of the dump was then lying beside the track on the dump. On the track beside these stringers were lying a couple of rollers. On going down Mr.

Murdock ordered plaintiff to take hold of those stringers and help to shove them out, so as to get the stringers out before the cars should come down with the dirt. Charlie Peterson and plaintiff then took hold and lifted the stringers upon the rollers lying on the track, and plaintiff and Peterson commenced to shove the stringers on the rollers, Mr. Murdock assisting them, until the last roller was passed, when one of them took and placed it in front, and thus the work of shoving them out proceeded. The track was laid only one-half way out between the two last bents standing, and on which stringers were laid, and as the front roller dropped from the track down onto the stringers, Mr. Johnson came up on the trestle-work. At the same time a car came down from the cut, and Mr. Murdock went back towards it, while Johnson took his place, and the work of shoving the stringers out proceeded until the front roller struck the rope, with which the stringers already laid were tied to the cap of the last bent standing. The stringers moved were then so far out that they were about to tip for the men. Johnson then called Murdock, telling him that the stringers were going to tip, and that he had better come out and help them. Murdock came out and took hold, and told Peterson to go and get a piece of rope, which he did, and Murdock then tied the rope around the stringers which they were shoving out, and put one end of the rope around the end of the stringers lying in position, and made it tight, so they could hold them, and then ordered Johnson to go down on the ground and loosen the guy-rope, and let the sixth trestle come in a little. Johnson did so. At this time the hind end of the stringers, which were being moved, had left the track, and plaintiff knelt down on the stringers and held down the end of one of the stringers with both his hands, while Murdock had hold of the rope. After Johnson had got down on the ground and loosened the guy-rope and let the bent down a little, Murdock asked if it was far enough in, to which Johnson answered, "yes," and he tied the guy-rope. Mr. Murdock then eased up on the rope so as to let the stringers down onto the cap of the bent, then about to be raised, and just as the stringers touched the cap the whole trestle-work fell down in towards the dump, the only trestle remaining standing being the sixth one, which was held up by the guy-rope and the trestle which stood partly buried in the dirt, and perhaps the one nearest beyond this. The fall was not occasioned by the breaking of any portion of the appliances; nothing broke. When the trestle-work fell down to the ground plaintiff fell with it, and was injured.

Plaintiff had seen parties raising the trestles that morning, but did not notice how they were built. He had never worked on trestle-work before, and had no knowledge of how such work should properly be built or secured in order to make it safe, nor had he any knowledge of whether any longitudinal or other bracing or any fastenings other than what was used at the place was necessary in order to make the trestle-work safe to go out on. He did not know, and could not see from the place where he was working, whether or how the trestles were braced or how they were secured. But the trestles were in sight from the dump where he

was working from the time he commenced to work. He had no knowledge of the trestles erected that morning leaning in towards the dump. He did not know Johnson before he was working out there, except while working at Douglas Hill, in the city of Minneapolis. Knew nothing about his want of experience in building trestles. Did not know he was not a trestle builder or a carpenter, but knew in a general way what he was doing at the works. When the trestle-work which fell down was again erected by the defendants, longitudinal bracing between the different bents was used. There were at the place where the trestle-work was being built sufficient materials of all kinds for the work and for the bracings, and sufficient of bolts, nails, and spikes of all sizes, and sufficient tools and implements for the work.

Plaintiff introduced testimony by four civil engineers, who were graduates as such, and who had had a large experience in bridge building and trestle building, tending to show that the trestle-work in question, even supposing the stringers had been tied with ropes to the caps of the different bents, was unsafe to send people to work upon, pushing out stringers of the length and dimensions testified to, and that in order to make the structure reasonably safe the stringers should either have been bolted to the caps, or a plank should have been bolted to the stringers on each side of the cap, thus making a chuck, commonly called, or else spikes should have been placed in the stringers below on each side of the cap, or else there should have been provided longitudinal bracing between the different bents. The defendant's evidence tended to show that the fall of the trestle was not occasioned by the breaking of the structure, or any part of it, or any of the appliances. Nothing broke; the fall was occasioned while Murdock, plaintiff, and Peterson were endeavoring to extend the last pair of stringers to the bent which Johnson had just tied with the guy-lines. That the men were under no stress for time within which to put up this temporary trestle. That the defendant John Woods attended to the outside work of the defendants at and during all the time mentioned, and retained and conducted the supervision of the work in person, and was at this point and the other points where the other crews were at work, viz., the crews under Mahoney and under Frank Woods, as a rule, every week-day, or at least five times a week, and gave directions and made suggestions to the foremen themselves. That the foremen, including the foreman Murdock, had the privilege of setting men to work if any should apply, and there was a place for them on the work, or, if it became necessary for any reason, he could give them a bill of their time, and send them to the defendant for their pay, which was equivalent to a discharge. That beyond this he had no power in the hiring or discharging of any man; that he did not fix the wages of any man; that he simply did the work of any foreman on the work; kept the time of the men, and saw that they were about their work and doing what they were employed to do; that he took hold with the men whenever and wherever occasion presented itself, and when his assistance was required in assisting the men in doing what they were engaged

upon. That he did not employ the plaintiff, beyond telling him, when he applied to him that morning of the 2d of April, that he could go down on the dump to work with Johnson; that at the time of the accident it appeared by the defendant's testimony that the plaintiff was upon this temporary trestle, as were also Charlie Peterson and the man Johnson, when he (Murdock) was called by Johnson, and went out there to help hold the stringers. That no express directions were given to plaintiff or to either of the men to go out on the structure. Plaintiff, Johnson, and Peterson performed this work in this way as a part of the work in constructing the road; that the trestle was a temporary trestle only, and was only to run out empty Petler-cars on, carrying a cubic yard of dirt, after they were dumped. The trestle-bents were left in the fill. It also appeared by the defendants' evidence that the defendants at all times furnished and provided sufficient of all kinds of tools and implements and material for the work, and the defendants Woods and Mr. Murdock told the men and told the plaintiff to be careful to avoid accidents. Several witnesses also testified on behalf of the defendants, as experts, to the effect that the structure as described was a reasonably safe place and structure for the purpose for which it was constructed, if tied with ropes around the stringers to the caps. The defendants also showed that the man Johnson did his work well, and, after being shown how to put up and build temporary trestles on Lowry Hill and Douglas Hill, had always built the temporary trestles, and performed his work well. That the foreman, Murdock, performed his duties and did his work well.

To support their plea of a former adjudication, the defendants offered in evidence a duly-certified record, which showed the following facts: That the same plaintiff had brought an action against the same defendants upon exactly the same cause, for the same injury, in the district court of the state of Minnesota for the county of Hennepin, a court of general jurisdiction in said state. That upon the trial of said cause in said district court, after the plaintiff had put in all his evidence and rested his case, the defendant moved said district court to dismiss said action, upon the ground that the evidence of plaintiff did not make out a case against said defendants, which motion was granted, and said action was dismissed. That thereupon the plaintiff procured a stay of proceedings, and made up and procured to be settled and signed by the judge who tried the case a settled case and exceptions, containing all the evidence, and upon the pleadings and such settled case made a motion for a new trial in said district court. That said motion for a new trial was denied. That thereupon said plaintiff, under the practice and procedure in the Minnesota courts in such cases, appealed to the supreme court of Minnesota from said order denying the motion for a new trial, and carried to the supreme court upon such appeal the pleadings and all the evidence given in the court below. That the case upon said appeal was duly heard and tried in said supreme court, and the decision and order of said district court was in all things affirmed. 41 Minn. 212, 42 N. W. Rep. 1020. That thereupon a mandate issued from said

supreme court to said district court for further proceedings in accordance with such decision, and, upon the filing of said mandate, judgment in said cause was given and entered in said district court, "that said action be and is hereby dismissed." The court below excluded this record, and that ruling is assigned for error. The opinion of the circuit court on this question is reported in 47 Fed. Rep. 195.

The Minnesota statute (St. c. 66) upon the subject of the dismissal of actions is as follows:

"Sec. 262. *Dismissal of action.* The action may be dismissed without a final determination of its merits, in the following cases: *First*, By the plaintiff himself at any time before trial, if a provisional remedy has not been allowed or counter-claim made; *second*, by either party with the written consent of the other; or by the court upon the application of either party, after notice to the other, and sufficient cause shown at any time before the trial; *third*, by the court, where, upon the trial and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his claim, or cause of action, or right to recovery; *fourth*, by the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal; *fifth*, by the court, on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence. All other modes of dismissing an action, by nonsuit or otherwise, are abolished. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register; and a notice served on the adverse party. Judgment may thereupon be entered accordingly. Sec. 263. *Judgment on the merits.* In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits."

John M. Shaw and Willard R. Cray, for plaintiffs in error.

John W. Arctander, for defendant in error.

Before CALDWELL, HALLETT, and THAYER, JJ.

CALDWELL, J. The effect of the judgment of the state court, dismissing, on the defendants' motion, the action brought in that court, at the conclusion of the plaintiff's testimony, upon the ground that the plaintiff had failed to make out a case, is a question of local law depending on the construction of a statute of the state. It appears from the latest adjudged cases to be the established doctrine of the supreme court of Minnesota that under the statute of that state, upon a dismissal of the action when the plaintiff rests his case, on the motion of the defendant, upon the ground that the plaintiff has failed to establish a cause of action, the proper judgment to render is one of dismissal merely, such as was rendered in this case. That court holds that such a judgment is not a judgment upon the merits of the action, such as will bar the plaintiff from maintaining another suit for the same cause, but that it is, in effect, nothing more than a common-law or voluntary nonsuit. *Craver v. Christian*, 34 Minn. 397, 26 N. W. Rep. 8; *Andrews v. School-Dist.*, 35 Minn. 70, 27 N. W. Rep. 303; *Conrad v. Bauldwin*, 44 Minn. 406, 46 N. W. Rep. 850. The construction placed on the state statute by the supreme court of the state will be followed by this court. The record of the judgment of dismissal constitutes no bar to this action, and it was rightly excluded.

Did the court err in refusing to instruct the jury at the close of the evidence to return a verdict for the defendants? The solution of this question involves the application of the law to the facts of the case. There is no room for controversy over the material facts upon which the case must turn. They are very fully set out in the statement of the case. There was abundant evidence to warrant the jury in finding that the trestle was constructed without a due regard for the safety of those who were to work upon it. It was not braced between the trestle legs; the stringers laid on top were not spiked to the caps of the bents; the ties and track laid on the stringers were not spiked to the stringers; there were no chucks on the stringers on either side of the caps; nor any bolts driven into them on either side of the caps. The evidence shows that the doing of one or more of these things was necessary to render the structure reasonably safe and secure. The only means used to hold it together was a rope tied by hand around the stringers and the caps at each trestle-bent. It is not claimed that the plaintiff was guilty of contributory negligence, or that he constructed or assisted in constructing the bents or trestles. He was employed by Murdock to work on the dump,—that is, to dump cars, shovel dirt, and tamp the track; but Murdock could assign him to do any other work, and did require him to assist in raising trestle-bents when his services were necessary, and he was on the trestle by Murdock's order, assisting in raising a trestle-bent, when, without any fault or negligence on his part, the trestle upon which he was at work, by reason of its imperfect construction, fell and injured him.

Are the plaintiffs in error chargeable with this faulty construction of the trestle, and liable to the defendant in error for the injury he sustained by reason thereof? If this trestle had been erected under the immediate personal supervision and direction of the plaintiffs in error, it is clear they would be liable. But, instead of supervising and directing the work in person, they delegated this power and duty to Murdock; and it is said Murdock and the plaintiff are fellow-servants, and that the rule which precludes a servant from recovering from his master for an injury received through the negligence of a fellow-servant is applicable to this case. The proper construction of this trestle was a work that required more mechanical skill, judgment, and experience than is commonly possessed by the ordinary laborer, and the plaintiffs in error recognized this fact. They appointed a foreman to superintend, direct, and control the work. Murdock was intrusted with full control of the construction work on the section of the railroad embracing this trestle. He had authority to direct all the men on that section—between 30 and 40 in number—when to work, where to work, and how to work, and it was their duty to obey his orders. He superintended and supervised all the work on the section, and hired and discharged workmen, at his discretion. In these respects he was invested with all the power and authority his principals possessed. He did not ordinarily do manual labor; his chief duty was to personally supervise the work, including the building of the trestle, and to give directions how all parts of the same should

be done. He went back and forth between the places where the different crews were at work on the section, directing and instructing, and occasionally assisting, each of them in the work they were doing. Johnson, who framed the bents and put up the trestle, worked in obedience to his orders, as well as the other men. As the plaintiffs assumed through Murdock the superintendence and control of the construction of the trestle, they were bound to exercise ordinary care to make it reasonably safe and secure for those called to do work upon it. In the discharge of this duty Murdock occupied the place of the plaintiffs in error, and any failure on his part to exercise ordinary care in the discharge of this duty is imputable to them.

Whether the trestle was one of those structures the building of which the master might have committed to ordinary fellow-laborers, without any instructions or superintending care, by simply providing them with adequate materials and tools to do the work, need not be discussed. The plaintiffs in error did not attempt to build the trestle in any such way. They did not leave the mode and manner of its construction to the discretion or judgment of the laborers doing the work, but they constituted Murdock their representative, and imposed on him the duty, and conferred on him the authority, to supervise, direct, and control its construction, and required the laborers to obey his orders and directions in the premises. Under these circumstances, Murdock did not sustain the relation of a fellow-servant to the defendant in error in respect to this work. He stood in the shoes of his employers, and was their representative, and they are responsible for the results of his negligence in the work so committed to his direction, supervision, and control. This is the doctrine of the supreme court of the United States, (*Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Railroad Co. v. Herbert*, 16 U. S. 642, 6 Sup. Ct. Rep. 590,) and is the rule laid down in this circuit, (*Borgman v. Railway Co.*, 41 Fed. Rep. 667,) and by the courts of last resort in many of the states, and is appropriately denominated the "American Rule," (Shear. & R. Neg., 4th Ed., §§ 226-228.) This court unanimously approved and applied the rule in the case of *Railroad Co. v. Wilson*, 48 Fed. Rep. 57, (decided at the present term.) The reasons in support of the rule are forcibly and convincingly stated in the authorities we have cited, and need not be repeated here. In our judgment, the rule is right in principle, and is supported by the weight of authority. There was abundant evidence to warrant the jury in finding that Murdock did not exercise ordinary skill and care in supervising and directing the construction of the trestle, and that by reason of this negligence on his part the trestle was so defectively and imperfectly constructed that it fell and injured the defendant in error. This disposes of the first, second, and third assignments of error.

According to the view we have taken of the case, the court below properly modified the third request to charge, and properly refused the thirteenth and fourteenth requests. The fourth, fifth, and sixth assignments of error are therefore untenable. In the seventh assignment complaint is made of the action of the court in leaving the jury to determine

whether Murdock and Lindvall were fellow-servants, but as that issue was, in our opinion, rightly determined by the jury, and submitted to them under proper directions, the seventh assignment of error is untenable. The judgment of the court below is affirmed.

HALLETT, J., dissents.

WOODS *et al.* v. LINDVALL.

(Circuit Court of Appeals, Eighth Circuit. October Term, 1891.)

BILL OF EXCEPTIONS—TIME OF FILING.

In those districts where the custom prevails of entering judgment immediately upon the rendition of the verdict a bill of exceptions may be allowed and filed at the term in which the motion for a new trial is determined, although such action is taken at a term subsequent to the entry of judgment, and there is no order extending the time for allowing and filing the bill.

In Error to the Circuit Court of the United States for the District of Minnesota.

This is a motion to strike the bill of exceptions from the record for the alleged reason that it was not filed in time to become a part of the record. The case appears to have been tried at the January term, 1891, of the circuit court for the third division of the district of Minnesota. 44 Fed. Rep. 855. The verdict was returned on February 11, 1891, and on the same day judgment was entered on the verdict according to the usual practice in that district. On the following day, pursuant to section 987, Rev. St. U. S., plaintiffs in error asked and obtained a stay of execution for 42 days, to enable them to file a petition for a new trial. During the January term, and within the 42 days, such petition for a new trial was filed, but the January term adjourned *sine die* before the motion was heard or determined. At the succeeding June term, 1891, the petition for a new trial was argued and overruled, and at the same term, to-wit, July 30, 1891, a bill of exceptions was signed, sealed, and filed. The defendant in error duly objected to the allowance of the bill because the trial term had expired. It further appears that no order was entered at the January term, 1891, expressly extending the time for filing the bill to the June term, 1891, nor was any consent given that it might be so filed.

John M. Shaw and W. R. Cray, for plaintiffs in error.

John W. Arctander, for defendant in error.

Before CALDWELL, HALLETT, and THAYER, JJ.

THAYER, J., (after stating the facts as above.) We are all agreed that the motion to strike out the bill of exceptions should be overruled. It is true that in several cases cited by counsel for defendant in error, to-wit, *Walton v. U. S.*, 9 Wheat. 651; *Ex parte Bradstreet*, 4 Pet. 102,

and *Muller v. Ehlers*, 91 U. S. 249,—it was held in effect that, in the absence of an order of court extending the time, a bill of exceptions covering errors committed at the trial cannot be allowed and filed (unless by consent of parties) after the term has expired at which the judgment was rendered. But in none of these cases did the question arise whether a bill of exceptions may not be allowed and filed at the term when the motion for a new trial is finally acted on, even though such action is taken at a term subsequent to the entry of judgment; and that is the precise question which confronts us in the case at bar. The authorities cited are either cases in which no motion for a new trial was filed, or in which the bill of exceptions was presented after the lapse of the term at which the motion for a new trial was overruled. According to well-established principles, therefore, the judgments involved had become final at a term preceding that at which a bill of exceptions was tendered. Since the decision in *Rutherford v. Insurance Co.*, 1 Fed. Rep. 456, we believe the practice has been uniform in all the districts of this circuit, where the custom prevails of entering judgment immediately on the rendition of verdict, to allow a bill of exceptions during the term at which the motion for a new trial is overruled, even though it happens to be a term subsequent to the entry of judgment. This practice, according to our observation, has become so common that it may be termed a rule of procedure in this circuit. It is a convenient practice. It obviates the necessity of settling a bill of exceptions at the trial term, which is useless labor if a motion for a new trial is continued to and is sustained at the succeeding term. And in these days, when it is customary to take notes of trial proceedings in short-hand, the practice in question is not open to those objections formerly urged against it. We are of the opinion, therefore, that the practice which has hitherto obtained in many districts of the circuit should be upheld unless it is overborne by controlling authority, and we find no such authority. On the contrary, we think the rule requiring bills of exception to be filed at the term when judgment is rendered must be understood to mean the term when the judgment becomes final, and by reason of its becoming final the court loses control of the record. It has been held several times that, if a motion for a new trial is duly filed by leave at the trial term, the judgment does not become final until such motion is determined. *Rutherford v. Insurance Co.*, *supra*; *Brown v. Evans*, 8 Sawy. 502, 17 Fed. Rep. 912; *Railway Co. v. Murphy*, 111 U. S. 488, 4 Sup. Ct. Rep. 497; *Brockett v. Brockett*, 2 How. 238; *Memphis v. Brown*, 94 U. S. 716, 717; *Slaughter-House Cases*, 10 Wall. 289. In some of the state courts, also, the precise question of practice now before us has been determined adversely to the defendant in error. Thus, under a statute of the state of Missouri requiring all exceptions to be filed during the term at which they were taken, and all exceptions during the trial of a cause to be embraced in one bill, it has been held that the continuance of a motion for a new trial from the trial term to a succeeding term keeps the record open, prevents the judgment from becoming final, and enables the court to allow a bill of exceptions during the term at which the motion is finally deter-

mined. *Riddlesbarger v. McDaniel*, 38 Mo. 138; *Henze v. Railroad Co.*, 71 Mo. 636, 644. See, also, *Bank v. Steinmiz*, 65 Cal. 219, 3 Pac. Rep. 808. We hold, therefore, that the bill of exceptions in the present case was properly allowed and filed, and we accordingly overrule the motion to expunge it from the record.

In re BOLES.

(Circuit Court of Appeals, Eighth Circuit. October Term, 1891.)

1. CIRCUIT COURT OF APPEALS—HABEAS CORPUS—EXTRATERRITORIAL JURISDICTION.

A circuit court of appeals has no jurisdiction, in the absence of a statute expressly authorizing it, to award a writ of *habeas corpus* to be served outside of the circuit for which it sits, to secure the release of a person there held in custody.

2. SAME—APPELLATE JURISDICTION—TERRITORIAL DISTRICT COURTS.

The court is not authorized to award such writ on the ground that its appellate jurisdiction is invoked therein to revise the decision of the district court of a territory within its circuit under whose process petitioner was confined; for by section 15, Act Cong. March 3, 1891, creating the circuit courts of appeals, their appellate jurisdiction over territorial courts is limited to the supreme courts of the territories.

This is an application for a writ of *habeas corpus* to release from imprisonment one W. H. Boles, who is now, as it is said, confined in the Ohio state penitentiary at Columbus, Ohio, under a sentence imposed by the district court of Logan county, territory of Oklahoma, at its adjourned September term, 1890. The petition for the writ charges that the court before whom the petitioner was tried, convicted, and sentenced for horse-stealing had no jurisdiction of the offense for which he was tried, and that the sentence imposed was for that reason void. It also states in detail the several facts that are supposed to have rendered the proceedings of the district court utterly nugatory and void, but the view that we take of the case renders it unnecessary to recite such facts. A writ is sought against B. F. Dyer, warden of the Ohio state penitentiary, he being the person who now has the petitioner in custody.

Ira C. Terry, for petitioner.

Geo. D. Reynolds, U. S. Dist. Atty.

Before CALDWELL, HALLETT, and THAYER, JJ.

THAYER, J., (after stating the facts as above.) It will be observed that we are asked to award a writ of *habeas corpus* to be served at a place outside of the territorial jurisdiction of this court, for the purpose of securing the release of a person who is there confined, and we are of the opinion that we have no authority to award such a writ. It certainly cannot be maintained that this court has power to release persons who are unlawfully restrained of their liberty in any part of the United States under color of process of a federal court, as the supreme court may do, yet such would be the assertion of jurisdiction on our part, if we granted

a writ in the present instance. In the absence of any statute expressly authorizing us to issue a writ of *habeas corpus* to run and be executed outside of the circuit, our jurisdiction to release from unlawful imprisonment would seem to be restricted to cases where persons are restrained of their liberty somewhere within the circuit. *Ex parte Graham*, 3 Wash. C. C. 456. It was suggested at the hearing, as we understood counsel, that a writ might be awarded in this case to be served outside of the circuit, because the jurisdiction invoked is to revise the decision of the district court of the territory, and is therefore in its nature appellate, and because the appellate jurisdiction of this court extends to the territory of Oklahoma by virtue of the fifteenth section of the act creating circuit courts of appeal, and an order made by the supreme court on May 11, 1891, assigning Oklahoma to this circuit. The *Yerger Case*, 8 Wall. 86, and other kindred cases, are cited in support of this contention. It is sufficient to say that the authorities invoked have no application to the facts of this case. No writ of error or appeal can be prosecuted from the several district courts of the territory of Oklahoma to this court. We have no general supervisory control over the proceedings of those courts, and congress has not seen fit, in express terms, to confer on this court, as upon the supreme court, the power to issue writs of *habeas corpus*. Our appellate jurisdiction over territorial courts, except in the Indian Territory, is limited to a "review of the judgments, orders, and decrees of the supreme courts of the several territories" assigned to the circuit. *Vide* section 15, *supra*. It is an appellate jurisdiction formerly exercised by the supreme court of the United States, but whether it is more or less extensive than the jurisdiction formerly exercised by that court we do not now decide. For present purposes we only decide that we cannot issue the writ in question to be served in another circuit, merely because the petitioner is there confined in execution of a sentence imposed by one of the district courts of the territory of Oklahoma. It was contended on the argument of the application that this court could not grant the writ prayed for, even though petitioner was unlawfully restrained of his liberty within the circuit, because this court has not been authorized by statute to issue writs of *habeas corpus*. Several well-known authorities are cited in support of this proposition, to-wit, *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Parks*, 93 U. S. 18; *In re Burrus*, 136 U. S. 586, 10 Sup. Ct. Rep. 850; but we carefully refrain from expressing any opinion on this important question until a case arises that requires a decision. The writ is denied, and the application therefor dismissed.

Ex parte CONWAY.

(Circuit Court, D. South Carolina. October 27, 1891.)

HABEAS CORPUS—JURISDICTION OF CIRCUIT COURTS—IMPRISONMENT FOR ACT DONE BY FEDERAL AUTHORITY—POST-ROADS—ERECTING TELEGRAPH LINES.

Under Act Cong. March 1, 1884, (23 U. S. St. at Large, 3,) declaring all public highways and roads to be post-roads of the United States, a person engaged in erecting a telegraph line along a public road for a company which has accepted the provisions of Act Cong. July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," and which authorizes the construction of telegraph lines over and along any military and post roads of the United States, is acting under authority of an act of congress, and, if arrested by the state authorities for obstructing the highway merely because of the prosecution of such work, he will be released on *habeas corpus*.

On *Habeas Corpus* to release R. H. Conway from imprisonment under a warrant issued by a justice of the peace for obstructing a highway.

Mordecai & Gadsden, for petitioner.

SIMONTON, J. The petitioner is the foreman of the gang engaged in constructing and erecting the lines of the Postal Cable & Telegraph Company. This company, incorporated under the laws of New York, has its line running through all the Atlantic states, and the line upon which the petitioner was engaged connects Charleston with Savannah. The Postal Company has accepted the provisions of the act of congress approved July 24, 1866. This act, entitled "to aid in the construction of telegraph lines, and to secure the government the use of the same for postal, military, and other purposes," authorized the construction of telegraph lines over and along any of the military and post roads of the United States. By act of 1st March, 1884, (23 U. S. St. at Large, 3,) all public highways and roads are declared post-roads of the United States while they are kept up. The petitioner alleges that while he was engaged as such foreman in constructing this line through Colleton county, in South Carolina, over and along the old state road between Charleston and Savannah,—a public road, kept up and worked,—he was arrested, and is now in custody under a warrant issued by H. W. ACKERMAN, a trial justice of said county, upon the charge of obstructing a public road. He alleges that he is acting under and by virtue of the provisions of the act of congress, and claims the protection of this court. The case is cognizable in this court, (*Railroad Co. v. Mississippi*, 102 U. S. 135,) and the court can on this writ inquire into the cause of his commitment, and discharge him if he be held in custody in violation of the laws of the United States, (*Ex parte Royall*, 117 U. S. 250, 6 Sup. Ct. Rep. 742.) "If he be held in custody in violation of the constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged." *In re Neagle*, 135 U. S. 41, 10 Sup. Ct. Rep. 658. Section 761 of the Revised Statutes of the United States prescribed the duties of the court upon an application of this character to "proceed in a summary way to determine the facts

of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." "The single question is to be fully tried, not on affidavits, but upon testimony, not *ex parte*, but after a full hearing on both sides." Mr. Choate's argument in *Re Neagle*. The trial justice who has the petitioner in custody produces as his return the warrant and the prisoner. He does not appear, and no one appears for him. Counsel for the petitioner has, under instructions of the court, notified the solicitor of the circuit in which Colleton county is included of this hearing, and the solicitor does not appear. To this extent the court is without assistance. I recognize to the fullest extent the delicacy of the question, and would not willingly enter into a discussion which would seem to interfere with the process of the state court. It is a principle of right and of law, and therefore of necessity, that such interference should be avoided between the courts of the United States and the state courts. *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355. But the duty is cast on this court of examining into the facts of cases like this,—of hearing and deciding them. This has been done. The testimony of disinterested witnesses has been taken, and compared with the affidavit of the state's witnesses, and the conclusion has been reached that the cause and ground of the prosecution arise from the construction and erection of this telegraph line and from objections to it. Let the prisoner be discharged.

UNITED STATES *v.* SANGES *et al.*

(Circuit Court, N. D. Georgia. October 5, 1891.)

1. CONSTITUTIONAL LAW—RIGHT TO TESTIFY BEFORE FEDERAL GRAND JURY—CONSPIRACY.

The amendments to the constitution of the United States, including especially section 1 of the fourteenth amendment, so far as they relate to the rights of individuals, are intended to prevent the states and the United States, or any persons acting under their authority, from interfering with existing rights, and do not confer any new rights; and hence one cannot claim that his right to testify before a federal grand jury without interference from private individuals is one conferred by the constitution of the United States, within the meaning of Rev. St. U. S. §§ 5508, 5509, which prescribe a punishment for any persons who "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution of the United States, or because of his having so exercised the same." *Ex parte Yarbrough*, 110 U. S. 653, 4 Sup. Ct. Rep. 152; *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35; and *State v. Lancaster*, 44 Fed. Rep. 896,—distinguished.

2. SAME—CONSPIRACY—INDICTMENT.

Rev. St. U. S. § 1977, declaring that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other," will not support an indictment for a conspiracy by private individuals to injure and oppress a citizen for testifying before a federal grand jury, in the absence of allegations that such citizen was a person of color, or that the acts were committed because of his color and previous condition of servitude.

At Law.

At the October term of the United States circuit court for the northern district of Georgia, the grand jury returned an indictment under sections 5508, 5509, Rev. St. U. S., against the above-named defendants, for conspiring to injure and oppress a citizen of the United States in the exercise of civil rights, and for murder of said citizen. The indictment charges—

"That on the 11th day of November, Anno Domini, eighteen hundred and ninety, (11th November, 1890,) one Joseph Wright, near Marietta, in the county of Cobb, in the district aforesaid, was then and there a citizen of the United States, and was then and there returning to his home in Cobb county from Atlanta, having, while in Atlanta, appeared as a witness and testified on said date before the United States grand jury for said northern district of Georgia, then and there legally sitting, and clothed with power to inquire into and true presentment make of all crimes committed in said northern district of Georgia, against the laws of the United States, as to violations of the internal revenue laws of the United States, by one William Teasley and Dennis Alexander, who were respectively and severally charged with carrying on the business of retail liquor dealers within said district, on the 10th of November, 1889, 1st of April, 1890, 1st of July, 1890, and 20th of October, 1890, without having paid the special tax, as required by law; the said Joseph Wright having come from his home in Cobb county to Atlanta, before said United States grand jury, on the 10th and 11th of November, 1890, in response and in obedience to subpoena commanding him to appear as a witness for the United States against said Teasley and Alexander, and against each of them respectively, to-wit, said William Teasley and Dennis Alexander. That thereafter, to-wit, the day first aforesaid, 11th of November, 1890, while the said Joseph Wright was still said witness under said subpoena from the said United States court, one George Sanges, Dennis Alexander, Isaac Smith, and Charles Porter, together with divers other evil-disposed persons, whose names are to the grand jurors aforesaid unknown, did then and there combine, conspire, and confederate, by and between themselves, with force and arms, to injure and oppress him, the said Joseph Wright, in the free exercise and enjoyment of a right and privilege then and there secured to him, the said Joseph Wright, by the constitution and by-laws of the United States, and because he, the said Joseph Wright, was then and there in the free exercise and enjoyment of said right and privilege, to-wit, the right and privilege, as a citizen of the United States, to inform the proper officers of the United States of violations of its internal revenue, and of attempts to defraud the United States, by the said William Teasley and Dennis Alexander, and the right and privilege of a citizen of the United States to aid in preventing such attempts to defraud the United States of its revenues, and to prosecute such cases, and the right, privilege, and duty of said Wright, as a citizen of the United States, to obey the process of the court, and to comply with and answer the subpoenas of said United States court, in obedience thereto to appear and testify as a witness freely, fully, and truthfully, before said United States grand jury in Atlanta, for the northern district of Georgia, to any matter pending therein, criminating, and tending to criminate, said William Teasley, said Alexander, and other persons, for violating the internal revenue laws of the United States, and return to his home in peace and safety after so testifying, and the right and privilege of said Joseph Wright, as a citizen of the United States, to be secure, safe, and unmolested in his person, and exempt from violence, for having exercised and enjoyed the said rights, privileges, and immunities hereinbefore enumerated, secured to him, the said Joseph Wright, as a citizen of the United States, by the constitution and laws of the United States; and they, the said George Sanges, Dennis Alexander, Isaac Smith, and Charles

Porter, together with divers other evil-disposed persons, having so combined, conspired, and confederated, did thereafter, in pursuance of such combination and conspiracy, on, to-wit, the day first aforesaid, in the county of Cobb, and the district aforesaid, to-wit, on the 11th of November, 1890, at night, then and there go on the highway, and then and there assault him, the said Joseph Wright, with deadly weapons, to-wit, with pistols, then and there loaded with gunpowder and leaden bullets, and did then and there discharge the said deadly weapons to, at, and against him, the said Joseph Wright, and did wound and maim him, the said Joseph Wright; and they, the said George Sanges, Dennis Alexander, Isaac Smith, and Charles Porter, in pursuance of said conspiracy, and while then and there in prosecution of said conspiracy, as aforesaid, with force and arms, in and upon the body of said Joseph Wright, then and there, in the peace of the United States, being feloniously, willfully, and of their malice aforethought, and from a deliberate and premeditated design unlawfully to effect the death of the said Joseph Wright, did then and there shoot off and discharge at and against him, the said Joseph Wright, loaded pistols, then and there loaded with gunpowder and leaden bullets, and by shooting off and discharging said loaded pistols, as aforesaid, they, the said George Sanges, Dennis Alexander, Isaac Smith, and Charles Porter, did then and there willfully, and of their malice aforethought, strike and penetrate the body of said Joseph Wright with leaden bullets, and did then and there inflict upon him, the said Joseph Wright, mortal wounds, of which mortal wounds he, the said Joseph Wright, did then and there immediately die. And so the grand jurors aforesaid do find and present, on their oaths, that the said George Sanges, Dennis Alexander, Isaac Smith, and Charles Porter did then and there feloniously, and of their malice aforethought, kill and murder the said Joseph Wright, then and there a citizen of, and in the peace of, the United States, while they, the said George Sanges, Dennis Alexander, Isaac Smith, and Charles Porter, and their other co-conspirators, to the grand jurors unknown, were then and there prosecuting said conspiracy to injure and oppress the said Joseph Wright, with intent of them, the said conspirators, to prevent and hinder the said Joseph Wright in the free exercise and enjoyment of his said right and privilege as a citizen of the United States, then and there secured to him, the said Joseph Wright, by the constitution and laws of the United States of America, as aforesaid, as such a citizen of the United States, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

[Signed]

"S. A. DARNELL, U. S. Attorney."

The cause having come on for trial, the defendants demurred to this indictment upon five grounds, only two of which were relied on in the argument of counsel. These are—

"*Fourth.* Because there are no such rights or privileges secured to the party conspired against by the constitution and laws of the United States as those set out in the indictment.

"*Fifth.* Because, on the facts alleged in said indictment, there is no crime or offense set out of which the courts of the United States can take cognizance."

S. A. Darnell, U. S. Dist. Atty., and E. A. Angier, Asst. U. S. Dist. Atty.

J. E. Mosley, W. C. Glenn, and I. Z. Foster, for defendants.

Before LAMAR, Justice, and NEWMAN, J.

LAMAR, Justice. The two sections of the Revised Statutes under which this indictment is drawn, and which were relied on in the argu-

ment of the attorneys for the United States, viz., 5508 and 5509, are in the following language :

"Sec. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars, and imprisoned not more than ten years, and shall, moreover, thereafter be ineligible to any office or place of honor, profit, or trust created by the constitution or laws of the United States.

"Sec. 5509. If in the act of violating any provision in any of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed."

The questions presented by this demurrer are: Does an indictment which charges the defendant with conspiring to oppress and injure a citizen of the United States in the exercise of his right to appear and testify as a witness before the grand jury of a federal court, and also with having, in pursuance of such conspiracy, murdered him, because of his having exercised that right, describe an offense within the sections referred to? Is the right to appear as a witness and to testify before a grand jury of a federal court a right secured by the constitution and laws of the United States, in the sense in which that language is employed in those sections? These questions are not altogether free from difficulty, in view of other sections which have an important bearing on the case, in view of the acts of congress from which they are taken, and especially in view of the numerous decisions of the supreme court of the United States in which that court has had occasion to express its views upon the amendments to the constitution of the United States for the enforcement of which those statutes were avowedly passed. The two sections of the Revised Statutes under which this indictment is conceded to be drawn are taken from the acts of congress approved 31st May, 1870, (16 St. 141,) known as the "Enforcement Act," entitled "An act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes." The sixth and seventh sections of the act are substantially incorporated into the text of sections 5508, 5509, Rev. St. All the preceding sections of the act relate directly and exclusively to the protection of colored citizens in the exercise of the right of suffrage in the several states. Its fifth section makes it a penal offense for any person to prevent, hinder, or intimidate any person from exercising the right of suffrage, to whom it is secured by the fifteenth amendment, by means of bribery, threats, or threats of depriving of occupation, or of ejecting from land or tenements, or of refusing to renew a lease, or of violence to such person or his family. There is nothing in this fifth section which aims at a conspiracy. The sixth section does refer, in positive terms, to a conspiracy, and it is insisted by counsel for

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the prosecution that its language, retained in the Revised Statutes, refers to such a conspiracy as is set forth in this indictment, and that the federal courts have jurisdiction over the offense as charged. The attorney general of the United States clearly does not concur in this construction. In his late annual report he uses the following language:

"It is certainly an anomaly in government that those who have committed murders for the purpose of stopping prosecution in the federal courts should not only not be punished, but not even be put upon trial, although, in at least two cases in one district during 1890, well known. Yet such is the fact. It is needless to say that the federal courts have no adequate jurisdiction of these offenses. [*Italics ours.*] Section 5509 of the Revised Statutes provides that, if any person attempts, by intimidation, threats, etc., to prevent any citizen from exercising the right of suffrage, and in so doing commits a felony, or if two or more persons conspire to debar any person from the enjoyment of any of his civil rights, and in so doing commit a felony, such felony shall be punished according to the laws of the state wherein the same is committed. If section 5509 were so broadened as to make any felony committed while in the act of violating any statute of the United States triable in the United States courts, and punishable according to the laws of the state wherein the same is committed, it would greatly help in the administration of justice. So long as persons who kill officers, witnesses, or jurors for the purpose of impeding the administration of justice can only be tried and punished in a federal court as for a minor offense, the administration of the United States laws, and the laws themselves, in many districts, will have little respect."

See Annual Report of the Attorney General of the United States for the year 1890, (Dec. 1, 1890,) pp. xiii., xiv.

This construction of the attorney general derives some support from the fact that the enforcement act of 1870 itself was primarily passed to secure and enforce the equal right of suffrage to all citizens, irrespective of race, color, or previous condition of servitude. 1 Woods, 320. In the case of *Baldwin v. Franks*, 120 U. S. 678, 691, 7 Sup. Ct. Rep. 656, 768, the supreme court of the United States, in its opinion, delivered by Mr. Chief Justice WARRE, referring to section 5508, and the statute from which it was taken, used the following language:

"That statute was the act of May 31, 1870, c. 114, (16 St. 140,) 'to enforce the right of citizens of the United States to vote in the several states of this Union, and for other purposes.' It is the statute which was under consideration as to some of its sections in *U. S. v. Reese*, 92 U. S. 214, and from its title, as well as its text, it is apparent that the great purpose of congress in its enactment was to enforce the political rights of citizens of the United States in the several states. Under these circumstances, there cannot be a doubt that originally the word 'citizen' was used in its political sense, and, as the Revised Statutes are but a revision and consolidation of the statutes in force December 1, 1873, the presumption is that the word has the same meaning there that it had originally. This particular section is a substantial reenactment of section 6 of the original act, which is found among the sections that deal exclusively with the political rights of citizens, especially their right to vote, and were evidently intended to prevent discriminations in this particular against voters on account of 'race, color, or previous condition of servitude.'"

But, if it be assumed that this section was intended to have a wider scope than protection to the right to vote, and to extend to any right

secured by the constitution and laws of the United States, the construction of the attorney general is still corroborated by the further fact that, after it was passed, congress enacted another law, which, in express terms, described the specific offense of conspiring to intimidate and deter a witness from attending and testifying in a federal court, and also prescribing a punishment entirely different from that prescribed in sections 5508 and 5509.

The act referred to was passed April 20, 1871, (17 St. 13,) entitled "An act to enforce 14th amendment to the constitution of the United States, and for other purposes." Its second section is contained in section 5406 of the Revised Statutes, which is as follows:

"If two or more persons in any state or territory conspire to deter by force, intimidation, or threat any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit jury, or any such jury, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror, each of such persons shall be punished by a fine of no less than \$500 nor more than \$5,000, or imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment." Act April 20, 1871, (17 St. c. 22, §§ 2, 13.)

This section is in chapter 4 of the Revised Statutes, under the head of "Crimes against Justice;" and it is very properly there, for it manifestly relates to those crimes and misdemeanors which affect the government, its public polity, and the administration of its laws in its courts of justice, as distinguished from those offenses which are pointed against the civil rights of private persons. The congress of the United States clearly possesses the constitutional power, and is charged with the constitutional duty, to protect all the agencies of the federal government, including the courts, their officers, and all persons whose attendance is necessary in the proceedings of those courts, such as parties, witnesses, and jurors. That power and duty of protection have been exercised and performed with regard to parties, witnesses, and jurors in section 5406, above quoted.

We are informed by the brief of the assistant United States attorney that there is pending in the court a separate indictment, under section 5406, against these defendants, charging them with the offense made penal by that section. Hence, the particular effect of our decision upon the demurrer to this indictment now before us will be the determination of the question whether, in the event of conviction of these defendants of the crime of having conspired to deter by force the witness Wright from attending the United States court, or from testifying therein, or of having injured him in his person on account of having so testified, their punishment shall be that prescribed in section 5406, or that prescribed in sections 5508 and 5509. The right or duty of the government to provide for the protection given by section 5406 to parties, jurors, and

witnesses arises, not so much from the interest or right of those persons, as from the necessity of the government itself that the great agencies of its judicial organism should not be impeded in their official administration of the laws, and that all its instrumentalities should be protected against the obstructions of force or fraud. The status of a witness in a court, pending either a civil or criminal proceeding, is in law regarded as one of obligation and duty, which he is compelled to perform, or of a function which he is obliged to discharge, rather than a right on his part which he may or may not exercise, according to his own will. The right, in relation to his testimony, is the right of the parties litigant, or of the government, as the case may be, to have it taken; not his own, either to offer or withhold. They are entitled to the process of the court to compel his attendance, and, when he attends, to compel him to testify, even against his will, to the whole truth, and nothing but the truth.

With respect to the prosecution for a crime pending in a federal court, or in a United States grand jury, the right which this particular section designs to protect is a public right, *i. e.*, the right of the United States to have its witnesses and their testimony, and to have them protected in going to and returning from the court. The wrong punished in such cases is a public wrong, and its correlative is a public right. Section 5508 presupposes that the "right or privilege" involved has already been secured by the constitution and laws of the United States, and therefore it is necessary to turn to them for the definition of the right in this indictment charged to be violated, in order to determine whether the indictment is authorized by the provisions of that section. Fortunately we are not without judicial construction of these provisions and of other statutes relating to cognate subjects, as well as judicial expositions of the constitutional amendments which it is contended contained the authority for their enactment. *Slaughter-House Cases*, 16 Wall. 36; *U. S. v. Cruikshank*, 1 Woods, 308, 92 U. S. 542; *U. S. v. Reese*, Id. 214; *U. S. v. Harris*, 106 U. S. 629, 1 Sup. Ct. Rep. 601; *Strauder v. West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339; *Bradwell v. State*, 16 Wall. 130; *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292; *Civil Rights Cases*, 109 U. S. 3, 3 Sup. Ct. Rep. 18; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152; *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35. The case of *U. S. v. Cruikshank*, *supra*, arose from an indictment containing numerous counts drawn under the sixth and seventh sections of the enforcement act of May 31, 1870, charging the defendants with conspiring together to hinder and prevent certain citizens of the United States in the exercise of various civil rights therein described. The sections in the enforcement act on which the indictment in the *Cruikshank Case* was founded are, as we have stated, the same in substance as those on which the indictment in this case was founded. All the counts in the former indictment were held by Judge BRADLEY in the court below, (1 Woods, 308,) and by the supreme court, (92 U. S. 548,) to be not sufficient to sustain a conviction because the sixth and seventh sections of the enforcement act were unauthorized by the constitution. As the

constitutional amendments relied upon in the support of those sections are clearly illustrated, and the limits within which they may be enforced by congress are distinctly defined, in the able opinion of the court in that case, delivered by Chief Justice WAITE, we deem it proper to quote more freely from it than usual. The chief ground of the decision is that the clauses in the constitutional amendments relied on to sustain the validity of the enforcement act were guaranties of rights against the action of the government only, federal or state, and not against individuals; and that, therefore, they do not afford constitutional ground for penal legislation against individuals.

The rights specified in that indictment which the defendants were accused of conspiring to hinder and interfere with were—*First*, the right of peaceably assembling together for a peaceful and lawful purpose; *second*, the right of bearing arms for a lawful purpose; *third*, the right to be protected against the deprivation of life, and liberty of person, without due process of law; *fourth*, the right of equal protection of the laws of the state and of the United States; *fifth*, the right of voting as a citizen of the United States, irrespective of race, color, or previous condition of servitude. The court held that none of these rights are granted by the constitution, nor dependent upon it for their existence, but are only guarantied against state or federal infringement.

Speaking of the first-mentioned right, to-wit, the right to assemble together for a peaceable purpose, it says:

“The first amendment to the constitution prohibits congress from abridging ‘the right of the people to assemble, and to petition the government for a redress of grievances.’ * * * The particular amendment now under consideration assumes the existence of a right for the people to assemble for lawful purposes, and protects it against encroachment by congress. The right was not created by the amendment; neither was its continuance guarantied, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the states. The power for that purpose was originally placed there, and it has never been surrendered to the United States.” 92 U. S. 552.

With regard to the second right specified in the indictment, namely, the right to bear arms for a lawful purpose, it says:

“The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than it shall not be infringed by congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection, against any violation by their fellow-citizens of the rights it recognized, to what is called, in *City of New York v. Miln*, 11 Pet. 139, ‘the powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,’ ‘not surrendered or restrained’ by the constitution of the United States.” 92 U. S. 553.

Referring to the charge in that indictment, that the defendants conspired to deprive the citizens named therein of their several lives and liberty without due process of law, the court says:

“The 14th amendment prohibits a state from depriving any person of life, liberty, or property without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an

additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society." 92 U. S. 554.

In the same connection, the court said:

"This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the state of Louisiana. The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the governed.' The very highest duty of the states when they entered into the Union under the constitution was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.' Sovereignty for this purpose rests alone with the states. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state than it would be to punish for false imprisonment or murder itself. * * * These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment." Id. 553, 554.

With regard to the fourth right mentioned in that indictment which the defendants were charged with conspiring to violate, viz., the right of enjoying the equal protection of the laws of the state of Louisiana and of the United States, the court says:

"The fourteenth amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states, and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty." Id. 554, 555.

It is hardly necessary to go over the other cases which in another place in this opinion we have cited, for convenience of reference. In the decisions of the supreme court upon them it has been found necessary to pass upon the construction of these and many other sections of the Revised Statutes in their application to the varying facts presented by each case; but they all show the steady adherence of that court to the fundamental principles enunciated by Mr. Justice BRADLEY in the case of *U. S. v. Cruikshank*, 1 Woods, 308, and reiterated by the supreme court of the United States in the same case on a writ of error. They all agree that, aside from the extinction of slavery and the declaration of national citizenship, the constitutional amendments are restrictive upon the power of the general government and the action of the states, and there is nothing in their language or spirit which indicates that they are to be enforced by congressional enactments, authorizing the trial, conviction, and punishment of individuals for individual invasions of individual rights, unless committed under state authority; that the four-

teenth amendment guarantied immunity from state laws and state acts invading the privileges and rights specified in the amendment, but conferred no rights upon one citizen as against another; that the provision of the fourteenth amendment, authorizing congress to enforce its guaranties by legislation, means such legislation as is necessary to control and counteract state abridgment; and that the protection and enforcement of the rights of citizens of the United States provided in the enforcement act of 1870 and the civil rights act of 1875 apply only to such rights as are granted by and dependent on the constitution and valid and constitutional laws of the United States.

In the light of these principles, as laid down by the supreme court of the United States, we are not prepared to say that the right of any person to be a witness, and to attend court for the purpose of giving his testimony, is a right granted by the constitution. The constitution has no provision in relation to witnesses and their testimony in court, except that in article 5, declaring that no person shall be compelled in a criminal case to be a witness against himself, and the one in article 6, which declares that in criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor. The giving and receiving of evidence as an essential and vital principle in the proceedings of all courts had been firmly established in English and American law long anterior to the adoption of the constitution. It did not originate in the constitution, and is not in any manner dependent for its existence upon that instrument. Is there any law of congress outside of sections 5508 and 5509 which secures the right in question? We have already shown that it is not secured as a private right by section 5406, either in express terms or by implication.

We are not unmindful of the fact that the sixteenth section of the enforcement act of 1870 mentions the giving of evidence as a right. That law, as we find it incorporated into the Revised Statutes of the United States, (section 1977,) declares that—

“All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”

Manifestly the right to give evidence, which it is the intention of this section to secure, is not the right alleged to have been violated in the indictment under consideration. It unquestionably secures to persons of color the same right to give evidence as is enjoyed by white citizens. Its express purpose, as in section 858, is to take care of the colored witnesses in the United States courts, to remove all discrimination against them as witnesses, and to make the laws of the state the gauge of the competency of all witnesses. But there is another view which demonstrates that this section does not sustain the indictment in this case. We cannot present it more forcibly than by quoting the following from the opinion

of the supreme court, delivered by Mr. Justice BRADLEY, in the *Civil Rights Cases*, *supra*. Referring to the provisions as above quoted, and other subsequent provisions in the statute from which the section was taken, the learned justice says:

"This law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. In the Revised Statutes, it is true, a very important clause, to-wit, the words 'any law, statute, ordinance, regulation, or custom to the contrary notwithstanding,' which gave the declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to state laws, by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any state or territory, thus preserving the corrective character of the legislation. Rev. St. §§ 1977-1979, 5510. * * * In this connection it is proper to state that civil rights, such as are guarantied by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority, in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but, if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror. He may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but, unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the state where the wrongful acts are committed. Hence, in all those cases where the constitution seeks to protect the rights of a citizen against discriminative and unjust laws of the state by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the congress with power to provide a remedy. * * * And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration." 109 U. S. 16-18, 8 Sup. Ct. Rep. 25, 26.

Our attention has been called to two cases (*Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152, and *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35) as authorities in support of the theory of this indictment. The former of these two cases originated in an indictment in the circuit court of the United States for the northern district of Georgia. The indictment, founded on sections 5508, 5520, Rev. St., was for a conspiracy to intimidate a citizen of African descent in the exercise of his right to vote for a member of congress, in execution of which they bruised and maltreated him, and that they did this on account of his race, color, and previous condition of servitude. The court held that, inasmuch as the qualification for the exercise of the right of suffrage,

in the choice of the members of the house of representatives is defined by the constitution, which expressly confers upon the congress the power to prescribe the time, place, and manner of holding the election, it may make such regulations as are necessary to guard it from fraud and violence, and punish the persons by whom they are disregarded. The principle which pervades this case is not in any way inconsistent with those laid down in the case of *U. S. v. Cruikshank*, and the *Civil Rights Cases*. In these last-named cases the court decided that the rights named in the indictment, and alleged to be violated, were not created or conferred by the constitutional amendment, and that, therefore, section 5508, or rather the corresponding section of the statute of 1870, so far as it relates to those rights, was not constitutional. In *Ex parte Yarbrough* the court held that the right therein named and alleged to have been violated was created and conferred by the constitution in the body of the instrument itself, namely, the fourth section of the first article of the constitution of the United States, and also by the laws of congress passed in pursuance of the express power which that article conferred upon it. And the court, through Mr. Justice MILLER, says, speaking of the power to protect the parties assaulted: "The power in either case arises out of the circumstance that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. In reply to the objection that the right to vote for a member of congress is not dependent upon the constitution and laws, but upon those of the state, it says: "It is not correct to say that the right to vote for a member of congress does not depend on the constitution of the United States." Again: "It is not true, therefore, that electors for members of congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the state." 110 U. S. 663, 664, 4 Sup. Ct. Rep. 158. This is still more clearly shown in the case of *U. S. v. Waddell*, *supra*. In this case an information had been filed against Waddell and others, charging them, under these sections, with having conspired together to deprive a citizen of the right to establish a homestead upon the public lands under the homestead laws. The court held that this was a case in which the right, against the exercise and enjoyment of which injury and oppression were charged, was created by, and grew directly out of, the constitutional legislation of congress. In delivering the opinion of the court, Mr. Justice MILLER said:

"The protection of this section extends to no other right, to no right or privilege, dependent on a law or laws of the state. Its object is to guarantee safety and protection to persons in the exercise of rights dependent on the laws of the United States, including, of course, the constitution and treaties, as well as statutes, and it does not, *in this section at least, design to protect any other rights.* [Italics ours.] The right assailed, obstructed, and its exercise prevented, or intended to be prevented, as set out in this petition, is very clearly a right wholly dependent upon the act of congress concerning the settlement and sale of the public lands of the United States. No such right exists, or can exist, outside of an act of congress. The constitution of the United States, by article 4, § 3, in express terms vests in congress "the power to dispose of,

and make all needful rules and regulations respecting, the territory or other property of the United States.' One of its regulations, the one under consideration, authorizes a class of persons, of whom Lindsey is one, to settle upon its land, and, on payment of any inconsiderable sum of money, and the declaration of intent to make it a homestead, he is authorized to reside there." 112 U. S. 79, 5 Sup. Ct. Rep. 36.

Again:

"The right here guaranteed is not the mere right of protection against personal violence. * * * It is the right to remain on the land in order to perform the requirements of the act of congress, and, according to its rules, perfect his incipient title. Whenever the acts complained of are of a character to prevent this, or throw obstruction in the way of exercising this right, and for the purpose and with the intent to prevent it, or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law of the United States, and granted by that law, those acts come within the purview of the statute and of the constitutional power of congress to make such statute." Id. 80.

And one of the quotations from *Ex parte Yarbrough*, which we have given above, follows. These cases differ very materially from the case under consideration. There the rights were undeniably dependent upon the constitution of the United States, or the laws in pursuance thereof, and the rights in question there were such as fell clearly within the generally accepted view presented in previous decisions. They were such rights as might be enforced in a court of justice, and the denial of which by any one would subject the offender to a liability to an action for civil damages or to criminal prosecution in the court. Here none of these elements are found, as we think we have shown.

We have also been referred to the case of *U. S. v. Lancaster*, 44 Fed. Rep. 896, decided in the circuit court for the southern district of Georgia by Judge SPEER, as a case in all essential features similar to this one; and it is argued that on the authority of that case the demurrer herein should be overruled. We have examined the opinion of the learned judge in that case, and we have no hesitancy in saying that that case is not at all similar to this. That was a case in which there was an indictment for conspiracy, under sections 5508 and 5509, for injuring and oppressing a citizen of the United States in the exercise of his right to sue in the federal court, and it was also alleged in the indictment that in the execution and furtherance of such conspiracy the defendant murdered said citizen. The right in that case was so clearly one dependent upon and growing out of the constitution and laws of congress respecting the jurisdiction of United States courts that a bare mention of the fact is sufficient to show its entire dissimilarity to the right which this indictment charges to have been infringed.

The indictment in this case does not charge the defendants with a conspiracy to deprive a citizen of the United States, being a person of color, and because of his color and previous condition of servitude, of the right to be a witness and testify in a federal court, and with murdering him for having exercised the same; it does not allege that the state of Georgia, where the offense is charged to have been committed, has

made or enforced any law abridging the right of any citizen or citizens to be such witnesses or to give such evidence; it does not allege that the state has in any of its departments, or by any of its officers, or by any of its agents acting under its authority, denied to any person the right to give evidence in any court; it does not allege that the state has failed to recognize and protect the rights of all citizens of the United States, irrespective of race, color, or previous condition of servitude, to attend the courts when summoned, and to testify fully and freely therein; but it is an indictment which alleges that the defendants committed the crime of murder upon the person therein named, within the territorial limits of the state of Georgia.

It is the opinion of this court—*First*, that, irrespective of any question of the constitutional validity of sections 5508 and 5509, the indictment describes no offense within their purview; *secondly*, that any construction which brings the acts set forth in the indictment within the intent and meaning of these sections would render them, so far as they relate to witnesses and testimony, inconsistent with the constitution of the United States. It is our duty to adopt that construction which, without doing violence to the obvious import of the words, brings the enactment into harmony with the supreme law; and where the general words in a statute are equally susceptible of two constructions, one of which makes it accordant with the constitution, and the other renders it beyond the authority it confers, that construction should be adopted which brings the statute into harmony with the constitution. *Grenada Co. v. Brogden*, 112 U. S. 261, 269, 5 Sup. Ct. Rep. 125.

We have given the questions involved in this case the attention which their importance demands, and, after a patient examination of the arguments advanced and the authorities cited by counsel on both sides, we have come to the conclusion that the indictment is not in law good and sufficient. It is ordered that the demurrer be sustained.

UNITED STATES v. EDGAR.

(Circuit Court of Appeals, Eighth Circuit. October Term, 1891.)

IMMIGRATION—"ALIEN CONTRACT LABOR LAW"—WHAT CONSTITUTES CONTRACT.

A laborer in England wrote to a manufacturer in the United States stating that he had heard the latter wanted men to work in a certain branch of the business, and that himself and a comrade, who were experienced therein, desired to come to this country, and asking that passes be sent them. The manufacturer replied, inclosing tickets from Liverpool to St. Louis, and stating that he could give the applicants steady work. Nothing was said on either side as to time or compensation. The laborers came over on the tickets, but were returned by the commissioner of immigration at Philadelphia. *Held*, that the letters did not constitute a contract "made previous to said importation and migration," within the meaning of Act Cong. Feb. 26, 1885, imposing a penalty for assisting or encouraging the immigration of laborers under contract, since the act of coming to this country was necessary to make the arrangement a binding agreement in any respect. 45 Fed. Rep. 44, affirmed.

In Error to the Circuit Court of the United States for the Eastern Judicial District of Missouri.

Action against S. C. Edgar to recover the penalty prescribed by Act Cong. Feb. 26, 1885, § 3, (23 U. S. St. 332,) for aiding in the importation of alien laborers under contract. A demurrer to the petition was sustained, and a judgment entered for defendant.

STATEMENT. This is an action instituted in the court below by the plaintiff in error against defendant in error for an alleged violation of what is commonly called the "Alien Contract Labor Law," by assisting and encouraging the migration and importation of two aliens and foreigners, Isaac Boyce and Fred Dorosalski, into the United States from Bristol, England, to Philadelphia, in the United States, by prepaying their transportation, they being then under contract and agreement to perform labor or service for said defendant in error in the United States. The petition is in two counts, stating and reciting all of the facts, and each count asks judgment for the statutory penalty of \$1,000. The counts are the same, except as to the name of the alien imported, and the alleged contract is contained in the two letters and the acts done in pursuance of them, as set out in the two counts. The letters were transmitted and received by mail, as addressed, the first to the manager or agent of the defendant in error, who delivered it to the latter, who thereupon answered it. The letters are as follows:

"No. 16 AIKEN ST., BARTON HILL, BRISTOL, April 11, 1890.

"From Mr. I. Boyce to Mr. Gray, the Manager—DEAR SIR: I have heard that you are in want of men to work on the spelter furnaces. I and one of my fellow-workmen would like to come out hear, as the works hear is very slack; if it would be convenient for you to send us a pass each, we would come out as soon as possible. We have both worked in the spelter works for many years. Would you oblige us by writing back to let us now, and oblige,

[Signed]

"I. BOYSE,

"No. 16 Aiken street, Barton Hill, Bristol, England.

"The name of my fellow-workman, Fred Dorosalski."

"[S. C. Edgar, Lessee Glendale Zinc-Works, Manufacturers and Refiners of Spelter.]

"SOUTH ST. LOUIS, 1st July, 1890.

"I. Boyse, No. 16 Aiken Street, Barton Hill, Bristol, England—DEAR SIR: Your letter of April 11th has just been handed me, and I have this day bought two tickets for you and Fred Dorosalski from St. Louis agent of American line, and all you have to do is to take this letter to Ricardson, Spence & Co., No. 17 Water street, Liverpool, and get tickets through to St. Louis. We can give you steady work, and have places for about six or eight more smelters if they want to come. I run fourteen Belgium furnaces. Tickets will not be good after July 18th.

Yours, truly,

[Signed]

"S. C. EDGAR."

The facts are that, immediately upon receipt of the latter letter, it was presented as therein directed, tickets received for passages to St. Louis, that were paid for by defendant in error, and the parties named thereupon took passage on a vessel from England for Philadelphia, intending to come to St. Louis and perform service and labor for defendant in error.

ror in pursuance of said contract. They arrived at Philadelphia on August 5th following the date of the latter letter, and the special agent of the treasury department and immigrant inspector, under the direction of the collector of customs there, examined into their condition, and found that they had been imported into the United States by the defendant in error in violation of said alien contract labor law as above set forth, and refused to permit them to land from said vessel, and they were accordingly sent back to England. The defendant in error demurred to each count in the petition on the grounds that it did not state facts sufficient to constitute a cause of action; that the correspondence did not constitute a contract; and the aliens did not land in the United States. The court sustained this demurrer, and the plaintiff in error declined to plead further, and final judgment was rendered for defendant in error.

Geo. D. Reynolds, for the United States.

F. N. Judson, for defendant in error.

Present, CALDWELL, NELSON, and HALLETT, JJ.

HALLETT, J. It is averred in the complaint that defendant secured the importation of two men from Barton Hill, Bristol, England, who were "then under contract and agreement with the defendant to perform service and labor for said defendant in the United States, which contract was made previous to said importation and migration" by means of correspondence through the mails. The letters which passed between the parties are set out in the complaint, and they show a proposal on the part of the men to come to St. Louis and to enter into defendant's service on condition that transportation should be furnished them, and acceptance by defendant. It is averred, also, that defendant paid the passage of the men from Liverpool to St. Louis, and they came as far as Philadelphia in pursuance to the agreement with him. When the men arrived at Philadelphia, the facts having come to the knowledge of the officers of the government at that place, they were returned to England, pursuant to the provisions of an amendatory act approved February 23, 1887, (24th St. 414.) Upon the letters which passed between the parties, and the payment of passage money by defendant, and the act of the men in coming to Philadelphia, it is difficult to make a complete contract to perform labor, because the elements of time and compensation are entirely omitted.

But there is force in the suggestion of counsel for the government that, in construing a measure of public policy in a case where there may be reason to believe that the act complained of is in violation of the spirit if not the letter of the law, we ought not to be critical about the terms of the contract for labor mentioned in the statute; and we are not disposed to declare what shall be a sufficient contract under the law. The difficulty in supporting the complaint is that there does not appear to have been any contract or agreement whatever between defendant and the Englishmen, "made previous to the importation or migration of such alien or aliens, foreigner or foreigners." The letter written by one of the Englishmen, and defendant's answer, did not make a contract or agree-

ment of any kind, until something further should be done. The act of the Englishmen in getting the tickets at Liverpool, and coming to Philadelphia, was necessary to complete the contract or agreement, such as it was. In other words, when the defendant prepaid the Englishmen's passage, and thus assisted and encouraged them to come to the United States, there was no contract for labor which had been previously made by them; and so the case is not within the statute. The point has been ruled the same way in other circuits. *U. S. v. Craig*, 28 Fed. Rep. 795; *U. S. v. Borneman*, 41 Fed. Rep. 751. The judgment of the circuit court is affirmed.

Affirmed.

UNITED STATES *v.* TRUMBULL *et al.*

(District Court, S. D. California. October 23, 1891.)

1. FOREIGN CONSULS—EFFECT OF REVOLUTION—DUTY OF COURTS.

A vice-consul of a foreign nation, who possesses an unrevoked *exequatur* issued by the president of the United States, must still be recognized by the courts as the accredited representative of his country, entitled to all the privileges appertaining to that office, notwithstanding that the government which sent him has been overthrown, and an apparently successful revolutionary government established in its place.

2. SAME—RIGHTS AND PRIVILEGES—EXEMPTION FROM SUBPENA AS WITNESS—VIOLATION OF NEUTRALITY LAWS.

In a prosecution against private individuals for violating the neutrality laws of the United States by fitting out a warlike vessel to aid a rebellion against a foreign power, the vice-consul of that power cannot be compelled by legal process to attend as a witness in behalf of the United States, when it appears that the insurgent party has been successful, and the government established by it has been recognized by the United States.

At Law. Indictment of Ricardo Trumbull and G. A. Burt for violation of neutrality laws. On motion of Walter D. Catton to be discharged from process of subpoena.

W. Cole, U. S. Atty., *Alexander Campbell* and *A. W. Hutton*, Special Asst. U. S. Attys.

William Craig, for the Vice-Consul.

Ross, J. It is greatly to be regretted that the important question now presented to the court must be disposed of in the haste of a *nisi prius* trial. The question arises in a case in which the government of the United States, by various counts in the indictment, charges, in effect, that on the 9th day of May, 1891, at a certain designated place within this judicial district, Ricardo Trumbull and G. A. Burt attempted to fit out and arm, fitted out and armed, caused to be fitted out and armed, and were knowingly concerned in fitting out and arming, a certain steamship called the "Itata," which was then and there in the possession and under the control of certain citizens of the republic of *Chili*, known as the "Congressional Party," and who were then and there, in said republic,

organized and banded together in great numbers in armed rebellion and attempted revolution, and carrying on war against the republic of Chili and the government thereof, with which the United States then, and at the time of the finding of the indictment, were at peace, with intent that said ship should be employed in the service of the aforesaid Congressional party, to cruise or commit hostilities against the then established and recognized government of Chili, with which this government then was at peace; contrary to the provisions of section 5283 of the Revised Statutes of the United States. A similar violation of sections 5285 and 5286 of the Revised Statutes is also alleged. Counsel for the United States having caused a subpoena to be served upon Mr. Walter D. Catton to appear as a witness in the case on the part of the prosecution, he has appeared in obedience to the subpoena, and presented to the court his *exequatur*, issued by President Cleveland on the 26th of January, 1888, by which he was recognized by the executive as the duly-appointed vice-consul of Chili at San Francisco, Cal., and declared "free to exercise and enjoy such functions, powers, and privileges as are allowed to the vice-consuls of the most favored nations in the United States." He also presents the consular instructions received from his own government, which, among other things, prohibit consuls, without authorization from the minister of foreign affairs or the respective legations, if there be such, from making public the correspondence which they may hold with the government, or from giving publicity to information or data which they may receive while exercising their charge; and by which they are required to demand the privileges and exemptions which may appertain to them by virtue of treaties or conventions entered into between Chili and the nation where they may be stationed, and, in case there be no treaty, to demand the privileges and exemptions which are generally conceded in the country of their residence to consuls of other nations; and, as essential to the exercise of their office, they are required to demand inviolability of their archives and documents, and freedom in their acts performed in their capacity of consuls. For a violation of their instructions certain punishments are prescribed. Presenting the credentials and instructions mentioned, Mr. Catton asks to be relieved from further attendance upon the court as a witness. He bases the demand—*First*, upon the broad ground that his privileges as vice-consul exempt him from compulsory process to attend as a witness in any court of the United States; and, *secondly*, upon the ground that the circumstances of the present case are such as render it improper to require him to attend as a witness on the part of the prosecution.

The counsel for the United States deny that the privileges thus asserted by Mr. Catton exist; contending, in the first place, that he ceased to be vice-consul of Chili upon the overthrow of the government by which he was accredited. If the position of the counsel for the United States in this respect is correct, the question is of course ended, and Mr. Catton occupies the position of an ordinary witness subpoenaed in the cause. But I am unable to take that view of the matter. The court cannot say that the person who holds the unrevoked *exequatur* issued by

the president, by virtue of which he is in discharge of the duties of vice-consul of his country, is in fact not such officer. The recognition of representatives of foreign countries is a matter for the executive department of the government, whose action in the premises is accepted and followed by the judicial department. Whart. Int. Law Dig. p. 552.

But, accepting Mr. Catton as the duly authorized and acting vice-consul of the Chilian government, does his position as such, of itself, entitle him to exemption from compulsory process to attend as a witness in the courts of the United States? It is very clear that by the law of nations consuls and vice-consuls stand upon a very different footing from ambassadors and ministers. The latter are not amenable to either the civil or criminal jurisdiction of the country to which they are deputed; not so, however, the former. 1 Whart. Int. Law Dig. pp. 767, 775, 776; Wools. Int. Law, p. 162; 1 Kent, Comm. 45, 46. But it is contended that such immunity attaches to the vice-consul of Chili by reason of the treaty concluded between the United States and that country on the 29th of April, 1832. The first subdivision of article 31 of that treaty provided that it should—

"Remain in full force and virtue for the term of twelve years, to be reckoned from the day of exchange of the ratification; and, further, until the end of one year after either of the contracting parties shall have given notice to the other of its intention to terminate the same, each of the contracting parties reserving to itself the right of giving such notice to the other at the end of said term of twelve years. And it is hereby agreed between them that, on the expiration of one year after such notice shall have been received by either from the other party, this treaty in all the parts relating to commerce and navigation shall altogether cease and determine, and in all those parts which relate to peace and friendship it shall be permanently and perpetually binding on both parties."

Pursuant to notice by the Chilian government under the foregoing article, the treaty, together with the explanatory convention which followed it in 1833, were terminated January 20, 1850. Treat. & Conven. p. 118. As will be observed, the portions of the treaty so terminated were those relating to commerce and navigation, leaving permanently and perpetually binding on both powers those parts relating to peace and friendship, embracing, as is contended, article 25 of the treaty, which is as follows:

"Both the contracting parties, being desirous of avoiding all inequality in relation to their public communications and official intercourse, have agreed, and do agree, to grant to their envoys, ministers, and other public agents the same favors, immunities, and exemptions which those of the most favored nations do or shall enjoy; it being understood that whatever favors, immunities, or privileges the United States of America or the republic of Chili may find it proper to give to the ministers and public agents of any other power shall, by the same act, be extended to those of each of the contracting parties."

It being stipulated by the convention between the United States and France, ratified April 1, 1853, that their consuls shall never be compelled to appear in court as witnesses, it is urged that the same privilege attaches to the consuls of Chili by virtue of article 25 of the treaty of 1832 above cited. In the case of *In re Dillon*, 7 Sawy. 561, which arose

in 1854, it was held by the court that, because of the stipulation in the treaty between the United States and France to the effect that their consuls shall never be compelled to appear in court as witnesses, such consuls are not amenable to the compulsory process of the courts requiring their attendance, notwithstanding the provision of the constitution of the United States securing to the accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in his favor. The subpoena served upon Mr. Dillon also required him to produce a certain document, said to be in his possession. Having failed to appear, an attachment was issued, and he was brought into court, from which, after a hearing of the matter, he was discharged. When the attachment was served, he hauled down his consular flag, and the case was taken up by the French minister at Washington as involving a gross disrespect to France. A long and animated controversy between Mr. Marcy, then secretary of state, and the French government ensued. The fact that an attachment had issued, under which Mr. Dillon was brought into court, was regarded by the French government as not merely a contravention of the treaty, but an offense by international law; and it was argued that the disrespect was not purged by the subsequent discharge of Mr. Dillon from arrest. It was urged, also, that the fact that the subpoena contained the clause *duces tecum* involved a violation of the consular archives. Mr. Marcy, in a letter of September 11, 1854, to Mr. Mason, then minister at Paris, discusses these questions at great length. He maintains that the provision in the federal constitution giving defendants opportunity to meet witnesses produced against them face to face overrides conflicting treaties, unless in cases where such treaties embody exceptions to this right recognized as such when the constitution was framed. One of these exceptions relates to the case of diplomatic representatives. "As the law of evidence stood when the constitution went into effect," says Mr. Marcy, "ambassadors and ministers could not be served with compulsory process to appear as witnesses, and the clause in the constitution referred to did not give the defendant the right in criminal prosecutions to compel their attendance in court." This privilege, however, Mr. Marcy maintained, did not extend to consuls; and consuls, therefore, could only procure the privilege when given to them by treaty, which, in criminal cases, was subject to the limitations of the constitution of the United States. Mr. Marcy, however, finding that the French government continued to regard the attachment with the subpoena *duces tecum* as an attack on its honor, offered, in a letter to Mr. Mason, dated January 18, 1855, to compromise the matter by a salute to the French flag upon a French man-of-war, stopping at San Francisco. Count de Santiges, the French minister at Washington, asked, in addition, that when the consular flag at San Francisco was rehoisted it should receive a salute. This was declined by Mr. Marcy. In August, 1855, after a long and protracted controversy, the French government agreed to accept as a sufficient satisfaction an expression of regret by the government of the United States, coupled with the provision that "when a French national ship or squadron shall appear in the harbor of San

Francisco the United States authorities there, military or naval, will salute the national flag borne by such ship or squadron with a national salute, at an hour to be specified and agreed on with the French naval commanding officer present, and the French ship or squadron whose flag is thus saluted will return the salute, gun for gun." Whart. Int. Dig. p. 666.

It will therefore be seen that while the court held, in *Dillon's Case*, that the provision of the constitution securing to the accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in their favor does not authorize the issuing of such process to such consuls who, by express treaty, are not amenable to the process of the courts, the state department of the government contended that that provision overrides conflicting treaties, not embodying exceptions to the right guaranteed, recognized as such when the constitution was framed, within which exceptions consuls did not come. In the present case, however, the provision of the constitution referred to in *Dillon's Case* is not involved; for Mr. Catton has not been subpoenaed as a witness for the defendants, but on behalf of the prosecution. And if he is entitled, as in effect it is declared he is, by article 25 of the convention of 1832, and by the *exequatur* issued to him by the president, to the same privileges and immunities as are granted to the consuls of France, it would seem to follow that he is exempt from compulsory process to attend the court as a witness.

But for another reason I do not think he should be compelled to attend as a witness in this cause. The offenses with which the defendants stand charged are violations of the neutrality laws of the United States, and consist in the giving of aid to those who now constitute the established and recognized government of Chili. Having succeeded and become recognized, the acts of that government from the commencement of its existence will be upheld as those of an independent nation. *Williams v. Bruffy*, 96 U. S. 176. To require the representative of that government to appear and give testimony against those alleged to have aided its establishment would not only be contrary to the principle upon which neutrality laws are based, but would strongly tend to give grave offense to the government now recognized by the United States, and with which this government, happily, is at peace. The motion on behalf of the vice-consul is allowed.

UNITED STATES *v.* TRUMBULL *et al.*

(District Court, S. D. California. November 3, 1891.)

1. NEUTRALITY LAWS—FURNISHING ARMS TO FOREIGN INSURGENT—"FITTING OUT" VESSEL.

Rev. St. U. S. § 5283, prescribing a punishment for any person who is in any way concerned in "furnishing, fitting out, or arming" any vessel with intent that she shall be employed in the service of any foreign state or people, to cruise or commit hostilities against any foreign state or people with whom the United States are at peace, does not cover the act of purchasing arms and munitions of war, and putting them on board a vessel sent to receive them, with intent that they shall be carried to a party of insurgents in a foreign country, to be used in carrying on war against the government thereof, but which are not designed to constitute any part of the fittings or furnishings of the vessel herself.

2. SAME—SETTING ON FOOT EXPEDITION—WHAT CONSTITUTES.

When a party of insurgents, already organized and carrying on war against the government of a foreign country, send a vessel to procure arms and ammunition in the United States, the act of purchasing such arms and ammunition, and placing them on board the vessel, is not within the scope of Rev. St. U. S. § 5283, prescribing a punishment for every person who, within the limits or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, "to be carried on from thence."

At Law. Indictment of Trumbull and Burt for violation of neutrality laws.

W. Cole, U. S. Atty., and *Alexander Campbell* and *A. W. Hutton*, Special Asst. U. S. Attys.

Page & Eells, *Stephen M. White*, and *George J. Denis*, for defendants.

Ross, J. The indictment in this case contains 11 counts, the first 4 of which, in effect, charge that on the 9th day of May, 1891, at a certain designated place in this judicial district, near the island of San Clemente, the defendants unlawfully attempted to fit out and arm, fitted out and armed, procured to be fitted out and armed, and were knowingly concerned in furnishing, fitting out, and arming, a certain steamship called the "Itata," which was then and there in the possession and under the control of certain citizens of the republic of Chili, known as the "Congressional Party," and who were then and there, in said republic, organized and banded together in great numbers in armed rebellion and attempted revolution, and carrying on war against the republic of Chili, and the government thereof, with which the United States then and at the time of the finding of the indictment were at peace, with intent that said ship should be employed in the service of the aforesaid Congressional Party, to cruise or commit hostilities against the then established and recognized government of Chili, with which this government then was at peace, contrary to the provisions of section 5283 of the Revised Statutes of the United States, which section is as follows:

"Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of, any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or com-

mit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or who issues and delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she shall be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building or equipment thereof, shall be forfeited, one-half to the use of the informer, and the other half to the use of the United States."

The next three counts of the indictment, in effect, charge that the defendants, at the same time and place, increased, unlawfully procured to be increased, and were knowingly concerned in increasing, the force of a certain ship of war and armed steam-ship called "Itata," which arrived at the port of San Diego in this judicial district on the 2d day of May, 1891, and was at the time of her said arrival, and to and including the 9th day of May, 1891, (during which time she remained within the jurisdiction of the United States and of this court,) a ship of war in the service of a certain foreign people called the "Congressional Party," then citizens of and residing in the republic of Chili, and who were then and there banded together in large numbers, in open armed rebellion, and attempted forcible revolution, and making war against, and being at war with, a certain foreign state, namely, the republic of Chili, and the lawful government thereof, with which the United States then, and at the finding of the indictment, were at peace, by adding to the force of said armed vessel an equipment solely applicable to war, viz., by adding to her equipment 10,000 rifles, 10,000 bayonets, and 500,000 cartridges therefor, contrary to the provisions of section 5285 of the Revised Statutes of the United States, which is as follows:

"Every person who, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be deemed guilty of a high misdemeanor, and shall be fined not more than one thousand dollars, and imprisoned not more than one year."

The last four counts of the indictment, in effect, charge that the defendants, at the same time and place, began, set on foot, provided the means for, and prepared the means for, a certain military expedition to be carried on from thence against the territory and dominions of a foreign state, namely, the republic of Chili,—the United States then and there, and at the time of the finding of the indictment, being at peace with

said republic,—contrary to the provisions of section 5286 of the Revised Statutes of the United States, which is as follows:

“Every person who, within the territory of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.”

The evidence introduced by the United States in support of the indictment being concluded, the court is asked by the defendants to direct the jury to return a verdict of not guilty, on the ground that the evidence introduced on the part of the prosecution is insufficient to sustain any count of the indictment. For the purposes of the motion, every fact that the evidence tends to establish must, of course, be considered as proven.

Briefly stated, those facts are as follows: In January of this year the steam-ship *Itata* was an ordinary merchant vessel. Early in that month she was captured in the harbor of Valparaiso, Chili, by the people designated in this indictment as the “Congressional Party,” and who were then engaged in an effort to overthrow the then established and recognized government of Chili, of which Balmaceda was the head. The *Itata* was by the Congressional Party put in command of one of its officers, and was used in their undertaking as a transport to convey troops, provisions, and munitions of war, and also as an hospital ship, and one in which to confine prisoners. Four small cannon were also put upon her decks, and she carried a jack and pennant. Some time prior to the following April the defendant Trumbull came to the United States as an agent of the Congressional Party, and about the month of April went to the city of New York, and there bought from one of the large mercantile firms of that city, dealing in such matters, 5,000 rifles and 2,000,000 cartridges therefor, with the intention and for the purpose of sending them to the Congressional Party in Chili for use in their effort to overthrow the Balmacedan government. The sale and purchase of the arms and ammunition were made in the usual course of trade. Trumbull caused them to be shipped by rail to San Francisco, and engaged the defendant Burt to accompany them, which he did. Arrangements had been made by Trumbull with his principals in Chili, by which they were to send a vessel to the United States to get the arms and ammunition, and convey them to Chili for the use of the Congressional Party there. The *Itata* was dispatched by that party for that purpose, and was accompanied as far as Cape San Lucas by the *Esmeralda*, a war ship then in the service of the Congressional Party. At one of the Chilean ports the *Itata* took on board some soldiers, with their arms, by one witness stated to be about 150, and by another to be about 12, in number. At San Lucas the captain of the *Esmeralda* took command of the *Itata*, and the captain of the latter was left there in command of the *Esmeralda*.

The Itata then proceeded to San Diego, really in command of the Esmeralda's captain, but ostensibly in command of another, who represented to the customs officers at that port that she was an ordinary merchantman, and was bound to some port on the northern coast. Before coming into the port of San Diego, or into the waters of the United States, the Itata hauled down her jack and pennant, the cannon theretofore carried on her decks were removed and stowed in her hold, as were also the arms of the soldiers she carried; and their uniforms, as well as those of the officers, were removed, and all appeared in civilian's dress. At that port she laid in stores of coal and provisions, all of which were bought in the open market, and some of which were marked "Esmeralda." Meanwhile Trumbull had chartered a schooner, called the "Robert and Minnie," in San Francisco to take the arms and ammunition from there to a point in this judicial district, then expected to be near the island of Catalina, where she could meet the Itata, and deliver them on board of her to be conveyed to Chili for the purposes already stated. The schooner Robert and Minnie accordingly took on board the arms and ammunition at the port of San Francisco, and, in charge of the defendant Burt, proceeded to the neighborhood of Catalina island, where she expected to meet the Itata. In the mean time the suspicion of some of the officers of the United States that the neutrality laws were being violated was aroused, and the marshal of this district was directed by the attorney general to detain the Itata, if such was found to be the case; and, acting upon those and certain instructions from the district attorney of this judicial district, he went on board the ship at San Diego, and put a keeper in charge of her, and then went in search of the Robert and Minnie, which he did not find in the waters of the United States. Communication was, however, had between the Itata and the schooner, and a point near San Clemente island was fixed upon as the place of meeting for the purpose of transferring the arms and ammunition from the schooner to the ship. Accordingly, the Itata, on the 6th day of May, 1891, without obtaining clearance papers, and against the protest of the person left on board and in charge of her by the marshal, weighed anchor, and steamed out of the harbor of San Diego, with him on board, to meet the Robert and Minnie and receive the arms and ammunition. The marshal's keeper was, however, put ashore at Point Ballast, before leaving the harbor. While steaming out of it, one or more of the Itata's cannon were brought on deck, and some of the soldiers on board of her appeared in uniform. On the 9th of May the Itata and Robert and Minnie came together about a mile and a half southerly of San Clemente island, and there the arms and ammunition in question were taken from the schooner, and put on board the ship in original packages, and the latter at once left with them for Chili.

No evidence was introduced tending to show that the Congressional Party ever received any recognition of any character from the government of the United States until September 4th, when it was recognized as the established and only government of Chili. But since the argu-

ment and submission of the motion the counsel for the United States have called the attention of the court to the following facts furnished by the respective departments, to-wit: On March 4th, the secretary of the navy cabled Admiral McCann "to proceed to Valparaiso, and observe strict neutrality, and take no part in troubles between parties further than to protect American interests." On March 26th, the secretary of the navy cabled Admiral Brown, who had superseded Admiral McCann, "to abstain from proceedings in nature of assistance to either, that is, the Balmaceda or Congressional Party; that the ships of the latter were not to be treated as piratical, so long as they waged war only against the Balmaceda government." On April 25th, Secretary of State Blaine cabled the American minister, "You can act as mediator with Brazilian minister and French *chargé d'affaires*." On May 5th, Minister Egan cabled this government, "Government of Chili and revolutionists have accepted mediation of the United States, Brazil, and France most cordially; those of England and Germany declined." On May 7th, Acting Secretary of State Wharton acknowledged the dispatch of Minister Egan, and "expressed hope that through combined efforts of the governments in question the strife which has been going on in Chili may be speedily and happily terminated." On May 14th, Acting Secretary of State Wharton cabled Minister Egan that "French minister reports threats to shoot the insurgent envoys by Balmaceda," and directed that they should have ordinary treatment under flag of truce.

The foregoing are the facts of the case as now presented, and the question the court is called upon to decide is whether they are sufficient to justify a verdict against the defendants under any count of the indictment. The counsel for the United States concede that they are insufficient to justify a verdict against the defendants under either of the counts that are based on section 5285 of the Revised Statutes. It seems to me the same thing is equally true in respect to those counts that are based on section 5286. The very terms of that statute imply that the military expeditions or enterprises thereby prohibited are such as originate within the limits of the United States, and are to be carried on from this country. "Every person who, within the limits or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence,"—that is to say, from the United States,—is the language of the statute. If the evidence shows that in this case there ever was any military expedition begun or set on foot, or provided or prepared for, within the sense of this statute, it was begun, set on foot, provided and prepared for in Chili, and was to be carried on from Chili, and not from the United States. But I think it perfectly clear that the sending of a ship from Chili to the United States, to take on board arms and ammunition purchased in this country, and carry them back to Chili, is not the beginning, setting on foot, providing or preparing the means for any military expedition or enterprise, within the meaning of section 5286 of the Revised Statutes. The cases of *The Mary A. Hogan*, 18 Fed. Rep. 529; *U. S. v. Two Hundred and Fourteen Boxes of Arms, etc.*, 20 Fed. Rep.

50; and *U. S. v. Rand*, 17 Fed. Rep. 142,—cited by counsel for the United States in support of their position in respect to this point,—do not at all support it. In each of those cases there was a military expedition, and it was organized within, started from, and was to be carried on from the United States. The facts of those cases are wholly different from the facts of the present case.

There remain for consideration the four counts of the indictment that are based on section 5283 of the Revised Statutes. The first of these, as has been seen, charges that the defendants, on the 9th day of May last, at a certain designated place within this judicial district, unlawfully fitted out and armed a certain steam-ship called the "Itata," which was then and there in the possession and under the control of certain citizens of the republic of Chili, known as the "Congressional Party," and who were then and there, in said republic, organized and banded together in great numbers in armed rebellion and attempted revolution, and carrying on war against the republic of Chili and the government thereof, with which the United States then, and at the time of the finding of the indictment, were at peace, with intent that said ship should be employed in the service of the aforesaid Congressional Party, to cruise or commit hostilities against the then established and recognized government of Chili, with which this government then was at peace. The second count charges that the defendants, at the same time and place, attempted to do the same thing; the third count charges that, at the same time and place, they unlawfully procured the same thing to be done; and the fourth that, at the same time and place, defendants were "unlawfully and knowingly concerned in the furnishing, fitting out, and arming" of the Itata, with intent, etc.

It is contended on behalf of the defendants that section 5283 has no application to this case, for the reason that the people designated in the indictment as the "Congressional Party" do not constitute a people, within the meaning of that section. It is beyond question that the *status* of the people composing the Congressional Party at the time of the commission of the alleged offense is to be regarded by the court as it was then regarded by the political or executive department of the United States. This doctrine is firmly established. *Gelston v. Hoyt*, 3 Wheat. 246, 324; *U. S. v. Palmer*, Id. 610, 635; *Kennett v. Chambers*, 14 How. 38; Whart. Int. Law Dig. pp. 551, 552, and cases there cited. If the dispatches from the secretary of the navy, the secretary of state, and acting secretary of state, already referred to, are to be considered as indicating the light in which the people composing the Congressional Party of Chili were regarded by the executive department of this government prior to their recognition, on the 4th of September, the position of the United States towards them seems to have been similar to that taken by the United States towards the insurgents against Hayti in 1869. That position was thus stated by Mr. Fish, then secretary of state, in a letter dated September 14, 1869:

"(1) That we do not dispute the right of the government of Hayti to treat the officers and crew of the Quaker City and Florida (vessels in the service of

the insurgents against Hayti) as pirates for all intents and purposes. How they are to be regarded by their own legitimate government is a question of municipal law, into which we have no occasion, if we had the right, to enter. (2) That this government is not aware of any reason which would require or justify it in looking upon the vessel named in a different light from any other vessel employed in the service of the insurgents. (3) That, regarding them simply as armed cruisers of the insurgents, not yet acknowledged by this government to have attained belligerent rights, it is competent to the United States to deny and resist the exercise by those vessels, or any other agents of the rebellion, of the privileges which attend maritime war, in respect to our citizens or their property entitled to their protection. We may or may not, at our option, as justice or policy may require, treat them as pirates in the absolute and unqualified sense, or we may, as the circumstances of any actual case shall suggest, waive the extreme right, and recognize, where facts warrant it, an actual intent, on the part of the individual offenders, not to depredate in a criminal sense and for private gain, but to capture and destroy *jure belli*. It is sufficient for the present purpose that the United States will not admit any commission or authority proceeding from rebels as a justification or excuse for injury to persons or property entitled to the protection of this government. They will not tolerate the search or stopping, by cruisers in the rebel service, of vessels of the United States, nor any other act which is only privileged by recognized belligerency. (4) While asserting the right to capture and destroy the vessels in question, and others of similar character, if any aggression upon persons or property entitled to the protection of this government shall recommend such action, we cannot admit the existence of any obligation to do so in the interest of Hayti or of the general security of commerce." 3 Whart. Int. Law Dig. pp. 465, 466.

Does section 5283 of the Revised Statutes apply to any people whom it is optional with the United States to treat as pirates? That section is found in the chapter headed "Neutrality," and it was carried into the Revised Statutes, and was originally enacted in furtherance of the obligations of the nation as a neutral. The very idea of neutrality imports that the neutral will treat each contending party alike; that it will accord no right or privilege to one that it withholds from the other, and will withhold none from one that it accords to the other. In the case of *U. S. v. Quincy*, 6 Pet. 445, the supreme court of the United States said that the word "people," in the 3d section of the act of April 20, 1818, (and from that carried into the Revised Statutes as section 5283,) "is one of the denominations applied by the act of congress to a foreign power." This can hardly mean an association of people in no way recognized by the United States, or by the government against which they are rebelling, whose rebellion has not attained the dignity of war, and who may, at the option of the United States, be treated by them as pirates. Prior to the passage of the act of April 20, 1818, the supreme court of the United States, in the case of *Gelston v. Hoyt*, 3 Wheat, 246, speaking through Mr. Justice STORY, held that section 3 of the act of 1794, prohibiting the fitting out any ship, etc., for the service of any foreign prince or state, to cruise against the subjects, etc., of any foreign prince or state, with which the United States were at peace, did not apply to any new government, unless it had been recognized by the United States, or by the government of the country to which such new country belonged; and

that a plea which set up a forfeiture under that act, in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad. Congress, in passing the subsequent act of April 20, 1818, by which the provision referred to of the act of 1794 was, in substance, re-enacted, must be presumed to have known the construction that had been theretofore put by the supreme court upon the words "prince or state" in the act of 1794, and with that knowledge, in passing the act of 1818, inserted in the same clause the words "colony, district, or people." This was done, according to Dana's *Wheat. Int. Law*, § 439, note 215, and Wharton's *Int. Law Dig.* p. 561, upon the suggestion of the Spanish minister that the South American provinces then in revolt, and not recognized as independent, might not be included in the word "state." But in every one of those instances the United States had acknowledged the existence of a state of war, and, as a consequence, the belligerent rights of the provinces. *The Ambrose Light*, 25 Fed. Rep. 414, and references there made.

It will be observed that the supreme court, in the case of *Gelston v. Hoyt*, did not say that the independence of the new government must have been recognized by the United States to make the statute of which it was speaking applicable. There are different kinds or degrees of recognition, but can it be properly said that, in passing an act in furtherance of the obligations of the nation as a neutral, congress was legislating with reference to a people not in any way recognized by the government of the United States, and whom it might, at its option, treat as pirates? "To fall within the statute," said Judge Brown in the case of *The Carondelet*, 37 Fed. Rep. 800, "the vessel must be intended to be employed in the service of one foreign prince, state, colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of another, with which the United States are 'at peace.' The United States can hardly be said to be 'at peace,' in the sense of the statute, with a faction which they are unwilling to recognize as a government; nor could the cruising or committing of hostilities against such a mere faction well be said to be committing hostilities against the 'subjects, citizens, or property of a district or people,' within the meaning of the statute. So, on the other hand, a vessel, in entering the service of the opposite faction of Hippolyte, could hardly be said to enter the service of a foreign 'prince or state, or of a colony, district, or people,' unless our government had recognized Hippolyte's faction as at least constituting a belligerent, which it does not appear to have done." Attorney General Hoar, however, in a letter to Mr. Fish, secretary of state, of date December 16, 1869, (13 Op. Atty. Gen. U. S. 177,) said:

"Undoubtedly the ordinary application of the statute [in question] is to cases where the United States intends to maintain its neutrality in wars between two other nations, or where both parties to a contest have been recognized as belligerents; that is, as having a sufficiently organized political existence to enable them to carry on war. But the statute is not confined in its terms, nor, as it seems to me, in its scope and proper effect, to such cases. Under it, any persons who are insurgents, or engaged in what would be regarded under our law as levying war against the sovereign power of the na-

tion, though few in number and occupying however small a territory, might procure the fitting out and arming of vessels with intent to commit hostilities against a nation with which we were at peace, and with intent that they should be employed in the service of a 'colony, district, or people' not waging a recognized war."

The attention of Attorney General Hoar does not appear to have been attracted to the decisions of the supreme court and other cases above cited, nor are any authorities cited in support of the views expressed by him. In my opinion, it is, to say the least, extremely doubtful whether section 5283 of the Revised Statutes applies to the present case. But, assuming that it does, the evidence does not sustain the charges based upon it. It does not show, or tend to show, that the defendants, or either of them, attempted to do, or procured to be done, or were concerned in doing, anything that they did not in fact do. What the evidence shows that they did do has already been stated. If none of those acts constituted the arming, fitting out, or furnishing the Itata with the intent that she should be employed to cruise or commit hostilities against the then established government of Chili, it necessarily follows that the prosecution has failed to prove the case alleged against the defendants, and the motion made on their behalf should be granted. One of the counsel for the United States conceded, on the argument, that the evidence is insufficient to show that the defendants fitted out and armed the Itata, but he contended strenuously that it is sufficient to show that they were knowingly concerned in "furnishing" her. Of course, if he is right in the concession, it results that the first count is not established by proof; and, since the evidence does not tend to show that the defendants, or either of them, attempted to do, or procured to be done, anything they did not in fact do, the second and third counts would also fall. If, as is thus conceded, and as seems to me to be clear, the putting on board the Itata of the arms and ammunition, under the circumstances and for the purposes stated, did not constitute the fitting out and arming of that vessel, it is difficult to understand how the same acts, committed under the same circumstances and for the same purposes, constituted the "furnishing" of her. There is nothing in the evidence tending to show that any of the arms or ammunition were intended for use by the Itata. On the contrary, the whole case shows that the defendants caused them to be put on board of her with the intention that she should transport them to Chili for the use of the insurrectionary party there. This does not constitute the fitting out, arming, or furnishing of the Itata, with intent that she should be employed to cruise or commit hostilities in the service of the insurrectionary party against the then government of Chili. In principle, the case is, I think, much like that of *The Florida*, decided by Judge BLATCHFORD in 1871, and reported in 4 Ben. 452. That was a suit against the Florida for an alleged forfeiture incurred under the third section of the act of April 20, 1818, now, in substance, section 5283 of the Revised Statutes. The court said:

"Admitting that persons acting as agents of the insurrectionary party in Cuba were the real owners of the vessel and her cargo of arms and muni-

tions of war, and that the transaction of the borrowing, by Darr from Castillo, of the money wherewith the vessel and her cargo were purchased, was a sham, and that the vessel was to proceed with her cargo to Vera Cruz, and there vessel and cargo were to be transferred by Darr, their nominal owner, to persons acting for the insurrectionary party in Cuba, and that thence the vessel was to take the cargo to some point off the coast of Cuba, and land it on the shore by the use of rafts made out of the lumber on board, towed by the steam-launch on board, through shallow water, to the shore, and that Darr and such real owners of the vessel and cargo had an intent to do all this in fitting out the vessel, and putting her cargo on board, still a violation of the third section of the act of 1818 is not thereby made out. A vessel fitted out with intent to do this is not fitted out with intent to cruise or commit hostilities, within the sense of that section. If so, then every vessel fitted out to run a blockade, with a cargo of munitions of war, is necessarily fitted out, within the sense of that section, to commit hostilities against the country whose forces have instituted the blockade. * * * There is no satisfactory evidence that the vessel was furnished or fitted out or armed, or attempted to be furnished or fitted out or armed, with intent that she should be employed to cruise or commit hostilities, in the sense of the third section of the act, in the services of the insurrectionary party in Cuba, against the government of Spain. There is no evidence that she was intended to do anything more than transport her cargo to the coast of Cuba, and cause it to be landed there on rafts, by the aid of the launch on board. To do this was no violation of the third section of the act, which is the one on which the libel is founded."

In a letter from Attorney General Speed to Mr. Seward, then secretary of state, he said:

"I know of no law or regulation which forbids any person or government, whether the political designation be real or assumed, from purchasing arms from the citizens of the United States, and shipping them at the risk of the purchaser." 11 Op. Atty. Gen. U. S. 452.

The fact that secrecy and deception were resorted to in the present case, as was also done in the case of *The Florida*, cannot bring it within the purview of the statute, if not otherwise within it; nor can the circumstance that the *Itata*, in leaving the port of San Diego in the manner disclosed by the evidence, violated other provisions of law. The case alleged must, of course, be proved; otherwise the defendants are entitled to a verdict of not guilty.

Entertaining the views above expressed, it becomes unnecessary to decide what effect, if any, should otherwise be given in this case to the recognition by the United States, on the 4th of September, of the government established by the Congressional Party, or to determine other questions raised, all of which have been elaborately and very ably argued by counsel.

The evidence introduced on behalf of the prosecution being, in my opinion, insufficient to warrant a conviction under either count of the indictment, the motion made on behalf of the defendants is granted, and the jury are instructed to find a verdict of not guilty.

(STANDARD OIL CO. v. SOUTHERN PAC. R. CO. *et al.*)*Circuit Court, N. D. California. October 12, 1891.*

PATENTS FOR INVENTIONS—COMBINATION—OIL-CARS.

Letters patent No. 216,506, issued June 17, 1879, to M. C. Brown, for an improvement in cars, consisting in a division of the car into two or more parts, some of which shall be constructed as tanks for carrying oil, while others are fitted for ordinary merchandise, the object being to carry such merchandise on the return trip, and thus obviate the necessity for hauling empty oil-cars for long distances, are void for want of patentable combination.

In Equity.

Pillsbury & Blanding and Langhorne & Miller, for complainant.

John S. Boone and S. C. Denson, for respondents.

HAWLEY, J. This is a bill in equity for the infringement of letters patent No. 216,506, granted to M. Campbell Brown, June 17, 1879, and assigned to complainant, for "improvement in oil-cars." The specification in the patent recites as follows:

"My invention relates to cars, and especially to that class of cars designed for transporting merchandise and oil or other liquids, and it consists in the parts and combination of parts hereinafter described and claimed, whereby oils or other liquids may be safely transported in the same car with miscellaneous merchandise. * * * The object, as briefly above stated, of my device, is to produce an improved form of car for the transportation of oils and liquids in bulk, and which shall also be adapted for the transportation of ordinary merchandise on roads where a load of oil or liquid cannot be obtained on return trip, thus obviating the necessity of hauling empty tank-cars over long distances, as is now commonly done; and to this end the construction of the ordinary freight-car is modified as follows: The car space is divided into two or more compartments; but, for the purpose of the present specification, we will suppose it to be divided into three. The central compartment, as shown in the drawings, would embrace about two-thirds of the entire length of the car, and is designed and adapted for ordinary storage, and for this purpose may be constructed in any proper manner. The two end compartments occupy each about one-sixth of the entire length of the car, are located in the ends thereof, over the trucks, and are designed and constructed to contain metallic tanks, * * * which tanks are adapted for safely containing and transporting oil or other liquid. * * * I am aware that the several features embodied in my improvement are not independently new, and I restrict the invention to the specific combination of parts set forth in the claim. What I claim is: A car subdivided into two or more compartments, each end compartment containing an oil-tank; said tank constructed with an inclined or self-draining bottom, and resting upon a floor, formed in counterpart thereto; said tank also having a tapering or inclined top, with a filling opening placed at or near its highest point, and in line with a filling opening in the car-top, and there being a removable partition, separating said tank from the next adjacent compartment, all combined as substantially set forth."

Is this invention a mere aggregation, or is it a patentable combination? What is the distinction between mere aggregation and a patentable combination? A combination of well-known separate elements, each of which, when combined, operates separately and in its old way, and in which no

new result is produced which cannot be assigned to the independent action of one or the other of the separate elements, is an aggregation of parts merely, and is not patentable. But if to adapt the several elements to each other in order to effect their co-operation in one organization demands the use of means without the range of ordinary mechanical skill, then the invention of such means to effect the mutual arrangement of the parts would be patentable. The parts need not act simultaneously, if they act unitedly to produce a common result. It is sufficient if all the devices co-operate with respect to the work to be done, and in furtherance thereof, although each device may perform its own particular function only.

In *Hailes v. Van Wormer*, the court said:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be the product of the combination, and not a mere aggregation of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one, by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination, and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations; or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others in the combination." 20 Wall. 368.

In *Reckendorfer v. Faber*, the court said:

"The combination, to be patentable, must produce a different force or effect or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union. If not so, it is only an aggregation of separate elements." 92 U. S. 357.

In *Pickering v. McCullough*, the court said:

"In a patentable combination of old elements all the constituents must so enter into it as that each qualifies every other. * * * It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions." 104 U. S. 318.

Numerous other authorities might be cited, substantially to the same effect. The law is well settled, the principles clearly defined. The dividing line between mere aggregation and patentable combinations is well established. Every case must fall upon one side or the other. No case stands directly on the pivotal line. But the facts are often of such a character as to make it difficult to determine upon which side of the border line the case should be classed. This difficulty arises in the application of the facts to the principles of the law so frequently announced by the supreme court of the United States. If the question is considered doubtful, the court should overrule a demurrer to the bill, in order to have the question fully presented upon the final hearing. *Standard Oil Co. v. Southern Pac. Co.*, 42 Fed. Rep. 295, opinion by Judge SAWYER.

And in such a case the court for like reasons would be justified in cases of great hardship to refuse an injunction, or dissolve a restraining order if one is temporarily issued. *Standard Oil Co. v. Southern Pac. Co.*, decided by Judge HOFFMAN. But when the case comes up on final hearing it is the duty of the court to assume the responsibility of actually determining upon which side of the border line the case falls. To properly decide this question the court should constantly bear in mind not only the principles of law applicable to such cases, but must keep in view the reasons for the rule upon which said principles were founded.

The several features embodied in complainant's improvement are admitted not to be independently new. The contention is that new and useful results are reached that were not hitherto attainable under the prior state of the art. The result claimed to be new is the cheaper transportation of oil in bulk over long hauls; that is, by the combined use of the patented car complainant is enabled to save the expense of \$95 hitherto paid for the expense of the return of an empty car. It is not claimed that the carrying of oil one way co-operates directly with the performance of carrying dry merchandise the other way, but the point relied upon is that the two co-operate directly in the performance of carrying merchandise both ways, thereby producing a common result, viz., a reduction of the cost of transportation of oils by successive acts performed in different parts of the service of the car; this result being, as before stated, in saving the dead loss of hauling empty cars one way. If this contention is sound, then the patent must be maintained. Is it tenable? I am of opinion that it is not. The construction of this patent, as contended for by complainant, would, in my judgment, be extending the principle of patentability of inventions beyond the rules laid down by the supreme court of the United States in its recent decisions upon this subject. The patentee admits that the several features in his improvement "are not independently new." Upon the hearing prior patents were introduced, which embodied the general feature of carrying oils or liquid and dry freight at the same time, or "for liquid freight in one direction and dry freight in the other." Do the elements of the car and of the oil-tank combined so co-operate as to produce a new result by their joint union? Successive action of old parts, where they all relate to each other, and all work to a common end to perform a common result, if the result is new, are patentable, but in all cases it must be a result which is due to the successive action of these parts. In *Reckendorfer v. Faber*, *supra*, numerous illustrations are made. There the combination relating to the manufacture of combined pencils and erasers consisted only of the application of a piece of rubber to one end of the same piece of wood which makes a lead-pencil. The court said:

"It is as if a patent should be granted for an article * * * consisting of a stick, twelve inches long, on one end of which is an ordinary hammer, and on the other end is a screw-driver or a tack-drawer. * * * It is the case of a garden-rake, on the handle end of which should be placed a hoe, or on the other side of the same end of which should be placed a hoe. In all

these cases there might be the advantage of carrying about one instrument instead of two, or of avoiding the liability to loss or misplacing of separate tools, [and the court might have added that the cost of manufacturing the articles would be much less, and that the combined articles could be sold cheaper than the separate articles could.] The instruments placed upon the same rod might be more convenient for use than when used separately. Each, however, performs its own duty, and nothing else. No effect is produced—no result follows—from the joint use of the two.”

Now, in the case of the lead-pencil and eraser, the hammer and screw-driver, and with the garden-rake and hoe, there was not only a convenience and cheapness in the manufacture of the articles, as combined, but in their use. Time would be saved in the work to be performed by having the articles in the combined instrument; and, if the sole question of cheapness in the use was to govern, then the decision in the *Faber Case* should have been the other way. The patent should have been sustained. The new result to be accomplished, in order to take the case out of the rule of aggregation of separate elements as laid down by the supreme court, must be a result produced by the manufacture of the article or machine itself, its operation, union, and effect. Such illustrations are made in the case already cited, as, for instance, the frame in a saw-mill which advances the log regularly to meet the saw, and the saw which saws the log. The two co-operate and are simultaneous in their joint action of sawing through the whole log. Or in the sewing-machine, where one part advances the cloth and another part forms the stitches, the action being simultaneous in carrying on a continuous sewing. A stem-winding watch-key is another instance. The office of the stem is to hold the watch or hang the chain to the watch; the office of the key is to wind it. When the stem is made the key, the joint duty of holding the chain and winding the watch is performed by the same instrument. A double effect is produced, or a double duty performed, by the combined result. In these and numerous like cases the parts co-operate in producing the final effect; sometimes simultaneously, sometimes successively. The result comes from the combined effect of the several parts, not simply from the separate action of each. In this case there is no joint operation or effect in the construction of the railway car and the oil-tank combined which is in any manner due from the simultaneous or successive action of the two as combined. It is a mere aggregation of old elements, producing no new result by the combination.

I deem it unnecessary to notice the contention of complainant's counsel relative to the peculiar construction of the car, further than to say that I have carefully examined this question, and, while it may be admitted, for the purpose of this decision, that the construction is such as to distinguish this case in some respects from *Densmore v. Schofield*, 102 U. S. 375, which it is contended was for a claim for “the combination of a tank and a car, however united,” it is not sufficient, in my opinion, to take this case out of the rule as stated in the other cases to which I have referred. I have not, in the consideration of this case, overlooked the fact so frequently announced that patents for inventions should always be liberally construed, and all doubts, if any exist, should be

solved in favor of the patentee. I realize to the fullest extent the importance and necessity of upholding, sustaining, and encouraging the inventive skill and genius of the country. To quote the language of the supreme court of the United States:

"Patentees, as a class, are public benefactors, and their rights should be protected. But the public has rights also. The rights of both should be upheld and enforced by an equally firm hand whenever they come under judicial consideration."

The bill is dismissed.

MORSS v. DOMESTIC SEWING-MACH. Co.

(Circuit Court, D. Massachusetts. November 2, 1891.)

PATENTS FOR INVENTIONS—INFRINGEMENTS—EQUIVALENTS—DRESS-FORMS.

Claim 1 of letters patent No. 233,239, granted October 12, 1880, to John Hall, for an improvement in dress-forms, whereby they may be made more readily adjustable to the varying styles and sizes of dresses, was for "the combination, with ribs, *c*, of the springs, *h*, each pair of springs having their upper ends secured to a single rib, and their lower ends to the two ribs next the said single rib, substantially as and for the purpose specified." The specifications show the ribs to be divided into sections, with the two springs attached to the upper section, and spreading downwards to the adjoining ribs; and expressly disclaim as new the stretchers, blocks, rests, and band, and their operation to expand and contract the dress-form at pleasure. *Held*, that the patent was limited to the specific device, and that the equivalent thereof was not contained in the patent of November 29, 1887, to William H. Knapp, having double ribs composed of a single U-shaped wire extending in an unbroken piece their entire length, and rigidly attached to a segmented waist-band.

In Equity. Suit for infringement of patent.

Charles F. Perkins and Payson E. Tucker, for complainant.

John Dane, Jr., for defendant.

COURT, J. This is a suit brought for infringement of letters patent No. 233,239, granted to John Hall, October 12, 1880, for a new and useful improvement in dress-forms. Hall was also the inventor of an adjustable dress-form, embodied in a patent of the same date as the one in suit. The patent in suit is for an improvement on this prior invention, whereby, by means of springs attached to the ribs, the form is made more adjustable. The specification says:

"This invention relates to improved means for providing the ribs of a dress-form with the desired spring and elasticity necessary in order to make the dress-form adjustable, so as to conform to varying sizes, styles, etc., of dresses.

* * * The ribs, *c*, instead of extending each in an unbroken piece for the entire length of the skirt, are provided with springs, *h*, *h*; both ribs and springs being preferably of wood. Each rib, *c*, is provided with two springs, *h*, extending to the next adjacent ribs; the rib being beveled, so as to allow the springs to set at the angle shown. * * * It will be noticed that in the rear portion of the dress-form the springs, *h*, are cut off immediately after extending a trifle below the lower bands, *k*, while in front they are allowed to extend down while the ribs, *c*, are cut off. The effect is the same in either

case; as below the lower bands, *k*, the springs, *h*, cease to be springs, and perform the function only of ribs. * * * By means of the application of the springs, *h*, to the ribs, strength and firmness are secured, and much better elasticity and spring are produced than when the dress-form relied entirely upon the elasticity of an unbroken rib."

The first claim, which is alone in controversy, is as follows:

"(1) In a dress-form, the combination; with ribs, *c*, of the springs, *h*, each pair of springs having their upper ends secured to a single rib, and their lower ends to the two ribs next the said single rib, substantially as and for the purpose specified."

The patentee expressly disclaims in his specification, as not new in this invention, the stretchers, blocks, rests, and band, and their operation to expand and contract the dress-form at pleasure; in other words, he expressly limits himself to certain specific improvements in an adjustable dress-form. The improvement covered by the first claim is therefore limited to the combination of ribs having springs so arranged that each pair of springs have their upper ends secured to a single rib, and their lower ends spread out to the two ribs adjoining.

The dress-form of the defendant is constructed according to letters patent granted November 29, 1887, to William H. Knapp. A comparison of the Knapp dress-form with that described in the Hall patent fails to disclose the employment of such a combination of ribs and springs as embody the invention of Hall. The ribs in defendant's dress-form are composed of a single wire in such manner as to form a double rib, being U-shaped at the lower ends, and extending in an unbroken piece their entire length. The ribs are supported in position by being rigidly attached to a waist-band divided into segments; this segment waist-band serving the purpose of the band, *g*, of the Hall patent. In the Hall patent the ribs are divided into sections, and two springs are attached to the upper sections. This form of ribs, with the springs attached, is not found in the defendant's device. There is nothing in defendant's structure which corresponds, or which is the equivalent, within the meaning of the patent law, of the peculiarly constructed ribs and springs of the Hall patent. It certainly requires all the ingenuity of the complainant's expert to show that the unbroken wire rib of the Knapp dress-form is the same or the fair equivalent of the rib split into sections, and the springs attached thereto of the Hall patent. The ribs in defendant's form are continuous from waist-band to base. They have no springs connecting sections of ribs. If the ribs, or any portion thereof, are to be considered as springs, they have no connection with ribs on either side. Bearing in mind that the Hall patent is only for an improvement in adjustable dress-forms, I am of opinion that the defendant does not infringe the first claim of the patent, and that the bill must be dismissed.

Bill dismissed.

BROWN *et al.* v. YEATS *et al.*¹

(District Court, S. D. New York. November 3, 1891.)

DEMURRAGE—BROKERS' COMMISSIONS—GROSS AMOUNT OF CHARTER.

Where a charter provided for a commission to the ship-brokers of 5 per cent. "on the gross amount of charter," and also contained a stipulation allowing a certain sum daily for any detention by default of charterers, *held*, that commissions were due the brokers on demurrage collected under the detention clause of the charter, as well as on the freight.

In Admiralty. Suit to recover ship-brokers' commissions.

Owen, Gray & Sturgis, for libelants.

Wing, Shoudy & Putnam, (C. C. Burlingham, of counsel,) for respondents.

BROWN, J. The libelants, as ship-brokers, effected in behalf of the respondents a charter of their ship the *Alex. Yeats*, which contained a clause providing that "a commission of 5 per cent. on gross amount of this charter" should be due on the signing thereof. The charter was for a voyage from Manilla to New York, and contained a stipulation allowing 45 lay days for loading, and for customary dispatch on discharge; and for any detention by default of charterers, \$106.40 per day. The demurrage collected under this clause of the charter at Manilla amounted to \$24,046.40, and the freight collected amounted to \$15,308.11. The libelants, having agreed to allow two-thirds of their commissions under the charter to the respondents' agents, now claim their one-third of the stipulated commissions on the whole amount of freight and demurrage collected under the charter. The respondents paid into court the proportion of the commissions on freight, but contest their liability for commissions on the amount collected for demurrage.

I cannot sustain the defense. The charter expressly provides for commissions "on the gross amount of this charter." That expression fairly and naturally imports commissions upon the gross amount earned by the ship under the provisions of the charter. The word "demurrage" is not used in the charter. But the provision for the payment of a specified sum per day for any detention of the ship, though in the nature of demurrage, is one of the express contract stipulations of the charter, just as explicit as the provision for the payment of freight at a specified rate. The sum collected for detention is not by way of damages or penalty, but for the possession and use of the ship at a rate specifically agreed on. So far as I can see, there is no reason for discriminating, as respects the right to commissions, between any of the provisions of the charter under which the vessel obtains compensation. So far as the language of the charter goes, freight or dead freight might be excluded as well as demurrage.

The main consideration urged against this view is the further provision of the charter that the commissions were due "on the signing hereof;"

¹Reported by Edward G. Benedict, Esq., of the New York bar.

whereas, the claim for demurrage, it is said, could only accrue at a future time, after the detention of the vessel had occurred. But this argument, if valid, would apply to the freight as well; for the gross freight was not fixed, and could not be determined, at the time when the charter was signed, inasmuch as it gave an option to the vessel in regard to a considerable amount of the cargo at different rates of freight, and upon the exercise of this option the gross amount of freight depended.

The form of charter used in this case is a very common one, under circumstances like the present. The word "due" is plainly here used in the sense of obligation incurred, which was fixed and vested from the time of the signing of the charter, although the amount that might become payable under the different clauses of the charter, whether of freight, dead freight, or demurrage, was not then determinable. The obligation was *debitum in præsenti, solvendum in futuro*. The reason for the use of the word "due" is further explained in the evidence to be in order that the commissions agreed upon should become an insurable interest, by being made a fixed obligation of the ship.

The evidence further shows a very long custom in this country for the payment of commissions on demurrage accruing under stipulations of the charter with clauses like the present. But I do not regard this evidence of custom as essential to the libelants' claim. It was in evidence that the practice in England has for some time been to provide expressly for commissions on freight, dead freight, and demurrage, and that latterly that practice has been creeping into use with some of the ship agents here who are engaged in the English trade. Such an express clause would in one respect extend further than the present charter, since it would entitle brokers to commissions on demurrage earned in cases where the charter did not contain any provision as respects demurrage. In that case demurrage might not be covered by a clause like the present, which provides only for commissions "on the gross amount of this charter." Where the charter contains an express stipulation for demurrage at a specified rate, it is one of the subjects of the broker's negotiations; the amount earned by the vessel under the stipulation is her charter compensation for the use of the vessel beyond the time stipulated, and is within the contract exactly as much as the freight itself. In such cases, the phrase here used is of the same import as if the word "demurrage" were expressly used. Decree for the libelants, with interest and costs.

SORENSIN *et al.* v. KEYSER.¹

(District Court, S. D. Mississippi. September 21, 1891.)

DEMURRAGE—EXCEPTIONS IN CHARTER-PARTY.

Where a charter-party allows a certain number of days for delivery of a cargo, and excludes from computation therein all time lost by reason of flood, drought, storm, and any extraordinary occurrence beyond control of the charterer, and the charterer fails to deliver his cargo within such time because of storms and a drought which affects the river, which is the main source of supply at the port of loading, he is not liable for demurrage. *Paterson v. Dakin*, 31 Fed. Rep. 682, followed, and *Grant v. Coverdale*, L. R. 9 App. Cas. 470, distinguished.

In Admiralty. Libel *in personam*.

Rouse & Grant, for libelants.

Ford & Ford and John C. Avery, for respondent.

TOULMIN, J. This is a libel *in personam* for demurrage. The libelants are the owners of the bark *Urania*, which had been chartered to receive on-board at Ship island a cargo of timber. By the charter-party the charterer undertook to deliver the cargo at port of loading in 27 working days, which were allowed him for "actual delivery of cargo along-side." The charter-party stipulates that in the computation of the days for delivering the cargo shall be excluded any time lost by reason of drought, floods, storms, or any extraordinary occurrence beyond the control of the charterer. Notice of the ship's readiness to receive cargo was given on January 7, 1890, and the lay-days stipulated for would have expired February 12, 1890. Delivery of cargo began on February 11, 1890, and was not completed until March 30, 1890. The defense is that by reason of drought and storms delivery of cargo was delayed, and that all the time lost was by reason of these extraordinary occurrences, beyond the control of defendant; and that, excluding such lost time in the computation of the days allowed for delivering the cargo, 27 working days were not consumed in delivering the cargo at the port of loading. The evidence in this case is without conflict. It shows that, according to the custom and usual course of business, vessels chartered for Ship island obtain timber for their cargoes from the Pascagoula river and its tributaries by way of Moss point. It shows that when timber is brought for such cargoes from Mobile and other points it is for some exceptional reason, and is done at extraordinary risk and expense. It shows that prior to the chartering of the bark *Urania* the defendant had purchased and contracted to purchase much more timber than was required to load her and the other vessels he had chartered for Ship island and at about the same time, and that the delay in the delivery to the vessel of the cargo contracted for was by reason of an extraordinary drought that prevailed throughout the extent of country, affecting the rivers and streams from which the intended cargo was to be obtained; that this drought prevailed for several months before the arrival of the

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar

vessel, and continued for some time after her arrival; and also that some time was lost by reason of storms that prevailed during the laying days of the vessel.

The question presented in this case, and the only real issue raised in it, was considered and passed on in the case of *Paterson v. Dakin*, 31 Fed. Rep. 682. The facts of the two cases are about identical. I have seen no reason to change the views expressed in *Paterson v. Dakin*, and I cite the opinion in that case to sustain the conclusion reached by me in this one,—that under the exceptions in the charter-party, and on the other proof in the case, the defendant is not liable for the demurrage claimed. The proctors for libelants have referred to the case of *Grant v. Coverdale*, L. R. 9 App. Cas. 470, as holding a different view from that expressed in *Paterson v. Dakin*. I have carefully examined the case of *Grant v. Coverdale*, and I think that it is clearly distinguishable from the case at bar. In the one case the charter-party provides that "time to commence from the vessel being ready to load and unload, and ten days on demurrage over and above the said lay-days at £40 a day, (except in case of hands striking work or frosts or floods or any other unavoidable accidents preventing the loading, in which case owner to have the option of employing the steamer in some short voyage trade,)" etc. There the exception is limited to accidents preventing the "loading,"—the actual putting on board of the cargo,—the very act of loading. As said by a member of the court: "The exception applies only where the accident prevents the loading, and not where it prevents or retards the transit or conveyance of the cargo to the place of loading." There the shipper took on himself all the risks consequent upon delay in transit. In the other case (the one now before the court) the charter-party provides that 27 working days are to be allowed in which to deliver cargo at the port of loading, which is understood to mean "actual delivery of cargo along-side;" and that in the computation of the days allowed for delivering the cargo shall be excluded any time lost by reason of drought, floods, storms, or any extraordinary occurrence beyond the control of the charterers. The exception here applies where the accident or extraordinary occurrence prevents the delivering the cargo,—where such occurrence prevents or retards the transit or conveyance of the cargo to the place of loading. It is apparent that this exception was put in the contract for the benefit and protection of the charterer, and that he took on himself no risks consequent upon delay in transit or conveyance caused by drought, floods, storms, or any extraordinary occurrence beyond his control. In *Hudson v. Ede*, 8 Best & S. 631, "the charterer was bound to load in 30 days, detention by ice excepted; and detention in the river Danube many miles above the port excused him, though the port itself was free; it being usual to rely on the river for transportation." In that case the court say that the exception in a charter-party, whereby a certain number of lay-days is allowed to the charterer, but detention by ice is not to be reckoned as such, applies where the ice not only renders access to the ship impracticable in the port itself, but blocks up a river by means of which alone the in-

tended cargo can be conveyed to the port. *Hudson v. Ede, supra*, affirmed in L. R. 3 Q. B. 412; *Eleven Hundred Tons of Coal*, 12 Fed. Rep. 185. As I am of opinion that the issue must be found for the defendant, there will be an order entered dismissing the libel at libelants' cost.

THE MASCOTTE.¹

CARTER *et al.* v. THE MASCOTTE, (two cases.)

(District Court, S. D. New York. October 31, 1891.)

1. CARRIERS—DAMAGE TO CARGO—UNEXPLAINED DAMAGE.

Under the ordinary bill of lading, the burden being on the carrier to show that damage to cargo arises from an excepted peril, the carrier is liable when he has received cargo in good condition, and delivered it damaged, and is unable to explain how the damage occurred.

2. SAME—PLACE OF DELIVERY—TEA CARGOES—CUSTOM.

Tea cargoes consigned to the "port of New York" are, by custom, discharged on the New York side of the East river. It has also been customary, when there is difficulty in procuring a berth in New York, for the ship to give notice thereof to the consignees of the tea, that they may have opportunity of finding the ship a berth in New York. The ship *Mascotte*, with tea and other cargo, arrived in the port of New York and was entered at the custom-house at 10 o'clock Monday, and could have begun to discharge 48 hours after. At half past 1 on Wednesday, no berth having been found for her in New York by her agents, she was sent to Brooklyn; two consignees of other parts of the cargo of same tea assenting thereto. Shortly afterwards her agents were notified of a berth in New York. No notice of her inability to find a berth in New York was given to the principal consignees of the tea. *Held*, that the ship should bear the extra expense to the consignees of tea caused by transporting the cargo from Brooklyn to New York. The Port Adelaide, 38 Fed. Rep. 753.

In Admiralty. Suit to recover for damage to cargo and extra expense caused by ship's docking in Brooklyn.

Owen, Gray & Sturges, for libelants.

Convers & Kirlin, for claimants.

BROWN, J. 1. As respects the claim for damage to tea caused by oil, the bill of lading, as well as the master's testimony, shows that the chests were received on board in good condition. Some of the chests on delivery were, beyond doubt, oil-stained and defaced. All that the claimants can do to exonerate the ship has doubtless been done; but, after all, the evidence shows nothing more than that they cannot explain how the stains and defacing occurred. It negatives certain causes that might, under some circumstances, have produced the damage; but this is not, I think, sufficient to release the ship from her legal obligation. The ship has possession and control of the goods from the time they are delivered into her custody. If the goods are received in good condition, as this bill of lading shows they were, she warrants their delivery in like

¹Reported by Edward G. Benedict, Esq., of the New York bar.

condition, unless damaged through the act of God, public enemies, the dangers of the seas, or through some other excepted cause. *The Montana, Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 437, 9 Sup. Ct. Rep. 469. The burden of showing that the damage arose from such an excepted cause is upon the ship. *Nelson v. Woodruff*, 1 Black, 156. As the Mascotte's evidence does not show this, but merely leaves the damage unexplained, I must therefore hold the ship liable for this item.

2. As respects the extra ferriage caused by the delivery of the tea in Brooklyn, instead of within the tea district in New York, I think the libelants are also entitled to recover. The evidence in the present case, like that in the case of *The Port Adelaide*, 38 Fed. Rep. 753, leaves no doubt of the long-established custom that cargoes of tea shipped by the bill of lading for "the port of New York" are to be delivered within the tea district on the New York side of the East river, and not in Brooklyn. The Mascotte, in the present case, had sulphur and rice for part of her cargo, and the owners of those parts of the cargo and of a little tea consented to the discharge of the steamer in Brooklyn. I do not perceive, however, how that circumstance can impair the right of the other consignees of tea forming an important part, if not the major part, of the whole cargo, to have a delivery of their goods made in accordance with the meaning of the bill of lading given for them, as that meaning is fixed by the long-prevailing usage, or how the obligation of the ship is changed in respect thereto. It is only within a short period that mixed cargoes containing tea have been brought from China; and not more than half a dozen vessels are mentioned as having gone to Brooklyn with such cargoes, when, after several days, it had been found impossible to obtain a berth on the New York side. Even in these few cases, the most that was claimed on behalf of the vessel was that she should be allowed to go to Brooklyn after the lapse of three or four days from the time of her entry at the custom-house. Until the lapse of 48 hours thereafter, delivery could not be commenced. In the present case the vessel was entered at 10 o'clock on Monday. At half past 1 on the Wednesday following a berth was engaged in Brooklyn, her agents in the mean time not having found a berth in New York. Within an hour or two afterwards, if not on the day before, (about which there is some dispute in the evidence,) they were notified of a berth ready for the ship in New York, which was declined. The evidence shows that since the case of *The Port Adelaide* the number of docks for the discharge of tea on the New York side within the tea district has been somewhat diminished by the appropriation of certain docks for railroad uses. In the change that circumstances enforce, it may be that, notwithstanding a prior custom, a vessel is not bound to wait unreasonably in order to discharge within the customary limit, where these limits themselves have been abridged. When difficulty has been experienced heretofore in finding a berth within the tea district, the evidence shows that the practice has been to give notice thereof to the consignees of tea, that they may have an opportunity to assist in finding such a berth before the ship goes to

Brooklyn. Had this practice been followed in this instance, the evidence leaves no doubt that the vessel would have been berthed in New York before she reached her berth in Brooklyn. Such a practice is a reasonable mode of enabling consignees to save themselves from the extra expense of a discharge elsewhere, and outside of the customary limits; and where such a berth in fact might, upon inquiry of the consignees, have been found within a reasonable time, had notice been given to the consignees of the inability of the ship to find a berth, and of the proposal to go to Brooklyn, it is the ship, and not the consignees of tea, who ought to pay the extra expense of going there, whatever may be the convenience to the ship, or to the consignees of other goods that the ship may have chosen to take on board. Decrees for the libelants in both cases, with costs.

THE LUCY P. MILLER.¹

HALL v. THE LUCY P. MILLER.

(District Court, S. D. New York. October 21, 1891.)

SALVAGE—STANDING BY VESSEL AGROUND.

A steamer ran aground in the East river, near Hell Gate, early in the evening, during a dense fog. Her master signaled for help, and libelant's tug went to her assistance, and lay by her all night, most of the time pumping to keep down the water in her hold. No other tugs appeared during the night, though distress signals were occasionally sounded. It was important for the steamer to have aid at hand during the night, in case of emergency, and to keep down the water in her hold. In the morning, when the fog lifted, other tugs came, and all together took the steamer off the rocks to a place of safety. The value of the steamer and her cargo was about \$38,000. *Held*, that the service of the tug was a salvage service, and she was allowed (the other claims being settled) an award of \$750.

In Admiralty. Suit to recover salvage.

Peter S. Carter, for libelant.

Goodrich, Deady & Goodrich, for respondent.

BROWN, J. Early in the evening of April 15, 1891, the steamer Lucy P. Miller, in going east through Hell Gate, against the ebb-tide, just after she had passed Hallett's point, was caught by a sudden and dense fog, and ran aground close to Hog's Back, heading nearly parallel therewith to the eastward. It subsequently appeared that she had run in between two rocks, which crushed in her bottom, and made holes forward on each side about six or eight feet from her keel, through which she made water rapidly. Her master sounded signals for help, and the libelant's tug, H. W. Temple, which was lying at anchor at Astoria cove, in response to the signals, went to the Miller's assistance, reaching her about 8 o'clock p. m. The tug was fitted up with the usual wreck-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

ing pumps, and lay by the Miller all night, most of the time pumping, for the purpose of keeping down the water in the hold. The Miller had a cargo of mixed merchandise. The cargo in the lower hold was submerged, but little of the cargo between decks was wet. Signals were occasionally sounded during the night; but no other tug came near until early the next morning, when the fog cleared up, and the steam-tug Fuller, approaching, was called in to assist. The Temple was not able alone to clear the hold of water, although it was claimed that she reduced its height in the ship. The Fuller was a larger vessel, with larger pumps, and the two together soon pumped out the water. They were easily able to keep her free of water, so that on the following flood, at about 3 P. M., she was hauled off, with the assistance of two other tugs, and taken to pier 49, where she was discharged during the following night. The claimant, having settled with the other tugs engaged, contends that the libellant is entitled only to a compensation by the hour, but slightly above that of an ordinary towage service. It is urged that the Temple's services were of no actual benefit to the steamer; and that at the moment when the steamer was hauled off the rocks the Temple did not have hold of her. The last circumstance is true; but only because, at the moment when the other tugs were preparing to pull the Miller off, the Temple, in accordance with the orders of the master of the Miller, was moving around from her port side to her starboard side, where she joined with the others in taking her to pier 49.

The service was, I think, essentially different from a towage service, and is not to be compensated for upon that basis only. The place where the Miller grounded was one of the most dangerous in Hell Gate. Her precise position and the precise danger could not be known in the dense fog. The libellant thought there was danger of her rolling over to starboard, as the tide went down; but, as it subsequently appeared that she was resting upon rocks on the starboard side also, that danger did not exist. But the approach to a vessel in that position through a dense fog, and in a powerful tide-way setting upon the rocks of Hog's Back, was itself a matter attended with some danger to the Temple; and, though skillful and careful management might doubtless avoid injury, as the Temple avoided it, still this element of danger is by no means to be overlooked, under such circumstances; and the fact that no other tug responded to the signals while the fog lasted is significant. The Temple might, no doubt, have pulled the Miller off the rocks; but she alone could not handle her in a strong tide, and the fog made it impracticable to do anything more than the Temple did until the fog cleared, and the other vessels came up, on the following day. In the mean time, however, it was important that the Miller should have a tug by her to keep the water down as much as possible, and to be ready to give her assistance in any emergency that might arise. This service the Temple rendered promptly, and, as I have said, not without some danger and difficulty in the dense fog; and she was constantly at the service of the master of the Fuller. Without referring to other details shown in the testimony, and considering that the value of the vessel and cargo was

about equal, amounting altogether to \$38,000, I allow to the libellant \$750 against both,—one-third to go to the officers and crew of the tug in proportion to their wages, the other two-thirds to her owners,—with costs.

CARROLL v. WALTON & WHANN CO.

(District Court, D. Delaware. September 23, 1891.)

PRINCIPAL AND AGENT—SCOPE OF AUTHORITY—PURCHASE THROUGH BROKERS.

A Wilmington firm empowered certain New York brokers to purchase a cargo of "refuse salt" equal to a sample received from the latter, the cargo then being in transit from Canada. The purchase having been made, the sellers billed the article to the purchasers as "salt-cake," which is an entirely different article. The latter notified their brokers of the mistake, who presented the matter to the sellers. The latter assured them that the salt was like the sample, which representation they telegraphed to the purchasers. The cargo having arrived in New York, the purchasers requested the brokers to examine it, which the latter refused to do, because they were ignorant of the difference between the two articles. Thereupon the purchasers wrote them that the matter appeared to be straight, and ordered them to secure a boat, and forward the salt in it, which was done; but on its arrival the article was found to be salt-cake, and the purchasers refused to receive it. *Held*, that the brokers acted within their authority, and an injury having resulted to the boat from the acids in the salt-cake, in consequence of the delay caused by the refusal to receive it, the purchasers were liable therefor, as well as for freight and demurrage.

In Admiralty. Libel *in personam* by Thomas Carroll against the Walton & Whann Company.

Hyland & Zabriskie, for libellant.

Benj. Nields, for respondents.

WALES, J. The libellant sues to recover freight, demurrage, and damages. His claim is founded on a charter-party, which reads as follows:

"JUNE 11, 1889.

"We have this day chartered for our principals, the Walton & Whann Co., Wilmington, Del., the steam canal-boat J. H. Taylor, to take about one hundred and sixty-five (165) tons of refuse salt-cake in bulk from the canal-boat W. E. Duryea, at pier 6, East river, to the works of the Walton & Whann Co., Wilmington, Del., at the rate of one dollar (\$1.00) per ton of 2,240 lbs.; charterers to load and discharge boat, and captain to trim boat, to insure well; vessel to be loaded with customary dispatch.

"HELLER, HIRSH & Co.,

"S. G.,

"Agents.

"THOMAS CARROLL,

"WM. DENNY,

"Agt.

"Thro Mr. Denny, 10 South St."

The Duryea's cargo, which had been purchased for the defendants by their agents, Heller, Hirsh & Co., was taken on board of the Taylor, and carried to Wilmington, where the libellant reported his arrival and

readiness to discharge to the defendants, who refused to accept a delivery of or permit the cargo to be landed at their wharves; assigning as a reason for their refusal that the cargo was not like the sample by which they had purchased, and that their New York agents had exceeded their authority in chartering the libelant's boat. In consequence of this action on the part of the defendants, the libelant alleges that he was detained at Wilmington for several days before he could dispose of his cargo by storing it in a warehouse, and that in the mean time his vessel was injured by the action of the acid contained in the cargo, which had eaten away her oakum and softened her lining.

The answer of the defendants repudiates the contracts made by their agents, both in buying the Duryea's cargo and in chartering the Taylor. The question presented by the pleadings, and discussed at the hearing, is one of agency. The defense is that Heller, Hirsh & Co., who had previously sent a sample of refuse salt to the defendants, were instructed by the latter to buy a quantity similar in quality to the sample, and to ship the same to Wilmington, instead of doing which they had bought an entirely different article, which was of small value, and of no use to the defendants; and that as Heller, Hirsh & Co. acted as special agents only, and under particular instructions, the libelant contracted with them at his peril, and cannot recover in this suit. The evidence covers many pages, including copies of letters and telegrams which passed between the defendants and their New York agents in relation to this business; and after a careful examination of these papers, in connection with the oral testimony, I have come to the conclusion that the defendants' agents acted strictly within the authority conferred on them by their principals, both in the purchase and in the transshipment of the Duryea's cargo.

Heller, Hirsh & Co. were commission merchants and brokers in chemicals and fertilizer materials in New York, and had had dealings with the defendants for many years prior to this transaction. On May 1, 1889, the defendants wrote to Heller, Hirsh & Co., inquiring: "What have you in the way of refuse salt that you can offer for shipment during the present month?" On the next day, Heller, Hirsh & Co. replied: "By express to-night we are sending you sample of refuse salt for your examination, and if you can use it, will you please let us have your best offer for 200/300 tons, delivered Wilmington by canal-boat." After some further correspondence, a price was agreed on; Heller, Hirsh & Co. were instructed to buy; and the following sales-note was sent to the defendants:

[Copy.]

"NEW YORK, May 7, 1889.

"Sold, for account of Mess. E. S. Kuh & Tuska, to the Walton & Whann Co., Wilmington, Del., two hundred to two hundred and fifty (200/250) tons of refuse salt, in bulk, similar to sample sent, at the rate of three dollars and fifty cents (\$3.50) per gross ton, f. o. b. vessel, New York.

"HELLER, HIRSH & CO., Brokers.

"Terms Cash."

At the date of this contract the salt was in Canada, or on its way from there to New York, in the *W. E. Duryea*. Before the cargo was transhipped to the *J. E. Taylor*, it was billed to the defendants by Kuh & Tuska as salt-cake, and Heller, Hirsh & Co. were immediately notified by their principals that their bargain was for refuse salt, and not for salt-cake. Heller, Hirsh & Co. at once called the attention of Kuh & Tuska to this mistake, and the latter firm assured them that the salt was just like the sample, and this representation was repeated to the defendants by telegram from their agents, June 10, 1889. On the same day Heller, Hirsh & Co. wrote to the defendants: "We informed Messrs. K. & T. that you claimed to have purchased refuse salt, and they inform us that this is refuse salt like sample furnished by them and by which you bought." By this time the *Duryea* had arrived at New York, and the defendants requested their agents to examine her cargo, and ascertain its quality and condition. Heller, Hirsh & Co. declined to comply with this request, because, not being familiar with the article, and never having had any experience in handling it, they would not be competent to decide whether it was what it was represented to be or not. The defendants, having been thus put on their guard as to the character of the cargo, accepted the statements of Kuh & Tuska that it was refuse salt, similar to sample, and wrote to Heller, Hirsh & Co., June 14, 1889: "All now appears to be straight regarding the salt, providing the salt is in good order as discharged in New York from the original barge." What was meant by "good order" is shown from other testimony to be that the cargo should not be damaged by dampness caused by leakage of the vessel.

Having ratified the action of their agents in the purchase of the *Duryea's* cargo, the defendants next instructed them to employ the captain of that boat to take the cargo on to Wilmington without breaking bulk, if he would do it on reasonable terms, and, failing to make that arrangement, to secure another vessel. The captain of the *Duryea* demanded an exorbitant rate, and Heller, Hirsh & Co. chartered the *Taylor*. The evidence is not conflicting or contradictory in reference to any material fact. The cargo, on its arrival at Wilmington, turned out to be salt-cake, and not refuse salt. The two materials are similar in color, and, when pulverized, are so much alike in appearance that a casual observer might think they were the same. Refuse salt is damaged, or impure common salt. Salt-cake is a refuse produced in the manufacture of muriatic acid. Refuse salt is not a fertilizer material, in any acceptance of that term, and is used as a mechanical ingredient only, by the manufacturers of fertilizers, who also sometimes use salt-cake, but for a different purpose. The libellant says that he did not know the difference between the two, and that he would not have taken the *Duryea's* cargo on board of his boat if he had known what it was. His bill of lading calls for "a lot of refuse salt in bulk." Heller, Hirsh & Co. were also ignorant of the appearance and qualities of these articles, and prudently abstained from passing judgment on the cargo. All they could do, and all

they did, in making the purchase for the defendants, was to communicate to them the representations made by Kuh & Tuska, and the defendants unfortunately relied on those representations, instead of having a competent person in New York to inspect the cargo, and report upon its nature and quality. There is no doubt that gross carelessness, or intentional fraud, was committed by some one in causing a cargo of salt-cake to be put on the Taylor, and sent to the defendants; but, whether it was a mistake or a trick, the libelant was as innocent of it as were the defendants or their agents. As I view the evidence, Kuh & Tuska would seem to be liable to the defendants. They certainly are not to the libelant, as there was no privity of contract between them and him. Neither could the libelant seek redress from Heller, Hirsh & Co., because they signed the charter-party as agents for the defendants, and acted within the scope of their authority. *Whitney v. Wyman*, 101 U. S. 392. The libelant, therefore, has no other recourse than to the defendants. If I have not misunderstood the evidence, it proves that the defendants, through their specially instructed agents in New York, bought the Duryea's cargo, and employed the libelant's boat to carry that identical cargo to Wilmington. On this proof, a decree must be entered for the libelant, with an order of reference to ascertain the amounts respectively due to him for freight, demurrage and damages.

THE SANTEE.

SANDERS v. THE SANTEE.

(District Court, D. South Carolina. November 3, 1891.)

COLLISION—STEAM AND SAIL—DUTY OF STEAMER.

A steamer meeting a sloop on a river at night, where there is ample room, must presume that the latter will maintain its course, and must keep out of the way; and, if she attempts to pass so near as to cause apparent danger of collision, she is solely in fault, although the sloop, under stress of excitement, commits an error by suddenly changing its course.

In Admiralty. Libel by Samuel Sanders against the steamer Santee for collision.

J. F. Ficken, for libelant.

Smythe & Lee, for claimant.

SIMONTON, J. The libelant is the owner of the sloop *E. C. Holland*, a small vessel engaged in carrying freight about Charleston harbor and the adjacent streams and bays. On the night of 10th February last she came into collision with the steamer *Santee* in Ashley river. The sloop was proceeding up the river under mainsail and jib, with a very

light breeze, not exceeding three miles an hour. The steamer was proceeding down the river, against the tide. The sloop had up her lights. Both vessels saw each other for some time before the collision. The collision was sudden and unexpected. The sloop struck the steamer at right angles on her port side, on the wheel-house in front of the wheel, and her bowsprit penetrated the outer bulk-head of the steamer, passed through the berth of the engineer, and broke the inner bulk-head. The sloop was loaded below and on deck with bricks. She was seriously damaged. The steamer sustained no other injury. The law of this case is very simple. We have only to apply the facts. Navigation rule 20, Rev. St. U. S. 4233. "If two vessels, one of which is a sail-vessel, and the other a steam-vessel, are proceeding in such direction as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel." Where a steam and sailing vessel approach each other, so as to involve risk of collision, the latter must keep her course, and the former must keep out of the way. The steamer may be managed upon the assumption that the sailer will keep her course. *The Free State*, 91 U. S. 200. An error or fault on the part of the sailer at the moment of collision, under the excitement caused by the imminent peril, will not absolve the steamer. *The Carroll*, 8 Wall. 302; *The Dexter*, 23 Wall. 89. The duty of avoiding collisions with sailing vessels being upon steamers, the fact of a collision raises a presumption of fault on the part of the steamer, and throws on her owners the burden of proving that those navigating her took all precautions proper under the circumstances, and that the collision was caused by the fault on the part of the sailer or inevitable accident. *The Oregon v. Rocca*, 18 How. 570; *The Colorado*, 91 U. S. 692.

The sloop had no other crew than the master and one man. The master is dead. The man has been examined,—an illiterate negro,—who, however, gives his evidence, to all appearance, endeavoring to tell the truth. On the other side, we have the testimony of the master of the steamer and the pilot, both men of intelligence and large experience. At the place of collision the river is about 600 yards wide, with deep water. The steamer, when struck, was about 250 yards from the west shore. The channel was on that shore, but there was enough water on either side of her. Capt. Hopkins, master of the steamer, thus gives the account of the collision:

"We left the Ashepoo Works on our way down to the city, and about opposite Lowndes' avenue we met this sloop, and had this collision. I saw her some time before the collision. I saw her red light. I was then in the pilot-house, and I gave orders to port the wheel. It was done. That was to give the sloop more room, to turn it (our bow) to the right, and bring the boat on our left; and then I took hold of the wheel, and gave it a little more room, so that we could run along with plenty of room to clear him when he came under our bow. *Question.* Did you lose sight of the red light? *Answer.* Just before he struck us I saw his green light. The boat changed her course very suddenly, under our bow. *Q.* When you saw the green light of the sloop did

you take any precautions to prevent the collision? A. Immediately stopped the boat and blew the whistle. Q. That did not prevent the collision? A. No."

Upon the cross-examination he stated that the sloop must have changed her course very suddenly. He adds that he had plenty of room, and, had he anticipated the collision, could have gone either to the east or west of her.

From this statement it appears that the red light of the sloop was seen, and that it remained in sight until just before the collision. So the sloop kept her course up to that point. That the green light appeared suddenly; and that, although the steamer was stopped immediately, this could not prevent the collision. It is manifest that the steamer ported her wheel too late. All that she could accomplish by it was to change her own direction, and, instead of coming down on the sloop bows on, she came broadside. No wonder the frightened negroes, seeing "them coming so straight on us," lost their heads and luffed. But this did not cause the collision, for between the time the green light was seen and the impact of these vessels nothing could prevent the collision. "When upon the whole case there is no decisive evidence of fault on the part of the sailing vessel, the steamer must answer for the collision, when no circumstances appear to show that the accident was inevitable. With plenty of sea-room, and in good weather, a steamer is bound to take the necessary measures in time to avoid a sailing vessel." *The City of Truro*, 35 Fed. Rep. 317.

As to the damages. The rule is stated in *The Baltimore*, 8 Wall. 385, *restitutio in integro*. All the items stated are allowed but three. As the charge has been made for another boat to take the place of the sloop while she was undergoing repairs, I cannot allow the wages of the crew during that time. Nor can I allow the expenses of libellant's witness when he was instructing counsel in this case. Nor the item of incidental expenses. Eliminate these, and let a decree be entered for the remainder, with costs.

ENGLEMAN TRANSP. Co. v. LONGWELL *et al.**(Circuit Court, W. D. Michigan, S. D. March 23, 1880.)***MORTGAGEE IN POSSESSION—ACCOUNTABILITY FOR RENTS.**

Where a mortgagee in possession of an undivided half interest in a milling property forms a partnership with another to carry on the business, she will be charged, on an accounting in equity, with the fair rental value of the half interest, notwithstanding that the business resulted disastrously.

In Equity. On an accounting.

WITHEY, J. Mrs. Longwell, one of the defendants, a mortgagee in the possession of the undivided half of premises, the conveyance being absolute in form, has been required to account for the net rents and profits. It turns out that she has received from one of the two parcels of real estate no rent, and claims, therefore, that she is not chargeable with rent. The title of an undivided half of the property, upon the face of the records of the county where the property was situated, was in Mrs. Longwell. Defendant Sherman owned the other half. She gave him a mortgage on her half to secure one-half of the costs of repairs which he made on one parcel of the property; Sherman agreeing to carry on the business of milling and flouring for five years from September, 1875, and pay to Mrs. Longwell one-quarter of the net profits, she to bear one-half of the losses, if any. Her quarter of profits Sherman was to apply towards paying her share of the advances made by him, secured by the mortgage on her undivided half. The business of milling proved disastrous. Instead of a profit, there was a loss; consequently there was no reduction of the mortgage given to Sherman.

Now it is claimed that Mrs. Longwell is not chargeable with any rents whatever, as she received none. We regard this view to be a misapprehension of the rule under the facts. Mrs. Longwell, as mortgagee in possession of the undivided one-half of the mill property, would not be accountable for rent if she had been unable to lease the property, or had failed, after judicious leasing, to collect rent; but when she entered into a partnership arrangement with Sherman to do a milling and flouring business with this mill property, (the rule would be the same if she had alone carried on the business,) and the venture turned out disastrously, a court of equity will not inquire, under such circumstances, whether there was profit or loss, but will charge her with the fair rental value of the premises over repairs, insurance, etc., and taxes paid. The master is therefore directed to ascertain what the fair net rental value of the undivided half of the mill was during the period of the accounting, in the condition it was after the improvements were made, and credit her with the cost of her share of the improvements beneficial to the freehold.

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McCLASKEY *et al.* v. BARR *et al.*

(Circuit Court, S. D. Ohio, W. D. November 10, 1891.)

1. FEDERAL AND STATE PRACTICE—LIS PENDENS—PARTITION.

Rev. St. Ohio, § 5055, providing that, "when the summons has been served or publication made, the action is pending, so as to charge third persons with notice of its pendency, and, while pending, no interest can be acquired by third persons in the subject-matter thereof as against plaintiff's title," is a rule of procedure, and not a rule of property, so as to be binding upon the federal courts in suits for partition brought in Ohio.

2. LIS PENDENS—PARTITION—EFFECT OF MAKING NEW PARTIES.

A suit for partition is *lis pendens*, from the time of serving the subpoena, as to all the interests in the lands as they shall be determined in the final decree; and the fact that new parties come in and establish a right to part of the interest claimed by the original complainants gives no ground of complaint to third persons who purchased after service of the subpoena, and before the new parties intervened.

3. PARTITION—NEW PARTIES DEFENDANT—ANSWERS AND CROSS-BILLS.

When, in a suit for partition brought by persons out of possession claiming by heirship a certain interest in the lands, other persons claiming part of such interest are made parties defendant, these latter may set up their claim by way of answer, and cross-bills are unnecessary; therefore any cross-bills filed for this purpose will be considered as answers, and the defendants in possession are not entitled to service of subpoena issued thereon.

4. SAME—COMPENSATION FOR IMPROVEMENTS—CROSS-BILL—FOLLOWING STATE PRACTICE.

When, in a partition suit in a federal court, title to an interest in the lands is established by persons not in possession, and the defendants wish to claim compensation for improvements, such claim must be set up by cross-bill, although the state statutes prescribe a different practice, since the federal courts do not follow the state practice in suits in equity.

5. SAME—DECREE—RECITING FINDINGS.

When, in a partition suit, persons not in possession have established title to a certain interest in the lands by proving heirship to a remote owner, the court may permit the findings as to their pedigree to be recited in the decree, when it deems such a course probably necessary to prevent further question as to the rights of the parties, notwithstanding that equity rule 86 declares that neither any part of the pleadings, "nor the report of any master, nor any prior proceedings shall be recited or stated in the decree."

6. EQUITY PRACTICE—OBJECTIONS NOT RAISED AT HEARING—WAIVER.

In a partition suit, mere formal and technical objections to testimony will not be allowed as taken at the hearing, when in fact they were not then taken, but were first raised as to part thereof in a brief submitted after the hearing, and as to the remainder when the settlement of the decree was under discussion. All such objections will be considered as waived.

In Equity. Suit for partition of lands.

Henry T. Fay, C. W. Cowen, Howard Ferris, and S. T. Crawford, for complainants.

R. A. Harrison, J. C. Harper, and J. L. Lincoln, for defendants.

Before JACKSON and SAGE, JJ.

SAGE, J. This cause is now before the court on questions arising with reference to the settling of the decree, a draft by complainants' counsel having been submitted, and also a written statement and brief on behalf of the defendants in possession, suggesting their objections and certain modifications desired by them.

The first objection is to the statement in the introductory paragraph of the complainants' draft that "this cause came on to be heard at the

term of April, to-wit, the 19th day of May, A. D. 1891." This statement is in accordance with the fact. The cause was heard on the 19th of May. Counsel for the defendants asked leave to prepare and file a brief, and leave was granted. After about 30 days they filed a printed brief of 236 pages. The cause was taken under consideration by the court, and an opinion prepared and filed on the 4th of August. Counsel for the complainants then prepared a draft of decree, and moved that it be entered. Upon the urgent objection of counsel for the defendants in possession, the matter was deferred until such time early in the October term as the court could give parties a hearing. Further delay was then obtained by counsel for the defendants in possession, and the presentation of the draft to the court thereby postponed until now. Meantime the path of the complainants was impeded by every obstruction which the ingenuity and learning of counsel for the defendants in possession could suggest, until there are wires in the grass, and knots, at almost every step. It is the purpose of the court by its decree to make the way clear, and to settle, so far as this court is concerned, the questions already passed upon in this cause, so as to put an end to further litigation. On the 23d of June, 1891, more than a month after the actual hearing, Emeline E. Bird, Bailey J. Ely, and Mary Miller *et al.* were made defendants, and on the 15th and 16th of July they filed their answers and cross-bills, which have not yet been heard nor considered. The statement of the date of the actual hearing is therefore inserted in the decree, that it may appear affirmatively that it occurred before these persons were made defendants.

The next objection to which we deem it necessary to refer specifically is to the setting forth in the decree of the pedigree of the complainants and the defendants not in possession who claim as co-tenants. It is urged that the recital of these matters of detail is contrary to equity rule 86.¹ *Putnam v. Day*, 22 Wall. at page 67, however, recognizes that the decree "may proceed to state conclusions of fact as well as of law, and often does so for the purpose of rendering the judgment of the court more clear and specific." The court regards this as a cause in which the decree should be so framed as to prevent further question or doubt as to the respective rights and interests of the parties, and remove, as far as it can be done by the proceedings herein, every cloud from the title. It therefore deems it proper that the findings be so set forth in the decree that neither in any future proceeding herein, nor in any future litigation, shall the parties or their privies be at liberty to reopen questions which have been heard and passed upon.

As to the correctness of the findings relating to pedigree, we do not propose to enter into details. The opinion of the court, filed August

¹Equity rule 86: "In drawing up decrees and orders, neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.: ' [Here insert the decree or order.] '"

4th, sustains the claim of the complainants and of the defendants not in possession that they are heirs of the brothers and sisters of William Barr, Sr., as set forth in the pleadings and as shown by the testimony. The decree expresses specifically what is really included in the general statement of the opinion. We will, however, refer to one matter upon which an objection is based, to-wit, that tracts 21, 22, and 23 are leaseholds, and that the fee is in the heirs of Margaret S. Gunnison, who are not parties in this cause. The answer to this objection is that the unknown heirs of M. S. Gunnison were made defendants in the cause while it was pending in the superior court of Cincinnati, and before its removal to this court, and were served by publication duly made in the Cincinnati Commercial Gazette, commencing on the 19th day of January, 1887, and continuing six consecutive weekly insertions, until and including the 23d of February, 1887.

The next objection is that between the date of service of the petition filed in the superior court and the filing of the amended original bill after the removal to this court, a number of defendants to the original petition in possession of distinct parcels of land conveyed the same by deeds in fee-simple to persons who have not been made defendants to the amended original bill, or in subsequent pleadings. In the petition filed in the superior court, the plaintiffs alleged that they owned an undivided fifth part of the premises, whereas in the amended original bill the complainants allege that the four original plaintiffs owned only an undivided tenth, and that the Lobdells, who were not made parties plaintiff until the amended original bill was filed, owned an undivided tenth. It is contended, therefore, that until the amended bill was filed the suit was *lis pendens* only as to the title of Sarah E. McClaskey, Sarah King, Marcus Love, and Laura Ella Love, the four original plaintiffs. In support of this contention, section 5055, Rev. St. Ohio, which reads as follows, is cited:

"When the summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency, and, while pending, no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title."

The proposition that under this provision, even if it were applicable in this cause, the cause is pending only as to the interest of the plaintiffs set forth in the petition for partition, is not well founded. "As against the plaintiff's title," means, not the title claimed in the pleading, but as finally determined by the adjudication of the court. The construction claimed is too narrow. It would so limit the law of *lis pendens* in its application to a partition case as to exclude from its operation every interest in the property, excepting that claimed by the plaintiff in his petition, which could not have been the intention of the legislature. The section referred to is part of the Code of Civil Procedure in the state of Ohio, and does not apply in this court in a suit in equity, nor is it a rule of property in such sense as to make it binding here. The very essence of a suit in partition is that it shall dispose of all the interests in the entire estate, and from the date of the service of the subpoena the

cause is *lis pendens* to such extent that the purchase of any parcel of the entire tract is subject to the rights of all parties to the suit as determined by the decree of the court. "Conveyances made pending a proceeding in partition will, like all other *pendente lite* conveyances, be controlled by the decree and judgment in the partition case, as will also incumbrances made *pendente lite*." Bennet, *Lis Pendens*, § 155. This we conceive to be the true construction of the law of *lis pendens* in the state courts, for, in our opinion, section 5055 is not inconsistent with such a construction. The principles which govern ordinary cases involving only the plaintiff's rights to the claim originally set up are quite different from those governing partition cases, where the subject-matter of the action is the division of real estate between the rightful owners holding undivided interests, and where the court cannot make partition, or grant the relief prayed for in the bill, without bringing in all the co-tenants, ascertaining their several rights, and assigning to each his or her interest in the property. It follows necessarily that a suit for partition is notice to every subsequent purchaser that the jurisdiction of the court has been invoked to make complete partition, and that, as a matter of law, the court must determine and allot the interest, not only of the claimants, but also of any and all other persons who may be entitled; and the case becomes *lis pendens* to protect the decree of the court, whatever it may be, as against intermediate purchasers. They are bound, as matter of law, to know that the court has a right to bring in new parties, or even to hold in abeyance certain interests until the heirs can be ascertained; and that the jurisdiction is invoked, not only to determine the rights of the claimants, but also the rights of all persons interested in the subject-matter. The law of *lis pendens* affects a purchaser, as was said by Lord CRANWORTH in *Bellamy v. Sabine*, 1 De Gex & J. 566, 578, "not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party." It has also been held that, as the doctrine operates in cases where there is no possibility of the purchaser having notice of the pendency of the suit, it rests upon considerations of public policy, and not on presumption of notice. *Newman v. Chapman*, 2 Rand. (Va.) 93. It is not material that the pleadings were amended, and other claims set up, after the service of summons in the state court, and after the sales to purchasers above referred to. In *Tilton v. Cofield*, 93 U. S. at page 168, the supreme court say, speaking of purchasers *lite pendente*, that "they took the title subject to the contingencies of the amendments that were made, and of everything else, not *coram non judice*, the court might see fit to do in the case." The original plaintiffs in the state court, as sole descendants and heirs of Mary Grafton, claimed an undivided one-fifth part of the entire 161 4-100 acres described in their petition for partition. That was notice to the world that the heirs of Mary Grafton claimed, by virtue of their heirship, one-fifth of the entire property; and whether the plaintiffs were the only heirs, and alone entitled, or whether others not then parties, or even then known, were also in that line of heirship, is wholly immaterial, as

is also the circumstance that, although one-fifth interest was claimed, only one-sixth has been allowed.

It is further contended that the case is not ripe for decree as to those defendants in possession who have not been served with subpoena issued upon the cross-bills filed by Robert Barr *et al.*, Robert Eldridge *et al.*, and Laura O. Henley *et al.* This objection leads to the inquiry whether it was necessary that cross-bills should be filed by those parties for the purpose of setting up their interests as co-tenants with the complainants and the defendants in possession. As stated above, every co-tenant interested in the land sought to be partitioned must be made a party to the suit, and the partition must be complete; that is to say, must include all the interests of all the co-tenants. It is not, in any true sense, an adversary proceeding. Each co-tenant asks for the allotment of his portion, upon the understood condition that he allow the allotment to every other co-tenant of his portion. In this respect a suit for partition is like a bill for an account, in which, if it turn out that the balance is in favor of the defendant, the court will give him a decree therefor; and it has been held that for that reason the defendant need not file a cross-bill, but may set up his statement of the accounts in his answer. A suit for partition is also, in the respect stated, like a bill for the specific performance of a contract; in which case, if the parties differ as to the terms of the contract, and that question is decided in the defendant's favor, the court will compel complainant to perform the contract as thus established. The defendant in such case need not file a cross-bill, but may set up his version of the contract by way of answer. The cases which sustain this proposition are noted under section 156 of Langdell on Equity Pleading, and they proceed distinctly upon the theory that the court entertains such bills only upon the condition that the plaintiff will consent to the same justice being rendered to the defendant that he asks for himself. They are not distinguishable in this respect from bills in partition. When the complainant in partition obtains a decree setting off to him his share, he secures all that he is entitled to, and it need not concern him what disposition shall be made of the residue of the land among his co-tenants. That is their affair, and not his. In like manner, each of the co-tenants is interested only as to his portion. There seems to be, then, no reason why cross-bills should be filed, or why there should be any service of process, excepting that which brings the defendants into court in the first instance.

Why should the defendants in possession in this cause require that cross-bills be filed, and they served, whenever a new defendant who claims to be a tenant in common is brought into the case? All the title that these defendants in possession have, they have acquired by purchase. It has been found by the court to amount to eleven-eighteenths of the entire tract. Neither the complainants nor the other defendants have refused to recognize that title. It is true that the defendants in possession sought to retain the remaining interests, which they never purchased, and to which they never were entitled, by claiming the benefit of their construction of the statute of limitations, of the doctrines of

laches, and of the presumption of an ancient grant. But the court has found that all those claims were entirely without foundation, and that the defendants must stand alone upon their rights as purchasers. The contest as to the distribution of the remaining seven-eighteenths is exclusively between the complainants and the defendants not in possession, and yet the defendants in possession are proceeding in this cause as though every other party to the cause is to be regarded as adverse to them, and as though they may contest every movement made by these parties, whether it affects their interests or not.

A cross-bill is only necessary where the relief thereby sought cannot be afforded under bill and answer. The only prayer of the cross-bills filed in this cause is for relief, which not only might be had under the bill and answers, but which, if the facts pleaded be established, must be granted, as a necessary condition of any decree in the case, and without which the bill itself would be utterly defeated. If, therefore, cross-bills were necessary, the complainants and all the other defendants would be at the mercy of those defendants who happened to be in the position which the cross-complainants bear to their co-tenants. There is no method known whereby a defendant whose claim is not recognized by the complainants can be compelled to file a cross-bill. He may, it is true, be reduced to the alternative of doing so, or of failing to obtain the relief to which it would entitle him, but that is the utmost that can be done. If, therefore, the defendants in possession could have induced any one of the cross-complainants to decline to file a cross-bill, and the cross-bill was necessary, they could have effectually prevented the further prosecution of the suit in partition, and, so far as the jurisdiction of this court is concerned, have prolonged indefinitely their own occupation of the premises, to the exclusion of those rightly entitled to share with them as co-tenants. This cannot be according to the true course of equity pleading or practice.

The authorities are in full accord with the views above expressed. In *Freem. Co-Ten.*, at section 499, it is laid down as the law that when the defendants have an interest in the property as co-tenants it is incumbent on them, by their answer, to disclose the nature and extent of such interest as fully as the plaintiff in his complaint is required to disclose the nature and extent of his interest. They become, as it were, plaintiffs seeking affirmative relief, and bound by all the rules of pleading to exhibit the facts upon which alone that relief can be properly extended. An "action for partition," said the supreme court of California in *Morenhout v. Higuera*, 32 Cal. 295, "under our statute, is *sui generis*. The parties named in the complaint, whether as plaintiffs or defendants, are all actors, each representing his own interest. Whether complainants or defendants, they are required to set forth fully and particularly the origin, nature, and extent of their respective interests in the property. This having been done, the interests of each or all may be put in issue by the others; and, if so, such issues are to be first tried and determined, and no partition can be made until the respective interests of all the parties have been ascertained and settled by a trial."

Story, Eq. Pl. § 394, is authority for the proposition that, if a bill be filed for the specific performance of an agreement, and the defendant insist upon an agreement different from that stated in the bill, and offer to perform the agreement as set forth by him, the old requirement that he should file a cross-bill is not now necessary, because the court will under such circumstances, at his request, if his statement of the agreement be found to be the true one, decree a specific performance thereof as set up in the answer. So, also, it was held in *Jennings v. Webster*, 8 Paige, 503, that a cross-bill was not necessary to enable the defendant to avail himself of a set-off in a foreclosure suit; such agreement should be set up in the answer to the original bill. In *Coxe v. Smith*, 4 Johns. Ch. 271, Chancellor KENT, in a case for partition, said that an equitable title might be set up by the defendants by answer, and that a cross-bill was not necessary. He further said that, if that could not be done, the result would only be to let the cause stand over until the defendants, or such of them as asked for the recognition of their equitable title, could file a cross-bill. But he held that the cross-bill was not necessary. In *German v. Machin*, 6 Paige, 288, 290, Chancellor WALWORTH laid down the law as follows:

"The master was wrong in supposing that a defendant, in a partition suit in this court, could not set up in his answer, as a defense to the suit, the fact that he was in equity entitled to the whole premises of which partition was sought by the bill. The defendant must unquestionably proceed by cross-bill, if, in addition to the denial of a decree for partition and a dismissal of the bill, he seeks further and affirmative relief on his part by a decree for the transfer to him of the legal title to the whole premises, or if a discovery is necessary to establish his equitable defense;" citing *Mitt. Eq. Pl.* (3d Amer. Ed.) 81. See, also, *Fife v. Clayton*, 13 Ves. 546; *Higginson v. Clowes*, 15 Ves. 525.

These authorities show, not only that the defendants not in possession were not required to file cross-bills, but that the defendants in possession are the only parties in this cause who are really in default, and in no position to be pressing formal objections. As is stated in *Freeman*, at section 504, when compensation for improvements is sought, the pleading should be by cross-bill. Every one of the defendants in possession desires compensation for improvements. Not one of them has filed a cross-bill, or is in position to present any claim for improvements for the consideration of the court. It is true that they propose to follow the course of practice in the state courts of Ohio as laid down in the statutes relating to partition; but, while this court will recognize all rights secured by statutes of Ohio to tenants in common, it will not conform to the form and mode of securing those rights prescribed by those statutes. The right may be substantially secured by such suitable methods as the flexibility of chancery proceedings will enable the court to adopt in conformity with the practice of the federal courts. See *Brine v. Insurance Co.*, 96 U. S. 627, and *Insurance Co. v. Cushman*, 108 U. S. 61, 2 Sup. Ct. Rep. 236, where it is also said that there is no doubt of the power of the federal court to adopt its own modes and methods for the enforcement of the rights given by the local law, but that the particular mode

prescribed by the local law is not of the substance of the right. The mode or manner of ascertaining and securing the right belongs, so far as the federal court is concerned, to the domain of practice, and the power to regulate the practice in harmony with the laws of the United States and the rules of the supreme court is expressly given by statute to the circuit court. Rev. St. U. S. § 918. See, also, *Allis v. Insurance Co.*, 97 U. S. 144.

The defendants in possession will not be permitted to file cross-bills setting up claims to improvements, excepting upon terms which will prevent further delays, or the further setting up of mere formal objections in this cause. They will be required to consent that the cross-bills be treated as answers, as one of the conditions upon which their cross-bills will be admitted to the files. The court may so treat them without consent. Equity looks through forms to substance, and determines the character of a pleading by the averments it contains, and not by the name given it. *Daniell*, Ch. Pr. (5th Ed.) *355, note 2; *Cincinnati v. Cameron*, 33 Ohio St. 336; *Northman v. Insurance Co.*, 1 Tenn. Ch. 312; *Arnold v. Moyers*, 1 Lea, 308. Calling the defendants' pleadings cross-bills did not make them anything more than assertions of their rights by answer, on which, if established, relief would be granted without any cross-bill. Such other conditions will be imposed as shall seem to the court to be proper and necessary.

The draft of decree by complainants' counsel makes no findings or order respecting improvements or rents, excepting to direct the master and the appraisers to make certain findings of fact. Counsel for the defendants in possession insist that the decree shall exclude from the appraisement all improvements made between the death of Maria Bigelow, the life-tenant, August 3, 1860, and the date of the commencement of the suit by the complainants, and also by each cross-complainant, respectively, and so limit the recovery of rents that they shall begin to run from the date of service upon each defendant in possession, but that the question of excluding from the appraisement improvements prior to the death of Maria Bigelow, and subsequent to the bringing of the suit, shall be left open to them for future argument and consideration, as well as the question of the modification in their favor of the decree as to rents. They insist upon the findings above referred to, because they say they are in accordance with the opinion on file, and, on the other hand, that they shall have an opportunity to apply for a future order as to rents and as to improvements. In other words, they wish to have the decree so framed as to preclude any enlargement in favor of the complainants and the defendants not in possession, but so as to leave it open for enlargement in their favor. The court declines to grant this modest request. The court will give counsel on both sides equal opportunity to be heard with reference to improvements and to rents, and both questions will be left open to be decided after the coming in of the report of the appraisers and of the master. No argument was made at the hearing upon either question, but the court carefully considered both questions, and thus far sees no reason for modifying the rulings as they appear in the opin-

ion. These rulings were made upon a careful adjustment of the equities of the cause as they presented themselves to the mind of the court. Should counsel for the defendants in possession succeed in convincing the court that the ruling with reference to improvements ought to be more liberal in favor of the defendants in possession, it may as well be understood now that the result will probably be a radical change in the ruling as to rents, so as to make them more liberal to the complainants and to the defendants not in possession. This, it strikes us, will be necessary in order to preserve the balance of equities. By leaving these questions open, we do not intend to be understood as at all disposed to change the rulings as they appear in the opinion, but we do mean to be understood that, while we are willing to hear argument upon one side upon those questions, the argument shall be as free upon the other side.

There is also submitted, by counsel for the defendants in possession, a list of objections to the testimony which they present for allowance as made on the hearing. This list covers 18 legal-cap type-written pages. The majority of the objections are formal and technical, such as are waived if not made before the hearing. See *Doane v. Glenn*, 21 Wall. 33; *York Manuf'g. Co. v. Illinois Central R. Co.*, 3 Wall. 107; *Blackburn v. Crawford*, 3 Wall. 175. Almost all these objections are new to the court, and were not even suggested at the hearing. But counsel claim that they were taken in their brief, which was prepared and filed after the hearing. That was too late for formal objections, which are not received in equity, unless presented while the opportunity is yet open to the party against whom they are directed to correct them, and have his testimony in due form at the hearing. But counsel are in error in stating that the objections now presented were specified in their brief. Under the head of incompetency of the testimony, there is a discussion of the law of evidence claimed to be applicable to the cause, beginning at page 55, and extending to the bottom of page 73. The only specific objections to testimony are (1) to the deposition of Maria Bigelow, which was passed upon in the opinion; (2) to the declarations of John Barr Grafton, testified to by Mrs. Henley; (3) to the declarations of Jennette Allen; (4) to the bill filed by John Lobdell, and the answer of James Grafton thereto in the case of *Grafton v. Grafton*; (5) to the recitals in the various deeds introduced by the complainants; (6) to the Hyde genealogy; (7) to the loose scraps of paper attached as exhibits to the deposition of Mrs. Lobdell; (8) to the exhibit from the land-office at Jackson; (9) to the receipts for legacies produced by Thomas Gibson Barr at Columbus; (10) to an affidavit made by Martha Reed before one Washington Geer, a justice of the peace; (11) to the deposition of Robert Barr, of Iowa, as a declaration; (12) to the certificate by the chancery clerk of Adams county, Miss., that he had examined the old probate records in his office, and failed to find any record of letters of administration upon the estate of Daniel Grafton, Sr., and Mary Grafton his wife, etc.; (13) to the record of the case of Parsons and Ely as not properly certified under section 905, Rev. St. U. S.; (14) to the record of the will of Robert Barr, because not properly certified, (both of these last ob-

jections fall within the adverse rulings in 21 Wall. and 3 Wall., cited above;) (15) to the depositions of Sarah McClaskey, Sarah King, Mrs. Lobdell, Mrs. Henley, Robert Barr, of Iowa, Samuel Barr, of Pennsylvania, and Mary Brewster, as not competent under the terms of section 5242, Rev. St. Ohio, which does not apply in this cause, the competency of these witnesses being determined by section 858 of the Revised Statutes of the United States; and (16) to two documents offered by counsel for the cross-complainants, Robert Eldridge *et al.*, to-wit, the deed of Robert Barr, of Wood county, and the receipt of Robert Barr, of Westmoreland county, for legacies. No rulings of the court were had upon any of these objections, excepting those to the deposition of Maria Bigelow, and to the documents which were produced from the custody of Thomas Gibson Barr, of Columbus. The list presented by counsel for the defendants in possession will be rejected, and the court, rejecting all formal objections, will recognize only the objections to competency specifically made in the brief; it being understood, however, that the objection to the deposition of Maria Bigelow, and to the papers produced by Thomas Gibson Barr, which were made at the hearing, will be recognized.

We have made such modifications of the draft of the decree presented by counsel for the complainants as we deem necessary, and as so modified it will be entered. All further discussion in this cause will be postponed until the coming up of the questions which have been reserved for further consideration. The circuit judge concurs in this opinion.

PENNSYLVANIA R. CO. *et al.* v. ALLEGHENY VAL. R. CO. *et al.*

(Circuit Court, W. D. Pennsylvania. August 31, 1891.)

1. RAILROAD MORTGAGES—FORECLOSURE—SALE FOR DEBT DUE—PRESERVATION OF LIEN OF UNMATURED PART.

In a proper case, a court of equity has the power so to mould its decree as to order a sale of mortgaged premises to satisfy that part of the mortgage debt which is due, and preserve the lien upon the mortgaged premises in the hands of the purchaser as to the unmatured part of the debt.

2. SAME—BONDS—COLLECTION OF COUPONS—REMEDIES.

Company A. negotiated its coupon bonds, secured by a mortgage upon its railroad, etc., each bond having an indorsement by Company P., binding it to purchase at maturity the bond and each interest coupon, at par, "and, when so purchased, each and all of said bonds and coupons are to be held by the said company, with all the rights thereby given, and with all the benefit of every security therefor." Company P., having been obliged to purchase coupons, filed a bill before the maturity of the bonds. *Held*, that the contract of purchase is to be so construed as to preserve to the bondholders their mortgage lien until Company P. shall have fully performed its obligations according to the tenor of its indorsement, and that in the mean time its remedies upon purchased coupons must be kept within such limits as will effect that object.

3. SAME.

The equities of all the parties in interest being best subserved by a sale of the railroad, etc., under and subject to the lien of the said mortgage as to the principal of the bonds thereby secured, and the interest payable after the making of the sale, it was so decreed.

In Equity.

Wayne MacVeagh and James A. Logan, for complainants.

John G. Johnson, George Shiras, Jr., and D. T. Watson, for income bond holders, complainants in cross-bill.

Samuel Dickson, for trustee under mortgage of March 31, 1869.

ACHESON, J. At the end of this protracted litigation, the court is called on to decide, not whether a sale of the lines of railroad, franchises, and property generally of the Allegheny Valley Railroad Company should be decreed, but upon what terms with respect to the discharge of liens the sale shall be made. The fixed charges are as follows:

"*First.* An issue of \$4,000,000 of interest-bearing bonds, due March 1, 1896, secured by a mortgage dated March 1, 1866, on the company's main line, extending from the city of Pittsburgh to Oil City, being the first lien thereon.

"*Second.* An issue of \$10,000,000 of bonds, with interest coupons payable semi-annually attached, due April 1, 1910, secured by a mortgage dated March 31, 1869, on the company's branch line, (the low-grade division,) extending from the main line to the mouth of Bennett's branch, being the first lien thereon; which issue of bonds is further secured by a mortgage dated September 4, 1874, on the company's main line, being the second lien thereon.

"*Third.* An issue of interest-bearing bonds to the commonwealth of Pennsylvania, of which, according to the allegations of the bill, about \$2,600,000 remained unpaid, secured by a mortgage dated April 1, 1869, on said branch line, being the second lien thereon, and further secured by a mortgage dated September 5, 1874, on the company's main line, being the third lien thereon.

"*Fourth.* An issue of \$10,000,000 of income bonds, due October 1, 1894, secured by a mortgage dated October 1, 1874, which is the fourth lien on the company's main line and the third lien on the said branch line. This income bond mortgage of October 1, 1874, is expressly made under and subject to the lien of the five mortgages prior in date above mentioned, and the interest on the income bonds is made payable only out of the company's net income, after payment of interest on the bonds secured by prior mortgages."

The \$10,000,000 of bonds secured by the mortgage of March 31, 1869, when negotiated, each contained an indorsement, lawfully made and duly executed by the Pennsylvania Railroad Company, one of the plaintiffs, as follows:

"For a valuable consideration paid, the Pennsylvania Railroad Company hereby covenant and agree, to and with the lawful holder of the within bond, that the Pennsylvania Railroad Company shall and will, upon the 1st of April, 1910, or thereafter when requested, upon delivery to them of the within bond, purchase the same for cash at par, and shall and will, upon the 1st day of October, 1871, and semi-annually thereafter, upon surrender and delivery to them of the proper interest warrants therefor, purchase from the lawful holder thereof, at par, each and every subsequent semi-annual sum of interest to become due upon the within bond, according to the tenor and effect of said bond, and the interest warrants thereto attached; and, when so purchased, each and all of said bonds and coupons are to be held by said company, with all the rights thereby given, and with all the benefit of every security therefor. In witness whereof," etc.

And by a special indorsement on each coupon the Pennsylvania Railroad Company bound itself to purchase the same at par at maturity from the holder.

Before the filing of the bill in this case, as therein averred, the Pennsylvania Railroad Company, under its above recited contract, and by reason of the insolvency and default of the Allegheny Valley Railroad Company, had been obliged to purchase coupons of the bond issue of 1869, to the amount of \$4,175,000; and it would seem that the total of its purchases of these coupons up to March 20, 1891, amounts to \$6,336,245, exclusive of interest thereon. The plaintiffs, as guarantors, having lifted \$400,000 of overdue bonds of the Allegheny Valley Railroad Company to the commonwealth, secured by the mortgages of April 1, 1869, and September 5, 1874, the now outstanding bonds yet held by the commonwealth, and not due, amount to \$1,800,000. These bonds are payable in yearly installments of \$100,000; the next installment on January 1, 1892, and the last on January 1, 1910. The commonwealth is not a party to this suit, and never voluntarily appeared in any of the proceedings herein. The proofs show that the plaintiffs, among themselves, hold and own \$6,087,000 of the income bonds aforesaid of the Allegheny Valley Railroad Company. The bill prays for a sale of the corporate property, franchises, etc., of the Allegheny Valley Railroad Company, under and subject to the lien of the above-mentioned five mortgages, prior in date to the income bond mortgage of October 1, 1874, "as to the principal of the bonds thereby secured, and not theretofore matured, and the interest thereafter payable after the making of said sale;" the sale to pass to the purchasers the same title, excepting as to the liens so to be preserved, as would vest by a judicial sale upon a judgment recovered on the coupons lifted and held by the Pennsylvania Railroad Company, or upon a decree in a suit proceeding upon the mortgage upon which there was default, and that out of the proceeds of sale the Pennsylvania Railroad Company be paid the defaulted coupons, and the commonwealth be paid the defaulted installments due to her, and the balance to be distributed among the creditors entitled.

The trustees under the mortgages of March 31, 1869, and September 4, 1874, securing the \$10,000,000 bond issue of 1869, submitted themselves to the court, but in their answer prayed "that, in the event of a sale being decreed, as prayed for in the said bill, such decree may be formulated and enforced as will leave unaffected the lien of the several mortgages of which they are trustees, except so far as the interest thereon may be payable out of the proceeds of said sale." The Allegheny Valley Railroad Company, in its answer, admitting the truth of the allegations of the bill, submitted itself to the judgment of the court, and has interposed no objection to a decree of sale in conformity with the prayer of the bill. The only opposition to the sale upon the terms contemplated by and prayed for in the bill comes from certain of the income bond holders (a minority in interest) who intervened in the suit, and are plaintiffs in the cross-bill, which contested the validity of the claim of the Pennsylvania Railroad Company, and went to defeat a sale altogether.

These parties, however, no longer deny, but concede, the right of the Pennsylvania Railroad Company, as the holder of overdue coupons of the bond issue of 1869, to a decree of sale; they now only insisting that the sale, to be decreed shall be made upon terms discharging the lien of all the mortgages except the mortgage for \$4,000,000, the first lien on the main line. Under the pleadings and proofs, then, what ought the terms of sale to be? I cannot doubt that, in a proper case, a court of equity has the power so to mould its decree as to order a sale of mortgaged premises to satisfy that part of the mortgage debt which is due, and preserve the lien upon the mortgaged premises in the hands of the purchaser as to the unmatured part of the debt. 2 Jones, Mortg. § 1459; *Fleming v. Soutter*, 6 Wall. 747. This power has been judicially recognized and exercised, (*Cox v. Wheeler*, 7 Paige, 248; *Weiner v. Heintz*, 17 Ill. 259; *Hughes v. Frisby*, 81 Ill. 188; *Burroughs v. Ellis*, 76 Iowa, 649, 38 N. W. Rep. 141;) and coupons, being the equivalent of bonds for separate installments of the mortgage debt, (*Clark v. Iowa City*, 20 Wall. 583,) clearly come within the principle of these decisions.

But the power of the court to decree a sale for the present realization of the matured part of a mortgage debt, while preserving the lien of the part not due, is not here so much controverted as is the propriety of the exercise of the power in this particular instance; and it may be, as the counsel for the objecting creditors contend, that such a decree ought not to be made except for special reasons, and where the equities upon which it is based are clear and prevailing. How, then, stands this case? In its circumstances the case is certainly peculiar. In the first place, the bill is carefully framed with a view of preserving the lien of the mortgages of March 31, 1869, and September 4, 1874, as respects the principal of the bonds thereby secured, and the interest to accrue after the sale, and the lien of the two mortgages to the commonwealth as to the installments which may not be due at the time of the sale, and the specific prayer of the bill is to that effect. The cross-bill contains no prayer for a sale, and the decree must rest upon the matters set forth in the original bill. Upon the pleadings, then, it is very difficult to see how the court can rightfully decree a sale upon terms essentially different from those specified in and sought by the original bill. 2 Jones, Mortg. § 1578. True, under the general prayer for relief, the court sometimes may grant relief not specifically asked for, but it must be such as is agreeable to the case made by the bill; otherwise, the court would take the defendant by surprise. 1 Daniell, Ch. Pr. 386. That very thing would happen here should the court so widely depart from the specific prayer of the bill as these income bond holders ask; for the trustees under the mortgages of March 31, 1869, and September 4, 1874, were not called on by the bill to resist a sale which should divest the lien of the mortgages, and the bondholders thereby secured have never had a proper opportunity of defending themselves against a decree attended with such a result. In the next place, the commonwealth of Pennsylvania has an interest in the property which might be seriously affected by such a sale as is now proposed, but is not a party to the suit. If it be con-

ceded, upon the authority of *Christian v. Railroad Co.*, 133 U. S. 233, 10 Sup. Ct. Rep. 260, that this would not hinder the sale, still, the qualification with which the supreme court there spoke is to be heeded: "In such a case, the foreclosure and sale of the property will not be prevented by the interest which the state has in it, but its right of redemption will remain the same as before." Pages 243, 244, 133 U. S., and page 263, 10 Sup. Ct. Rep. Thus, to say the least of it, an element of uncertainty would attend such a sale. Again, the mortgage of March 31, 1869, is the first lien upon the low-grade division, (the Bennett's branch line,) standing to it, in that regard, on the same footing as does the mortgage for \$4,000,000 with respect to the main line; the lien of which latter mortgage all agree should be preserved. Furthermore, it is too plain for argument that, without the consent of the bondholders, the court cannot decree that the bonds of the issue of March 31, 1869, shall become presently payable; and, therefore, in the event of a sale discharging the mortgage lien, it would be incumbent upon the court to impound the principal for the protection of the bondholders, and either reinvest the fund, or otherwise secure it for their ultimate benefit. But, manifestly, that would be a very undesirable result, even were it clear that the Pennsylvania Railroad Company has the right to a decree involving such consequences.

But when we turn to the consideration of the equities of the respective parties, and reflect that the bonds of the issue of March 31, 1869, bear interest at the rate of 7 per cent. per annum, and are negotiable securities, having nearly 19 years to run, and hence possessing, undoubtedly, a market value much beyond their face value, we come to realize the great and certain injury to which the holders would be subjected by a decree destroying their mortgage lien. Surely a court of equity should long hesitate before inflicting this loss, and ought only to yield to some imperative rule of law, or for the sake of rights clearly superior. No such controlling legal principle is perceived.

Are there any predominant equities on the side of the income bond holders? To this question I am constrained to return a negative response. No evidence whatever has been submitted to the court to show that by a sale discharging the prior mortgages, as proposed, more could be realized for the income bond holders than by a sale preserving those liens. Nor is that result inherently probable in the nature of the case. Indeed, the reasonable presumption is, I think, quite the other way, as the purchaser at the sale upon the latter terms would be relieved from the necessity of immediately raising very large sums of money, and would have the benefit of long credits. At any rate, no one can confidently say that the terms of sale specified in the bill will prove detrimental to the income bond holders, or that any substantial advantage would accrue to them by substituting the proposed terms. In this connection, it must be remembered that the creditors objecting to the sale as prayed for in the bill constitute a minority of their class, and that the plaintiffs themselves hold more than three-fifths of the issue of income bonds. Moreover, a foreclosure and sale under the income bond mort-

gage itself (and it has but three years to run) would necessarily be subject to the lien of the prior mortgages not due. *Jerome v. McCarter*, 94 U. S. 736; 2 Jones, Mortg. § 1609. So that, in this regard, a decree in accordance with the prayer of the present bill will only anticipate by a brief period the unavoidable result awaiting the income bondholders.

To the argument based upon the provision of the mortgage of 1869, which gives, in distribution, to the overdue coupons priority over the principal of the bonds, the answer is twofold—*First*, that stipulation relates to a sale by the trustees under the special power conferred by the mortgage; and, *secondly*, the application of the proceeds of sale thereby provided for is simply the appropriation which the law itself makes where the fund is deficient, namely, to the discharge of accrued interest first, and then the balance to the principal of the debt. I fail to see how this particular clause of the mortgage operates as any obstacle or valid ground of objection to the decree the plaintiffs seek.

But, finally, the case is to be considered with reference to the contractual relations between the Pennsylvania Railroad Company and the holders of the bonds of the issue of March 31, 1869. In view of its indorsement upon those bonds, can the company rightly ask broader relief than what is here specifically prayed for? A sale in the manner, and subject to the conditions, mentioned in the bill, while entirely just to that class of bondholders, would yet afford the Pennsylvania Railroad Company the equitable relief to which it is now fairly entitled. Ought the company to demand more? It is a familiar doctrine that in enforcing the right of subrogation there can be no interference with the creditor's securities until he is fully satisfied. *Kyner v. Kyner*, 6 Watts, 221; *Bank v. Potius*, 10 Watts, 148. Now, it is true that the Pennsylvania Railroad Company is not here technically a surety, clothed simply with the implied right of subrogation, but its contract of purchase, indorsed on the bonds when put upon the market, and upon the faith of which they were negotiated, ought to receive such an equitable construction as will conserve the interest of the bondholders. Looking at the purpose the parties to the transaction then had in view, can it be for an instant supposed that they intended that, whenever the Pennsylvania Railroad Company was obliged to take up a batch of coupons, it might proceed by a strict foreclosure to sweep away from the bondholders their mortgage security? The terms of the indorsement do not require that a construction so unreasonable shall be given to it. The parties themselves, it would seem, have not so understood their contract. Why, then, should an inequitable interpretation of the contract, upon which the parties thereto do not insist, prevail? It rather seems to me that the contract is to be construed so as to preserve to the bondholders their mortgage lien until the Pennsylvania Railroad Company shall have fully performed its obligations according to the tenor of its indorsement, and that in the mean time its remedies upon purchased coupons must be kept within such a limit as will effect that object. Surely, however, the company is not bound to pursue a course needlessly prejudicial to those bondholders.

Upon the whole case, I am of opinion that the original bill was framed upon the true theory of the equitable rights of all the parties in interest, and that the sale of the property of the Allegheny Valley Railroad Company, which all now agree must be decreed, should be upon the terms specifically prayed for in the bill.

MASSACHUSETTS & SOUTHERN CONST. CO. v. TOWNSHIP OF GILL'S
CREEK *et al.*

In re HART.

(Circuit Court, D. South Carolina. November 11, 1891.)

1. ATTORNEY'S LIEN—SERVICES RENDERED IN STATE COURTS.

In South Carolina an attorney's lien is limited to his disbursements and the costs taxed; and therefore a federal court sitting in that state cannot declare a lien on the fruits of its judgment for services rendered in the state courts in litigation concerning the same subject-matter.

2. SAME—NATURE AND EXTENT—SERVICES RENDERED IN OTHER SUITS.

An attorney's lien upon the fruits of a suit is limited to the services rendered therein; and, although a number of separate suits involve the same questions, and are argued and determined together, the fruits of one are not subject to a lien for services rendered in the others.

3. SAME—PROSPECTIVE SERVICES.

Nor will the lien extend to prospective services in the hearing of an appeal.

4. SAME—RIGHTS OF SEVERAL ATTORNEYS.

When several attorneys have rendered services for the complainant in a suit, they are equally entitled to a lien for compensation on the fruits of the judgment, and, if one of them has obtained an assignment of such fruits, his possession cannot be disturbed in favor of another.

In Equity,

Ex parte petition of James F. Hart, in the case of the Massachusetts & Southern Construction Company against the township of Gill's Creek, York county, S. C., and the Boston Safe-Deposit & Trust Company, to assert a lien for services rendered the complainant as an attorney in that and other cases. Dismissed.

C. E. Spencer, for petitioner.

Samuel Lord, opposed.

SIMONTON, J. A railroad company had been incorporated under the name of the Charleston, Cincinnati & Chicago Railroad Company, for the purpose of building a railroad from Charleston, S. C., towards Chicago. The Massachusetts & Southern Construction Company contracted to construct the railroad, and a part of the consideration of this contract was the delivery to it of township bonds issued in subscription to the railroad company under the authority of the general assembly of South Carolina. By an agreement made between the construction company and the authorities of the several townships, these bonds were placed on deposit with the Boston Safe-Deposit & Trust Company, to be

delivered to the construction company when certain conditions were fulfilled. Before these bonds were delivered much litigation arose in the courts of the state of South Carolina respecting the validity of township bonds; and, bonds of the character of these of which we are speaking having been declared invalid, an act of the legislature was passed seeking to cure the defect, and the question of the validity of this act was made in courts of that state. The litigation then began in this court. Eight separate suits were brought by the Massachusetts & Southern Construction Company, in all of which the Boston Safe-Deposit & Trust Company was a party. The townships of Cherokee, Broad River, York, Catawba, Ebenezer, Cane Creek, Gill's Creek, and Pleasant Hill, respectively, were each a co-defendant with it in its own separate suit. 42 Fed. Rep. 750. Each one of these suits sought the delivery to the construction company of the bonds of the defendant township, upon the allegation that all of the conditions precedent were fulfilled. To each suit there was a separate answer. The defense in the cases were the same,—the invalidity of the subscription and the bonds; and in one (Cane Creek) there was another and distinct ground of defense. The result of the litigation in this court was that the defense of Cane Creek was sustained, and an order was entered in each of the other cases for the delivery of the bonds therein referred to to the construction company. All of the townships defendant but one (Gill's Creek) acquiesced in the decision, and the bonds issued by them, and in the hands of the Boston Safe-Deposit & Trust Company, became the property of the construction company. The bonds of Gill's Creek township, in par value \$39,000, still remain on deposit, awaiting the result of an appeal to the supreme court. The petitioner alleges that he was engaged professionally in the litigation in the state courts and in this court, having been retained by the Massachusetts & Southern Construction Company; that no fixed sum was contracted for, but that his services in the state court and in this court were reasonably worth \$5,000, and for his services in the case under appeal, present and prospective, he claims \$1,000. He sets up a lien on the bonds of Gill's Creek township for these services as in part the fruit of his labor and skill, professionally rendered. He prays that his lien may be protected, and to this end that the Boston Safe-Deposit & Trust Company may be ordered to deliver the bonds to him, and so perfect his lien. The answer of the company sets up three defenses: (1) That petitioner was the attorney of the railroad company and of the construction company at a fixed salary, and that he can make no further charge for services which he may have rendered. (2) It denies that his services were worth the sum stated by him, and also denies that he has any lien of any nature on these bonds. (3) It avers that on 13th December, 1890, all the bonds of Gill's Creek township were legally sold and assigned to John H. Albin. The notice thereof has been given to the Boston Safe-Deposit & Trust Company.

Mr. Hart in the litigation in the state courts was associated with Messrs. Sheppard & Shand. In the litigation in this court, the attorneys of record were Lord & Hyde; Messrs. J. H. Albin and Hart were

of counsel. There can be no doubt that from an early period courts have always interfered in securing to attorneys the fruit of their labors, even as against their own clients. *Ex parte Bush*, 7 Vin. Abr. 74. This is an equitable interference on the part of the court, (*Barker v. St. Quintin*, 12 Mees. & W. 441,)—the enforcement of a claim or right on the part of the attorney to ask the intervention of the court for his own protection, when he finds that there is a probability that his client may deprive him of his costs, (*Mercer v. Graves*, L. R. 7 Q. B. 499.) See, in full, *In re Knapp*, 85 N. Y. 285. For the want of a better word, it is called a "lien," but this so-called "lien" is limited to the funds collected in the particular case in which the services were rendered. *In re Wilson*, 12 Fed. Rep. 235. This is the rule followed by all courts, without requiring the sanction of a statute. In England until the statute of 18 Victoria the lien of an attorney was confined to the taxed costs and his disbursements. In South Carolina there is no provision by statute on the subject, and that rule of the English court is followed strictly. *Scharlock v. Oland*, 1 Rich. Law, 207; *Miller v. Newell*, 20 S. C. 123, 128. The courts of the United States seem to protect attorneys in their fees as well as in their taxed costs. In *Wylie v. Cox*, 15 How. 415, the court protected an attorney by securing him the percentage contracted to be paid him on recovery. In *Cowdrey v. Railroad Co.*, 93 U. S. 354, an attorney was secured the fee he had expressly contracted for. So, also, in *McPherson v. Cox*, 96 U. S. 404. These were express contracts. As this protection to the attorney is founded upon the idea "of a contract implied by law," and as effectual as if it resulted from an express agreement, (*Ex parte Bush*, *supra*; *Cowell v. Simpson*, 16 Ves. 279,) and as the statutes of the United States expressly recognize the right of attorneys to charge their clients reasonable compensation for their services, in addition to taxable costs, (Rev. St. U. S. § 823,) it would seem that the United States courts will also protect the implied contract.

The petitioner's claim is upon a fund arising under a judgment in this court for services rendered in the state courts and in this court,—a right arising under contract. *Cowell v. Simpson*, *supra*. As the law of South Carolina confines such a lien to costs and disbursements, it is clear that the counsel fee could not have entered into the contract of service in the state court, even if the recovery were had there. This protection of attorneys, in the absence of a statute, is given by each court to its own officers. This court would not—perhaps I should say could not—extend the protection to services rendered in another wholly distinct jurisdiction. There is another consideration. There were eight separate suits and seven separate recoveries. All the bonds recovered in six suits have been removed from the control of the court. It is true that there was one question, common to all of the suits; but they were argued together simply for the sake of convenience.

If, as we have seen, the protection is given to an attorney as against a particular fund, for his services in the suit gaining that fund, and that only, how can we fix on the Gill's Creek bonds the claim for services rendered to the other bonds? This would be a general lien. See Jones,

Liens, § 194, and cases quoted. How can we tell what part of the \$5,000 is to be allotted to the Gill's Creek bonds? Of course, as the protection is for services rendered, there can be no lien for \$1,000, a prospective charge for services to be rendered. But the assignment to J. H. Albin disposes of the matter. He, with the petitioner and Messrs. Lord & Hyde, were all engaged on the same side in the same case. If the petitioner has a right to the protection of the court, so, equally, has each one of them, and in each of them the right is equitable. *Barker v. St. Quintin, supra*. But with this equity Mr. Albin has, so to speak, the legal title. When equities are equal, the law will prevail. He cannot be disturbed in his right of possession. Without entering into the question whether Mr. Hart was specially retained by the complainant, the petition must be dismissed.

GULF, C. & S. F. RY. CO. v. JAMES.

(Circuit Court of Appeals, Eighth Circuit. October Term, 1891.)

1. SUMMONS—AMENDMENT TO CONFORM TO COMPLAINT.

Under Mansf. Dig. Ark. § 5080, which by Act Cong. May 2, 1890, § 81, was extended over the Indian Territory, it is proper to allow a summons to be amended by changing the name of the plaintiff, therein from P. R. Jones to P. R. James, so as to conform to the complaint.

2. SAME—SUFFICIENCY—STATEMENT OF CAUSE OF ACTION.

Under Mansf. Dig. Ark. § 4968, it is no objection to a summons that it fails to set forth the cause of action stated in the complaint.

3. JURIES—SUMMONING AND IMPANELING—LISTS—STRIKING OF NAMES.

Mansf. Dig. Ark. § 4018, relating to jurors, which by Act. Cong. May 2, 1890, was extended over the Indian Territory, provides that, if either party shall desire a panel, the court shall cause the names of 24 competent jurors to be placed in a box from which the names of 18 shall be drawn and entered on a list. Section 4014 provides that each party shall be furnished with a copy of this list, from which each may strike the names of three jurors, and the 12 names remaining shall constitute the jury. *Held*, that the refusal of the court to furnish the parties, on request, with such list of 18 jurors is reversible error.

In Error to the United States Court in the Indian Territory for the Third Judicial Division.

Action by Phillip R. James against the Gulf, Colorado & Santa Fe Railway Company. There was judgment for plaintiff, and defendant brings error. Reversed.

C. L. Jackson, E. D. Kenna, and Adiel Sherwood, for plaintiff in error.

W. A. Ledbetter and O. W. Patchell, for defendant in error.

Before CALDWELL, NELSON, and HALLETT, JJ.

NELSON, J. This was an action brought to recover damages for personal injuries sustained by the plaintiff below through the alleged negligence of the railway company, and for exposure by reason of being compelled to leave the section boarding-house of the company after being injured. On the trial a verdict was rendered against the company for the sum of \$2,750.

The facts as they appear in the bill of exceptions are these: The plaintiff below, Phillip R. James, was a sectionman employed by the railway company, working on its road near Berwyn station, in the Chickasaw Nation, Indian Terr. He was injured on July 12, 1890, while aiding in unloading a hand-car. The freight train bringing this car stopped about 3½ miles from this station, opposite the place where James, with three other section hands, were eating their dinner, and a road-master, by name Jim Connors, came to the men and said: "We got a hand-car to unload for you boys." He asked where the rest of the men were, and, on being informed, gave orders to unload the car. Six sectionmen, four trainmen, the section foreman, and the road-master assisted in unloading. The road-master gave the sectionmen instructions to unload, and some of them opened the door, and went into the freight-car, and set the hand-car in a position on one side, and slid it out of the door, so that the men outside could get a good hold. As the hand-car was partly out, and nearly all the weight rested upon the shoulders of James, he informed the men, and some came to his assistance, and let it down about half way to his waist, and Jim Connors, the road-master, who had hold of the hand-car, assisting in unloading, gave an order, "Let her go," and the hand-car turned over and fell upon James, injuring his back. The character of the ground where the hand-car was unloaded was well known to James, and there is no evidence that it was dangerous to unload it at that place, but only inconvenient, as no depot platform was there. The car was furnished for the use of the sectionmen to carry them to and from their homes; and there is no evidence in the case to show that James was carried beyond his employment when, in obedience to the orders of the road-master, he went to aid in unloading it.

The specific acts of negligence charged in the complaint are: (1) That Jim Connors, a road-master of the railway company, who ordered James to assist in unloading the hand-car, was guilty of gross negligence and carelessness in selecting a place to unload the same where there was no depot platform; (2) by commanding the men assisting in unloading to turn the car loose while James was in such a position that he could not prevent its falling upon him.

The record furnished is voluminous, made so by the unnecessary repetition therein of the same deposition taken and read on the trial, and other proceedings prior and subsequent thereto, and also by the assignment of errors, 58 in number. Most of them are trivial, and indicate that proper care and attention were not given by counsel in the preparation of the case. A few are meritorious: It is urged that the court erred in deciding that it had jurisdiction of the case, and permitting the plaintiff below to amend the summons. The original complaint was filed January 17, 1890, in the office of the clerk at "Ardmore," where the court is held for the third judicial division, and on the same day a writ of summons was duly issued to the marshal, and returned with an indorsement thereon, "Personally served on an agent of the railway company at Ardmore, Indian Territory." This summons commanded the

defendant to answer on the first day of the next March term, "a complaint filed against it in said court by Phillip R. Jones, and warns it that upon failure to answer the complaint will be taken for confessed." A motion was made and filed on the first day of the March term to quash the writ of summons, which was withdrawn and renewed on the next day, for reasons alleged briefly: That the summons was improperly and illegally issued, and no cause of action is set forth therein, and the nature of the complaint is not shown; and also that there is a variance in the name of the plaintiff as contained in the complaint and the summons. The court granted a motion to amend the summons by changing the name of the party plaintiff from Phillip R. Jones to Phillip R. James, and afterwards the motion to quash the writ was overruled, and rightly. The amendment of the summons was proper, and fully authorized by section 5080, Mansf. Dig., of the Arkansas statutes, which was the law extended over the Indian Territory, and governing applications to amend. This section is as broad as the statutes of the United States relating to amendments, (Rev. St. U. S. §§ 948-954,) and the change of the name in the summons was allowed in furtherance of justice, and certainly within the discretion of the court. Neither does the practice act in force in the territory require the nature of the cause of action as stated in the complaint to be set forth in the summons. Mansf. Dig. § 4968. The complaint is filed in the clerk's office, and the purpose of the summons is to inform the defendant served of the fact, so that he can ascertain the cause of action alleged against it. The original complaint was amended, and the defendant filed a demurrer, which was overruled, and a motion to strike out certain portions of the same was denied, and the defendant filed its answer. When the case was called for trial the counsel for the railway company, before the jury was impaneled, requested the court "to cause a list of eighteen competent and qualified jurors to be made, and to furnish counsel of both parties with a copy of such list, from which each party might strike the names of not exceeding three jurors, and from said list the twelve jurors to try this cause should be selected; and that the jury to try this cause be selected as is by the statutes in such case made and provided." This request was refused, to which exception was taken, and such refusal is duly assigned as error. On May 2, 1890, congress passed an act to enlarge the jurisdiction of the United States court in the Indian Territory. In section 31 certain general laws of the state of Arkansas as contained in Mansfield's Digest, published in 1884, are extended over the territory, and among these laws is mentioned chapter 90, the provisions of which relate to the selection and summoning of jurors and drawing of a trial jury. Section 4013 of this Digest enacts that, "if either party shall desire a panel, the court shall cause the names of twenty-four competent jurors, written upon separate slips of paper, to be placed in a box, to be kept for that purpose, from which the names of eighteen shall be drawn and entered on a list in the order in which they were drawn and numbered." Section 4014 provides that "each party shall be furnished with a copy of said list, from which each may strike the names of three jurors, and return the

list so struck to the judge, who shall strike from the original list the names so stricken from the copies, and the first twelve names remaining on said original list shall constitute the jury." Section 4015 provides, in substance, that before drawing the list of 18 the court shall decide all challenges for cause which are presented, and, if there are not 24 competent jurors, by-standers shall be summoned until the requisite number of competent jurors is obtained, from which said list shall be drawn. Under these sections parties are entitled to have 18 jurors on the list before they are required to exercise the right of peremptory challenge. The denial of the request for a panel, as provided by the statute, deprives the defendant of a substantial right, and gave it a jury different from that which the law provided. The defendant had only 12 jurors when the statute gave it 18 from which it could strike off 3 names. This requirement of the statute that 18 jurors should be on the list when parties must make their peremptory challenges is mandatory, and the court cannot depart from the essential requirements of the law. See *Thomp. Trials*, § 89; *Thomp. & M. Jur.* §§ 267, 270, and authorities cited. A denial of this request by the court, to which exception was taken, is a fatal error. At the close of the evidence the defendant moved the court to direct the jury to return a verdict in its favor, because under all the evidence the plaintiff is not entitled to recover. The court declined to do so, and this refusal to instruct the jury as requested was duly excepted to and is assigned as error. As the case goes back for a new trial it is sufficient to say in reference to this assignment that we have looked in vain through the record for evidence tending to show why the plaintiff, James, did not let go of the hand-car when the other men did, and that the order of Connors was negligent under the circumstances, and caused the injury complained of. There is no evidence to show that James was in such a position that he could not escape being injured, and that Connors knew it, and was at fault in giving the order. It cannot be presumed or inferred that because the hand-car turned over when it was being unloaded, and the plaintiff was injured, the railway company is responsible therefor. The refusal to give the instruction asked is error. Judgment is reversed, and the cause is remanded, with directions to grant a new trial.

SANGER *et al.* v. FLOW *et al.*

(Circuit Court of Appeals, Eighth Circuit. October Term, 1891.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—INVENTORY.

Manf. Dig. Ark. § 805, provides that before an assignee for the benefit of creditors shall be entitled to take possession of or in any wise control the assigned property he shall file a complete inventory of the property, and a bond in double its estimated value. *Held*, that a provision in the deed of assignment that the assignee shall not take possession until he files the required bond is surplusage, and will not be construed as authorizing him to take possession before he files an inventory, in violation of the terms of the statute.

2. SAME—UNPREFERRED CREDITORS—SCHEDULE.

Where a deed of assignment prefers certain creditors, and provides that the balance of the fund shall be paid to all the remaining creditors *pro rata*, its validity is not affected by the failure to give in the deed or in any schedule attached thereto the names of the unpreferred creditors, or the amounts due them.

3. SAME—TIME OF APPLICATION OF PROCEEDS.

Nor is the validity of such assignment affected by failure to fix a limit of time for the assignee to apply the proceeds of the assigned property.

4. STATUTES—CONSTRUCTION—ADOPTION OF STATE LAWS BY CONGRESS.

Since Act Cong. May 2, 1890, (26 U. S. St. c. 182, § 81,) adopts and puts in force in the Indian Territory the body of the statutes of the state of Arkansas, it will be presumed that the construction and interpretation placed on these statutes by the supreme court of the state prior thereto were adopted at the same time.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—INVENTORY.

The failure of an assignee for the benefit of creditors to file an inventory of the assigned property, as Manf. Dig. Ark. § 805, requires him to do before he takes possession of or in any wise controls the assigned property, will not invalidate the deed of assignment as against an attachment levied after it was executed. Following *Clayton v. Johnson*, 36 Ark. 406.

6. SAME.

Where such attachment is levied before the assignee is able to make an inventory, and the property is sold by the marshal as being perishable, an inventory by the assignee, which adopts the description under which the property was sold by the marshal, is sufficient.

7. ATTACHMENT—CLAIMS BY THIRD PERSONS—WITNESSES—EXAMINATION.

Where an attachment is levied on the ground that defendants have disposed of their property in fraud of creditors, and a third person intervenes, claiming the attached property under an assignment for the benefit of creditors, it is within the discretion of the court, on the trial of the intervention, to refuse to allow plaintiff to put leading questions to the assignors.

8. SAME—INTERVENTION—PETITION—SUFFICIENCY.

The failure of the intervenor to file the deed of assignment under which he claims is not ground for a demurrer to his petition, but only for a motion for a more specific statement.

9. SAME—EVIDENCE—PREFERENCES—RELEVANCY.

On an issue as to the validity of this assignment, evidence that the assignors—a partnership—preferred and provided for the payment of an individual debt of one of them, is irrelevant where there is no allegation that the assignee knew of or participated in this arrangement.

10. SAME—INSTRUCTIONS—HARMLESS ERROR.

Where the only objection to the assignment is that the assignee failed to conform to the requirements of the statute, an instruction that it is the duty of a failing debtor to assign all his property for the benefit of his creditors is harmless error.

11. SAME—TRIAL—RIGHT TO OPEN AND CLOSE.

Where plaintiff in the attachment denies the validity of the assignment under which the intervenor claims, the burden of showing its validity is thrown on the intervenor, and he has the right to open and close.

Error to the United States Court in the Indian Territory.

Action by Sanger Bros. against Flow & Foster, in which L. P. Anderson intervened. There was judgment on verdicts for defendants and intervenor, and plaintiffs bring error. Affirmed.

Before CALDWELL, NELSON, and HALLETT, JJ.

W. O. Davis, for plaintiffs in error.

W. B. Johnson, A. C. Cruce, and C. E. Mitchell, for defendants in error.

CALDWELL, J. On the 24th of November, 1890, the plaintiffs in error brought suit in the court below against Flow & Foster upon account for \$2,171.67. On the same day the plaintiffs filed an affidavit for an attachment against the defendants, upon the ground that they had disposed of their property with the intent to defraud their creditors. An order of attachment was issued on the 24th of November, and on the same day levied on a stock of general merchandise, store fixtures, safe and contents, books, accounts, and notes, which had been the property of the defendants. Upon the application of the plaintiffs the court made an order directing a sale of all the property attached as perishable property, and on the 5th of January, 1891, it was sold by the marshal. On the day the plaintiff sued out the attachment, but some hours before the order of attachment was issued or levied, the defendants executed a deed of assignment to the interpleader, Anderson, conveying to him, in trust for their creditors, the identical property afterwards seized by the marshal on the order of attachment against the defendants. The deed of assignment was duly acknowledged and delivered to the assignee, and filed for record before the order of attachment reached the hands of the marshal. The assignee appeared, and filed an interplea, claiming the attached property under the deed of assignment, and the defendants filed an affidavit denying the grounds of the attachment. The plaintiffs filed an answer to the interplea, denying the execution of the deed of assignment, and alleging that it was void on its face, fraudulent in fact, and executed after the issue and levy of the writ of attachment. The issues on the interplea and on the attachment were submitted to the same jury who found the issues on the interplea in favor of the interpleader, and the issue on the attachment in favor of the defendants. Judgment was rendered in favor of the interpleader for the proceeds of the sale of the attached property, and in favor of the defendants quashing the attachment. The specifications of errors filed below and relied upon in counsel's brief will be considered.

The act of congress approved May 2, 1890, (26 U. S. St. c. 182, § 31,) adopted and put in force in the Indian Territory the body of the statutes of the state of Arkansas, as contained in Mansfield's Digest of the laws of that state. Among the statutes thus put in force was chapter 8 of that Digest relating to assignments for the benefit of creditors. Section 305 of the Digest provides that before the assignee shall be entitled to take possession, sell, or in any way manage or control the assigned property he shall file in the office of the clerk exercising chancery jurisdiction a full and complete inventory of the property, and a bond in double its estimated value. The deed of assignment contains this clause: "The said L. P. Anderson not to take possession of said property until he shall have filed a good and sufficient bond, as in such cases

made and provided." The deed makes no reference to an inventory, and the contention is that the clause prohibiting the assignee from taking possession until he gives bond is tantamount to providing that he shall take possession before making and filing the requisite inventory. It is the settled construction of this act by the supreme court of Arkansas that a deed of assignment, which in terms or by necessary implication provides that the assignee shall take possession of the assigned property before he makes and files the required inventory and bond, is repugnant to the statute, and void. But it is not essential to the validity of a deed of assignment that it should require the assignee to make and file the inventory and bond. The law imposes that duty on the assignee. The clause in the deed requiring the assignee to give bond before taking possession of the property is, therefore, surplusage. A useless provision, relating to giving the bond, which is in harmony with the statute, cannot be construed as authorizing or directing the assignee to take possession before he makes an inventory, in violation of the statute.

The deed of assignment prefers certain named creditors, and provides that, after paying the expenses of the trust and the preferred creditors, the balance of the trust fund shall be paid "to all our remaining creditors *pro rata*, according to their indebtedness." The names and amounts due the unpreferred creditors are not given in the deed or in any schedule attached thereto. It is claimed that the failure to attach such a schedule avoids the deed. The law is otherwise. Burrill, Assignm. pp. 186, 205. Such a schedule, if filed, would not be conclusive as to who were creditors, or the amount of their debts. If any surplus remains to be distributed to such creditors, and there is any doubt as to who they are, or the amount of their debts, the assignee should refer the matter to the court of chancery administering the trust, and that court will, by some appropriate proceeding, determine these questions, and order the fund distributed accordingly. If the assignee fails to act, any creditor may compel him to do so. Nor does the failure to fix a limit of time for the assignee to apply the proceeds of the assigned property affect the validity of the deed of assignment. Burrill, Assignm. p. 323. If the assignee does not pay over the trust fund to the creditors as quickly as he should, the court under whose supervision he is administering the trust, or any court of chancery having jurisdiction, will compel him to do so on the application of any creditor.

Several assignments of error rest on the proposition that the failure of the assignee to make and file the required inventory and bond before the property was attached by the plaintiffs avoids the deed as against such attachment. In adopting the Arkansas statutes for the Indian country it will be presumed that they were adopted with the construction and interpretation placed upon them by the supreme court of that state prior to their adoption by congress. It has long been settled by the decisions of the supreme court of Arkansas construing the statute under consideration that the execution and delivery of the deed of assignment to the assignee passes the title to the assigned property; that the failure of the assignee to make and file the inventory and give the bond does not affect

the validity of the deed, or the assignee's title to the property thereunder, but that the assignee is not "entitled to take possession, sell, or in any way manage or control" the assigned property until he makes and files the inventory and gives the required bond, though he may have "access" to the property for the purpose of making his inventory. *Clayton v. Johnson*, 36 Ark. 406; *Thatcher v. Franklin*, 37 Ark. 64; *Rice v. Frayser*, 24 Fed. Rep. 460. If for any reason the assignee does not make the inventory and give the bond within a reasonable time, the debtor, or any one of his creditors, may apply to the proper court for the appointment of an assignee who will qualify and execute the trust. *Clayton v. Johnson*, *supra*, 422. In this case the attachment of the assigned property by the plaintiffs put it out of the power of the assignee to make any more exact and complete inventory than was made. It seems that he finally adopted as his own the inventory made by the marshal under the order of attachment. As to one item, it is said that the inventory is not sufficiently specific, viz.: "One iron safe, books, accounts, and notes, \$1,500." But the property was seized by the marshal on the order of attachment before the assignee had had time to make an inventory, and it was afterwards sold by the marshal upon an order of the court, and assumed the shape of money in the hands of the marshal or in the registry of the court. The assignee could, therefore, do no better than accept the marshal's description of the property which he had seized and sold. As this condition of things was brought about by the attachment sued out by the plaintiffs, they will not be heard to complain of the necessary results of their own action. The inventory, being the best and only one that could be made under the circumstances, was sufficient. Now that the property has been converted into money in the manner stated, an inventory of that would be sufficient.

The case seems to have been tried below by the plaintiffs in error on the theory that the interpleader could not maintain his claim to the property unless he had made and filed the required inventory and bond before he filed his interplea, and that, if he had not done so, the plaintiff's attachment should be sustained. But neither of these propositions is sound law. The interpleader might make and file the required inventory and bond during the trial, and they would have the same legal effect as if they had been made and filed on the day the assignment was executed; and, if the assignment was otherwise valid, a total failure to make and file the inventory and bond would not invalidate the assignment, or sustain the plaintiff's attachment of the assigned property. In such case the property should be discharged from the attachment, and returned to the custody from whence it was taken, there to remain until the assignee qualified himself to receive it, or until a court of chancery, on the application of the debtor or some creditor, appointed an assignee to execute the trust.

It is assigned for error that the plaintiff "proposed to propound to the assignors leading questions," and the court refused to permit them to do so. This was a matter resting in the sound discretion of the trial court, and not reviewable in this court. In the trial of the issue between the

plaintiffs and interpleader the plaintiffs, no more than the interpleader, had a legal right to ask the assignors leading questions. A demurrer to the interplea was overruled, and that ruling is assigned for error. We see no objection to the sufficiency of the interplea. It was sufficient in substance. If a copy of the deed of assignment should have been attached to the plea, the failure to do so was not ground of demurrer, but only of a motion for a more specific statement. Such a motion was afterwards filed, but it did not ask that the interpleader be required to file a copy of the deed of assignment.

The plaintiffs offered to prove by the witness Betts that a note which the witness owned and held in his hand, for \$360, and purporting to be signed "A. J. Foster" and "D. D. Flow," and payable to one Lewis, was given for an improvement sold by Lewis to Foster, and which improvement had since been occupied by Foster as his homestead; and that said note was originally signed by Foster alone, and that Flow's name was added after witness purchased the note from Lewis. This evidence was excluded upon the ground, as stated in the bill of exceptions, that the note was the best evidence as to who were its makers. The object of this evidence was to show that the assignors had preferred and provided for the payment out of the firm assets of an individual debt of one of the partners. The evidence was rightly excluded, but not for the reason assigned in the bill of exceptions. It was irrelevant, and did not tend to impeach the assignment, unless the assignee had knowledge of and participated in the arrangement. *Emerson v. Senter*, 118 U. S. 3, 6 Sup. Ct. Rep. 981. The court expresses no opinion on the question whether such knowledge on the part of the assignee at the time he accepted the trust would avoid the deed. That question is not in the case upon the pleadings. The answer to the interplea setting up this defense does not allege that the assignee was a party to the transaction, or had any knowledge of it whatever; nor was it proposed to offer such proof. For these reasons the evidence was irrelevant to the issue, and rightly excluded. *Emerson v. Senter*, *supra*.

The plaintiffs in error excepted to every paragraph of the charge to the jury. We perceive no substantial error in the charge for which the case should be reversed. In the course of the charge the court told the jury that "it has been decided by the highest judicial authorities, both in this country and in England, that a failing debtor has not only the privilege, but it is his duty, to make an assignment of all his property for the benefit of his creditors." The law imposes no such duty on a failing debtor, and the statement that it does was erroneous; but, as it was an abstract proposition, which could not affect or influence the verdict, it is not an error for which the case should be reversed.

It is assigned for error that the interpleader was permitted to open and close the argument to the jury. The plaintiffs denied the execution and validity of the assignment. This imposed the burden on the interpleader of proving the execution of the deed and his title to the assigned property, and entitled him to the opening and close on that issue. The interpleader was not concerned with the issues on the attachment.

That was an issue between the plaintiffs and the defendants, triable before the court. *Holliday v. Cohen*, 34 Ark. 707, 716. It was, however, submitted to the jury trying the issue between the interpleader and the plaintiffs, because it was known its fate must be determined by the result of that issue. There was no ground for the attachment other than the making of the deed of assignment. If the assignment was valid, the attachment was confessedly wrongfully sued out, and *vice versa*. The real issue was on the interplea, and the interpleader's rights could not be prejudiced by the plaintiffs and defendants agreeing to submit to the same jury the issue between them on the attachment.

There was an error in the mode of impaneling the jury in the case. *Railway Co. v. James*, 48 Fed. Rep. 148, (decided at the present term.) But we are all of opinion that upon the state of the pleadings and the proofs in this case there was nothing for the court to submit to the jury, and that the court should have directed a verdict for the interpleader. *Chandler v. Von Roeder*, 24 How. 224; *Commissioners v. Clark*, 94 U. S. 278. There was no evidence tending in the slightest degree to impeach the assignment. An appellate court should not reverse a judgment for an error when it plainly appears from the record that the error worked the complaining party no harm. *Deery v. Cray*, 5 Wall. 795, 807; *Smith v. Shoemaker*, 17 Wall. 630; *Gregg v. Moss*, 14 Wall. 564; *West v. Camden*, 135 U. S. 507, 521, 10 Sup. Ct. Rep. 838. As the verdict rendered was the only verdict that could have been rendered in the case, no matter how the jury was impaneled or constituted, the plaintiffs were not harmed by the error. Judgment affirmed.

BEUTTELL v. MAGONE, Collector.

(Circuit Court, S. D. New York. January 29, 1890.)

CUSTOMS LAWS—RUGS—TOURNAY VELVET CARPETS.

Daghestan rugs and Dag. Dag. rugs of like character or description to Tournay velvet carpets, though not, or not made from, portions of such carpets, are, under Schedule K of the tariff act of March 3, 1883, (22 U. S. St. 483,) dutiable at the rate of duty imposed by that schedule upon Tournay velvet carpets.

At Law.

During November and December of the year 1887 the plaintiff made six importations from Halifax, England, into the port of New York, of certain merchandise invoiced as Daghestan rugs and Dag. Dag. rugs. These rugs were classified for duty by the defendant, as collector of that port, as rugs of like character or description to Tournay velvet carpets, under the provision that "mats, rugs, screens, covers, hassocks, bedsides, and other portions of carpets or carpetings, shall be subjected to the rate of duty herein imposed on carpets or carpeting of like character or description," contained in Schedule K of the tariff act of March 3, 1883,

(Tariff Ind., New, par. 378.) and the provision for Tournay velvet carpets contained in the same schedule, (Id. par. 370;) and, pursuant to such provisions, duty at the rate of 45 cents per square yard, and, in addition thereto, of 30 per centum *ad valorem*, was exacted thereon. Against this exaction and this classification the plaintiff duly protested, claiming that these rugs were dutiable at the rate of 40 per centum *ad valorem* as "rugs," under the provision for all other rugs contained in the same schedule. Id. par. 378. Thereafter, the plaintiff duly made appeals to the secretary of the treasury, and, within 90 days after adverse decisions were rendered thereon by the secretary, duly brought this suit to recover the difference between the duties at the rate exacted and the duties at the rate claimed by him in his protest. Upon the trial it appeared that these rugs were of the following sizes: 36 inches long by 18 or 36 inches wide; 53 inches long by 27 inches wide; 63 inches long by 36 inches wide; 72 inches long by 44 inches wide,—that the upper surfaces of the same were plush, made of worsted; that the upper surface of Tournay velvet carpets, which was another name for Wilton velvet carpets, were also plush, made from worsted, and that there were other carpets enumerated *eo nomine*, or otherwise, in the tariff act of March 3, 1883, whose upper surface were also plush; that the backs or lower surfaces of these rugs were of the same general character as the lower surface or back of Wilton or Tournay velvet carpets, though made of different materials; that the designs upon the upper surfaces of these rugs were of the common rug designs, and not of the same designs as found on Wilton or Tournay velvet carpets; that these rugs were otherwise of the same character or description as Wilton or Tournay velvet carpets; that the plaintiff advertised and put upon the market these rugs under the designation of Wilton Daghestan rugs; that on and prior to March 3, 1883, rugs of like character and description to the rugs in suit were bought and sold in the trade and commerce of this country under the name of Wilton rugs; that there were rugs made from portions of carpets or carpeting; that the rugs in suit were not so made, but were each woven in a loom, generally to the number of 10 to 15, separate and distinct, being only connected by fringe, which consisted of threads running through the entire number of rugs woven at one time; that after these rugs were so woven, they were cut apart by cutting this fringe, and the fringe left at the ends of each rug was tied, and each rug was then ready for the market; that the looms on which the rugs in suit were woven were heavier than the looms on which the Wilton or Tournay velvet carpets were made, and had six frames, while the looms upon which the Wilton or Tournay velvet carpets were woven had only from three to five frames; that the looms on which the rugs in suit were woven were especially adapted to weaving rugs, and not carpets; that the looms upon which Wilton or Tournay velvet carpets were woven were especially adapted for weaving carpets, and were not adapted for weaving rugs; and that bedsides were simple pieces or portions of carpets or carpetings, cut into desired lengths, and without any finishing after being so cut, to be laid down beside beds. Both sides having rested, both plaintiff and defend-

ant respectively moved the court to direct the jury to find a verdict in his favor.

Stephen G. Clarke and Charles Curie, for plaintiffs.

Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (*orally.*) The rugs in suit are of like character or description to Wilton or Tournay velvet carpets. The provisions for these and other carpets or carpetings, and also for rugs, contained in Schedule K of the tariff act of March 3, 1883, and similar provisions contained in various other tariff acts, from 1861 to March 3, 1883,—Act March 2, 1861, c. 68, § 13, (12 U. S. St. 178;) Act July 14, 1862, c. 163, § 9, (Id. 543;) Act June 30, 1864, c. 171, § 5, (13 U. S. St. 202;) Act March 2, 1867, c. 197, § 1, (14 U. S. St. 559;) Schedule L, § 2504, Rev. St.,—leave little doubt as to the question raised here. It appears that congress, after providing for a great many different kinds of carpets or carpetings by specific names, or by descriptive terms indicative of the materials of which they are composed, has further provided that all rugs of like character or description to any of these enumerated carpets or carpetings shall be subject to the rate of duty imposed on such carpet or carpetings. Having made provision for such rugs, it has then provided that all other rugs, not included in that provision, shall be subject to duty at the rate of 40 per cent. *ad valorem*. There is no reason to suppose, as contended by the plaintiff in support of his claim, that congress intended that rugs of like character or description to some one of the various enumerated carpets or carpetings, when they are, or are made from, portions thereof, should pay the same rate of duty as is imposed on such carpet or carpetings, but, when not so made, should pay a less rate of duty. On the contrary, there is strong reason to conclude that congress considered the character or description of rugs, if like the character or description of any one of such carpets or carpetings, a more important element in fixing their classification than their mode of manufacture. I therefore direct a verdict for the defendant.

INGERSOLL *et al.* v. MAGONE, Collector.

(Circuit Court, S. D. New York. February 18, 1891.)

CUSTOMS LAWS—TRAVELING RUGS.

Traveling rugs which were imported during the year 1888, and which are articles generally used for wrapping about the legs or the body of a person when traveling, and as coverings for lounges and beds, or for throwing over the body of a person when lying on a lounge or a bed, are not dutiable under the provisions for rugs contained in paragraph 378 of the act of March 3, 1883, (22 U. S. St. 488.)

At Law.

During the year 1888 the plaintiffs made an importation from England into the port of New York of certain articles invoiced as "woolen rugs."

These articles were classified for duty as "woolen shawls," under the provision for "woolen shawls" contained in Schedule K of the tariff act of March 3, 1883, (22 U. S. St. 488, Tariff Ind., New, par. 362,) and duty, accordingly as their value exceeded or did not exceed 80 cents per pound, was exacted thereon at the rate of 35 cents per pound and 40 per centum *ad valorem*, or 35 cents per pound and 35 per centum *ad valorem*, by the defendant, as collector of that port. Against this classification and this exaction the plaintiffs duly protested, claiming that these articles were "traveling or carriage rugs," and, as such, were dutiable at the rate of 40 per centum *ad valorem*, under the provisions for "all * * * other rugs," found in Schedule K of the aforesaid tariff act, (Tariff Ind., New, par. 378,) and in accordance with the decision of the department promulgated March 2, 1888. The plaintiffs at the same time made due appeals, which were decided adversely to them, in accordance with the decision of the department promulgated December 11, 1888, and, after such adverse decision, duly brought this suit to recover all duties exacted on these articles in excess of 40 per centum *ad valorem*. On the trial it appeared that the articles in suit were made of wool, and were of two kinds,—one, 5 feet long by 5 feet and 2 inches wide, weighing 4 pounds and 12 ounces, with a fringe at each of its two ends, and presenting on one side a bright colored striped appearance, and on the reverse side a twilled appearance in two colors; the other, 6 feet and 2 inches long by 5 feet and 2 inches wide, weighing 3 pounds and 6 ounces, without fringe, bound on all its edges with a binding, and presenting a dull striped appearance, alike, or nearly alike, on both sides; that the weight of each was much greater than that of a "shawl;" that articles like those in suit had been known to trade and commerce in this country only for the past 15 years; that during that period such articles were never known in trade and commerce in this country as "shawls," but always as "traveling rugs," and by no other name; that such articles were generally used for wrapping about the legs or the body of a person when traveling, and as coverings for lounges and beds, or for throwing over the body of a person when lying on a lounge or a bed; that a "shawl," as defined by Webster, is "a cloth of wool, cotton, silk, or hair, used especially by women as a loose covering for the neck and shoulders;" that a "rug," as defined by Webster, is "a coarse, nappy, woolen fabric, used for various purposes,—as (a) for the cover of a bed; (b) for protecting the carpet before a fire-place; (c) for protecting the legs against the cold in riding, as a railway rug."

W. Wickham Smith and D. Ives Mackie, for plaintiffs.

Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (*orally*.) The articles in suit were known in trade and commerce of the country at and prior to the passage of the tariff act of 1883 as "traveling rugs," and by no other name. This act provides for "rugs" simply, and not for "traveling rugs." "Rugs" have been provided for *eo nomine* in the different tariff acts for nearly 30

years past,—Act March 2, 1861, c. 68, § 13, (12 U. S. St. 178;) Act July 14, 1862, c. 163, § 9, (Id. 543;) Act June 30, 1864, c. 171, § 5, (13 U. S. St. 202;) Act March 2, 1867, c. 197, § 1, (14 U. S. 559;) Schedule L of section 2504, Rev. St.; Act March 3, 1883, Schedule K, (22 U. S. St. 488,)—and always in connection with provisions for carpets or carpetings, and for articles of a similar nature, and, like them, used on floors. “Traveling rugs” are generally used for wrapping about the legs or the body of a person when traveling, and as coverings for lounges or beds, and for throwing over the body of a person when lying on a lounge or bed. “Traveling rugs” have never been provided for *eo nomine* in any tariff act, and, according to the evidence in this case, have been known to trade and commerce of this country only for the past 15 years. In view of the history of the legislation of congress concerning “rugs,” as evidenced by the different tariff acts from 1861 to 1883, both inclusive, and of the evident intention with which it has used the word “rugs” in paragraph 378, in Schedule K of the tariff act of 1883, I am constrained to direct a verdict for the defendant.

In re CARRIER et al.

(District Court, D. New Jersey. October 29, 1891.)

BANKRUPTCY—PROCEEDINGS TO REALIZE ESTATE—OBJECTION TO JURISDICTION.

Where an assignee in bankruptcy applies for a rule against persons claiming lots by purchase from the bankrupt, to show cause why they should not be turned out of possession and restrained from interfering with a sale by the assignee, and they appear before the register and defend on the merits, and then fail to except to his report, on which the rule is made absolute, it is too late for them thereafter to seek to have the proceedings set aside as void for want of jurisdiction in the court as a court of bankruptcy.

In Bankruptcy.

This was a petition by A. J. and J. L. Long to set aside certain orders in bankruptcy proceedings against Carrier & Baum. The opinions of the court on former questions arising in the same proceedings are reported in 46 Fed. Rep. 850 and 47 Fed. Rep. 438.

James Fitzsimmons, for petitioners.

L. B. D. Reese, for assignee.

REED, J. A petition was filed December 31, 1889, by L. B. Duff, assignee of Carrier & Baum, setting forth that at the time of the filing of the petition in bankruptcy A. E. Baum was the owner of certain lots in the borough of Freeport, Armstrong county, Pa., and reciting at length of title by which said Baum held the lots. The petition further averred that the said lots, title to which it was claimed had passed to the petitioner as assignee, were held by one Ingersoll, who had been put into the building on the lots by Baum for the purpose of taking care of it, and that Ingersoll had agreed, after some legal proceedings

had been taken against him, to surrender possession to petitioner whenever desired. That in 1889, some 15 years after the adjudication of said Baum as a bankrupt, an attempt was made by petitioner, under an order of court, to sell the property, and on the 28th day of December, 1889, at the time the lots were exposed to sale, a notice was read by Ingersoll, as attorney for A. J. Long and J. L. Long, claiming to have purchased the property from A. F. Baum, Robert Campbell, and Margaret Baum, and stating that bidders would take no title. The petition charges that, after the order of sale had been obtained, Baum made a pretended sale to the Longs, who put a small quantity of lumber on the lots, in order to claim colorable possession thereof, and, together with Baum, procured Ingersoll to give said notice, in order to affect the bidding and deter purchasers. That the possession claimed by Longs is without color of title. That Robert Campbell has no interest in said lots, and that such acts, upon which possession is claimed to rest, took place within three months, and were fraudulent and collusive, and designed to prevent the property from coming into the hands of the assignee. The petition prays a rule upon Baum, Ingersoll, and A. J. and J. L. Long, to show cause why they should not vacate said property, and why an order should not be made restraining them from interfering with the possession of the property and the sale thereof by the assignee. To this petition an answer was filed January 11, 1890, by J. L. Long, A. J. Long, and A. F. Baum, generally denying the allegations of the petition; the Longs in their answer claiming title partially through Robert Campbell. They also say—

"That they respectfully object to being turned out of possession of the same in this way. That they are ready to defend their title to the said property in any regular judicial proceeding of the usual character, and submit their title cannot or should not be adjudged by this hasty remedy. They also submit to the court, with the utmost respect, that said assignee of Carrier & Baum has no right or title to the said property, or any power over the same."

George G. Ingersoll filed an answer, stating that he never interfered with the sale of the property, except by serving the notice for the Longs and for Baum and his wife, and alleging that he was in possession under a lease from Baum to Mrs. Ingersoll, the wife of the respondent. On April 3, 1891, the matter was referred to A. Y. Smith, Esq., register in bankruptcy, for examination and report. The testimony returned with his report shows that counsel for the respondents were present at the several hearings, and defense was made upon questions of fact and the merits. The register's report was filed August 24, 1891, and confirmed *nisi*. No exceptions having been filed, an order was made on September 4, 1891, confirming the report absolutely, and ordering the respondents to forthwith vacate the property, and containing a clause enjoining the respondents from taking or holding possession of the real estate, and from interfering with the possession of the assignee, or the sale by him of the property. No attention having been paid to this order, upon October 4, 1891, a petition was presented by the assignee, and a rule granted on the respondents to show cause why an attachment

should not issue against them, and why the United States marshal should not be directed to remove respondents from the property. This rule was returnable October 17, 1891, but at the request of the counsel for respondents was extended until October 24, 1891, at which time the rule was continued as to the attachment, but made absolute as to the direction to the marshal. On October 27, 1891, a petition was presented on behalf of the Longs, praying that all the above-recited orders be vacated and set aside as null and void, for want of jurisdiction in the court, as a court of bankruptcy, to make the same. Counsel for the assignee opposed the application, upon the ground that the lots were part of the bankrupt's estate, and in the possession of the assignee, (Ingersoll having recognized his right to possession, and agreed to hold under him,) until that possession was disturbed by the wrongful acts of the respondents; that, therefore, the proceeding by petition and rule to show cause was proper, and within the power of the court as a court of bankruptcy.

It is, however, unnecessary to pass upon that question, for the respondents appeared voluntarily, answered upon the merits, and went in to the hearing before the register, and have thereby waived any question as to the form of the proceeding. The case of *Stickney v. Wilt*, 23 Wall. 150, in my judgment, rules this case. There a petition had been presented by the assignee, a rule to show cause was not granted, but the parties appeared and answered, and an order was made after hearing, sustaining the petition, and decreeing relief, as prayed in the petition. The supreme court said:

"Rights of property were claimed in these lands by the appellee, and the suit in this case was commenced in the district court, contesting that claim, which is plainly a subject-matter cognizable under that provision. [Rev. St. § 4979.] Nor is it any argument against that theory that the first pleading in the district court is in form a petition, as suits at law and in equity, in many jurisdictions, are commenced in that form of pleading. Beyond all doubt, the petition contains every requisite of a good bill in equity, whether the pleading is tested by the statement of the cause of action, or by the charging part of the bill, or by the prayer for relief; and, if it be suggested that it contains no prayer for process, the answer to the objection is a plain one, to-wit, that three of the parties respondent appeared, and waived the issuing and service of process, and that the appellee voluntarily appeared and filed an answer."

A proceeding, similar in form to that in the present case, was sustained in the *Case of Anderson*, 23 Fed. Rep. 482.

I am unable to see how the petitioners have suffered any injury by the mode of proceeding followed in this case. They have had a full opportunity to be heard on the merits, and permitted the register's report to be filed and confirmed without objection, and did not even pursue to argument the suggestion in their answer as to the form of proceeding, even if the most favorable construction be put upon that portion of their answer, and it be considered as an objection to the proceeding. It is too late to inquire into the merits of the register's findings and report. The petition must be refused; and it is so ordered.

In re NICHOLS.

(Circuit Court, W. D. Pennsylvania. November 6, 1891.)

1. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—BOOK CANVASSER'S LICENSE—HABEAS CORPUS.

An ordinance of the city of Titusville, Pa., requiring the payment of a license fee from all persons soliciting orders for goods, books, etc., is void as a regulation of interstate commerce, in so far as it is applied to an agent soliciting orders for books, to be filled on the approval of his principal in New York, notwithstanding that the books are sent from a storehouse in Pittsburgh, which is kept replenished from the main office in New York; and, when such agent is imprisoned for a violation of the ordinance, he is entitled to be released by the federal circuit court on a writ of *habeas corpus*.

2. SAME—POLICE POWER.

The ordinance cannot be upheld on the ground that it is a police regulation designed to protect the inhabitants from the unwarrantable intrusions of such canvassers, since by paying the fee the business may be carried on without restraint.

At Law.

Petition by Charles D. Nichols for a writ of *habeas corpus* to release him from imprisonment for violating an ordinance of the city of Titusville, Pa., by canvassing for books without a license. Prisoner discharged.

Joseph R. McQuide, for petitioner.

George A. Chase, for the city of Titusville.

REED, J. The petition of Charles D. Nichols states that he is a citizen of the state of New York, and is the agent and employe of P. T. Collier, a citizen of the state of New York; that his business, as such employe and agent, is that of soliciting orders for the sale of books and periodicals published by said Collier in the city of New York, where all orders for books and periodicals taken by the petitioner for his employer are sent to be filled, and the goods are subsequently delivered by said Collier on such terms and conditions as meet his approval; that on October 3, 1891, while engaged in the business of soliciting orders for the sale of books and periodicals in the manner aforesaid in the city of Titusville, in the state of Pennsylvania, he was arrested upon a charge of violation of an ordinance of that city, requiring the payment of a license fee for the privilege of pursuing his business, as aforesaid, in the city, and, after a hearing, was sentenced to pay a fine of \$78 and costs, and in default of payment was imprisoned. At the hearing upon the petition the facts developed were substantially as stated in the petition, except that it appeared that Mr. Collier, the employer, had a branch office or store-room in the city of Pittsburgh, from which he sent out the books which were needed to fill the orders taken by the canvassers. As needed to replenish the stock in the branch office in Pittsburgh, Mr. Collier shipped books from time to time from his main office or store-house in New York city. The ordinance in question provides—

"That all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure

from the mayor a license to transact said business, and shall pay to the said treasurer therefor the following terms, according to the time for which said license shall be granted, viz.: For one day, one dollar and fifty cents; for one week, five dollars; for three months, ten dollars; and for one year, twenty-five dollars: provided, that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers residing or doing business in said city."

By a supplement the ordinance was amended in an immaterial matter relating to the amount of the license fee for one year.

In *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, the statute of Tennessee in question provided that all drummers, and all persons not having a regular licensed house of business in the taxing district of Shelby county, offering for sale, or selling, goods by sample, should pay a certain sum per week or per month for such privilege. The supreme court held that, so far as applied to persons soliciting the sale of goods on behalf of individuals or firms doing business in another state, it was a regulation of commerce among the states, and violated the provisions of the constitution of the United States, which grants to congress the power to make such regulations.

In the case of *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, the supreme court say:

"In our opinion, such a construction of the constitution leads to the conclusion that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or the receipts derived from the transportation, or on the occupation or business of carrying it on; and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress."

In the case of *Asher v. Texas*, 128 U. S. 129, 1 Sup. Ct. Rep. 1, a statute of the state of Texas provided that there should be collected from every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax of \$35. Asher, the plaintiff in error, was arrested for failure to pay the tax, and it appeared that he was employed as a drummer, or solicitor of trade by sample, by a citizen of Louisiana, engaged in business in the latter state. The supreme court held the statute unconstitutional, as imposing a burden upon interstate commerce by way of taxing an occupation directly concerned therein, and reaffirmed the principles laid down in the case of *Robbins v. Taxing Dist.*

In the case of *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. Rep. 256, a similar statute, enacted by the legislative assembly of the District of Columbia, was held to be a regulation of interstate commerce, so far as applicable to persons soliciting the sale of goods on behalf of individuals or firms doing business outside of the district, and hence unconstitutional.

So in the case of *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 879, the court say:

"Much reliance has been placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state cannot

be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself."

In the *Case of White*, 43 Fed. Rep. 913, a case identical with the present case in its facts, and in this court, Judge ACHESON discharged the petitioner, as held in custody under an ordinance which was unconstitutional, as a regulation affecting interstate commerce. Similar orders were made in the case of *Ex parte Stockton*, 33 Fed. Rep. 95, by the district court for the eastern district of Texas; by the district court of Minnesota, in the *Case of Kimmel*, 41 Fed. Rep. 775; and by the circuit court for the eastern district of North Carolina, in the *Case of Spain*, 47 Fed. Rep. 208.

It was argued by the counsel for the city that the ordinance in question in this case was a proper police regulation for the protection of its citizens, and to add to their comfort, "by preventing the intrusive domiciliary visitations of canvassers and peddlers, who go from house to house in relentless personal pursuit of purchasers." But, conceding (what is extremely doubtful, if, indeed not denied by the case of *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681) that a state or municipality may regulate the manner in which citizens of other states may prosecute their business by selling goods and merchandise not hurtful in themselves, still the ordinance does not purport to be such a regulation. It is solely for the purpose of raising revenue. Any person paying the prescribed license fee may, during the period covered by his license, freely transact business in the city, even to the extent of "intrusive domiciliary visits" to the unfortunate inhabitants.

It is impossible to distinguish the facts in this case from those in *Robbins v. Taxing Dist.*, *Asher v. Texas*, and *Stoutenburgh v. Hennick*, *supra*, and, that being so, the authority of those cases is such that there can be no discussion of the principles involved. The ordinance, therefore, being void as to the petitioner, and he being in custody in violation of the constitution of the United States, the petitioner is entitled to his discharge, and it is ordered that the petitioner be, and he is hereby, discharged; the respondent to pay the costs.

In re TYERMAN.

(Circuit Court, W. D. Pennsylvania. November 6, 1891.)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—BOOK CANVASSER'S LICENSE.

An ordinance of the city of Titusville, Pa., requiring the payment of a license fee from all persons soliciting orders for books, etc., and from persons delivering books under orders so obtained, is void as a regulation of interstate commerce, in so far as applied to one delivering books sold by an agent, to be delivered, on the approval of his principal in New York, from a store-house in Pittsburgh, which is kept replenished by shipments from the principal office in New York.

At Law.

Petition by William Tyerman for a writ of *habeas corpus* to release him from his imprisonment for violating an ordinance of the city of Titusville, Pa., by delivering books sold by a book canvasser. Prisoner discharged.

Joseph R. McQuaide, for petitioner.

Geo. A. Chase, for City of Titusville.

REED, J. The facts in this case are similar to those appearing in the *Case of Nichols*, 48 Fed. Rep. 164, (November term, 1891,) except that this petitioner was employed by P. F. Collier, a citizen of the state of New York, and doing business in the city of New York, to deliver the books sold by Mr. Nichols, and to collect the price therefor. These books are sent to him from Mr. Collier's branch store-room or office in the city of Pittsburgh, and while he was engaged in such employment he was arrested for failure to obtain the license required by the ordinance of the city of Titusville, and is now in custody for failure to pay a fine imposed under the provisions of such ordinance. For the reasons set forth in the opinion in the *Nichols Case*, he must also be discharged. There is no difference in principle between the two cases, this petitioner being engaged in completing the sales made by Mr. Nichols, and therefore engaged in interstate commerce. The precise question was decided in favor of the petitioner in the *Case of Spain*, 47 Fed. Rep. 208, Judge BOND saying: "The right to sell implies the obligation and the right to deliver. It is as much interstate commerce to do the one as the other." And it is ordered that the petitioner be, and he is hereby, discharged; the respondents to pay the costs.

In re DIDFIRRI et al.

(Circuit Court, S. D. New York. ———.)

IMMIGRATION—CONTRACT LABOR—HABEAS CORPUS TO REVIEW COMMISSIONER'S DECISION.

On preliminary inquiry by the inspection officers, certain immigrants stated that their passage was paid for them, and that they came under an engagement to work on a railroad in Ohio for 7 francs a day; but on a subsequent special inquiry they retracted these statements. *Held*, that there was competent evidence tending to show that they had come in violation of the restriction act, and the court had no jurisdiction to review by *habeas corpus* the commissioner's decision ordering them to be taken back.

Application for Writ of *Habeas Corpus*.

The relators, 36 immigrants, arriving at the port of New York, were prevented from landing by the acting commissioner of immigration. Upon their arrival they stated, in response to the inquiries of the inspection officers, that their passage was paid for them, and that they had been engaged in Italy to work on a railroad in Ohio for a compensation of seven francs a day. Subsequently, upon a special inquiry, they retracted these statements. The commissioner of immigration having directed the master of the ship to take them back, they obtained a writ of *habeas corpus* to review his action.

LACOMBE, Circuit Judge, (*orally*.) It appears in this case that upon the arrival of these immigrants the inspection officers made inquiries of them touching the circumstances under which they had come to this country. In reply to these questions, answers were given, which were reduced to writing in the form of affidavits, were translated to the immigrants, and were by them sworn to. These statements of the immigrants were certainly competent evidence for the commissioner of immigration to take into consideration in determining whether or not they should be permitted to land. They make out a case which would warrant the finding that their transportation to this country was paid for with the money of another, and that they came under an agreement, made previous to their emigration, to perform labor in the United States. Subsequently a special inquiry into their several cases was conducted by the commissioner of immigration, and the testimony taken on that inquiry contradicts their statements upon preliminary examination. In this respect these cases differ from that of *In re Feinknopf*, 47 Fed. Rep. 447, in which Judge BENEDICT filed the opinion referred to on the argument. In that case there was no evidence whatever, either in the preliminary examination or the special inquiry, tending to show that the immigrant was within one of the prohibited classes. Here, however, there is evidence which, standing alone, would fairly warrant the conclusion that these immigrants have come here in violation of the statute. That being so, it is not the part of the court to look any further to see if there is any additional evidence contradicting that, and to weigh all

the testimony in the case. Appellate tribunals have been created by the immigration law to correct any errors of the commissioner of immigration in cases where there is conflicting testimony. Where there is some competent evidence before the commissioner sustaining his ruling, this court will not interfere because there was also before him contradictory testimony, which he apparently disbelieved.

The writ is dismissed.

RICKS, Jr., *et al.* v. CRAIG *et al.*

(Circuit Court, D. Massachusetts. November 6, 1891.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRIOR STATE OF ART—ENGINE LUBRICATORS.

Letters patent No. 214,589, issued April 22, 1879, to Nicholas Seibert, were for a new and improved feed indicator and reducing plug attachments for oil-cups, used for oiling the steam-chest and cylinder of engines, so as to produce a uniform flow of oil. The specifications show that the discharge pipe of the oil-cup is connected directly with the steam-chest, and that, owing to the varying pressure in the chest, due to the opening and closing of the ports, the backward pressure of the steam in the oil-cup would vary, and thus cause an unequal flow of oil, and that the invention is designed to equalize this pressure by inserting in the discharge pipe, between the cup and the chest, a plug with an opening so small that steam could not pass through rapidly enough to communicate the rapid changes in the chest. Claim 2 is for "the reducing plug, constructed and operated as and for the purposes described." *Held* that, in view of the prior state of the art, this claim must be restricted to the purpose described, and it is not infringed by the patent of April 20, 1886, to William H. Craig, in which the pressure is made uniform by an "equalizing pipe," opening into the discharge pipe and connecting with the steam-pipe at a point where the pressure is constant, and also having an obstruction in the discharge pipe, with a small opening, fitted with a spindle valve, since it appears that this latter device was for the purpose of maintaining an equal pressure as against the suction produced by shutting off the steam from the steam-chest when the locomotive was running down grade.

In Equity. Bill for infringement of patent.

Thomas Wm. Clarke and Edmund Wetmore, for complainants.

William K. Richardson and F. P. Fish, for defendants.

COLT, J. The bill in this case charges the defendants with infringement of the second claim of letters patent No. 214,589, granted to Nicholas Seibert, April 22, 1879, for a new and improved feed-indicator and reducing-plug attachment for oil-cups. This class of lubricators is used upon steam-engines. Two things seem to be necessary to make a good lubricator,—the feed of the oil must be regular, and there must be an observation chamber, so that the engineer may see the quantity and regularity of the feed. The lubricator is generally fed by hydrostatic pressure. In the ordinary form of construction there is a pipe leading from the boiler or steam-pipe to a condensing chamber, where the steam is condensed into water. This chamber is connected at the bottom with the bottom of an oil reservoir. As the column of water is higher than the oil, the water passing into the oil receptacle will displace an equal

quantity of oil, which is carried by a pipe to the sight-feed in a glass observation chamber, and from there it passes through a discharge pipe to the parts to be lubricated. As the steam enters the condenser under boiler pressure it is manifest that, in order to prevent this pressure from affecting the flow of the oil, there must be an equal back steam pressure in the discharge pipe. This is accomplished by connecting the discharge pipe with the steam-pipe, or with the same steam space as fills the condensing pipe. By this means there is secured a balanced steam pressure at the sight-feed, and the oil is fed regularly by hydrostatic pressure. This form of lubricator is applied to stationary engines. But in locomotive engines the discharge pipe is connected either with the dry pipe, which is analogous to the steam-pipe, leading into the steam-chest above the cylinder, or with the steam-chest; and under these conditions it becomes a more difficult problem to produce a balanced steam pressure upon the oil-cup. When the discharge pipe is connected with the dry pipe on the engine side of the throttle-valve, it is apparent that, when the valve is closed in stopping the locomotive, or in running down grade, the steam will be entirely cut off from the discharge pipe, and there will be no back steam pressure to counterbalance the forward pressure from the condenser, and consequently the flow of oil will be increased. Again, when the discharge pipe is connected with the steam-chest, which opens into the cylinder, there is not only this unbalanced pressure to overcome, but there is also the fluctuations of pressure coming from the steam-chest when the engine is running, caused by the steam passing into the cylinder when the valves in the steam-chest are open, and remaining in the steam-chest when the valves are closed, in consequence of which the pressure in the steam-chest will be less when these valves are open and greater when they are shut. It is the devices to meet and overcome the irregularities in the oil-feed caused by these different variations in steam pressure which form the subject-matter of the later patented improvements in lubricators. As the present controversy turns upon the proper construction to be given to one of these improved devices, it is necessary to briefly review the progress and state of the art.

In the early Absterdam patent of 1854 there is shown a lubricator having an observation chamber, but this apparatus involved the maintenance of a uniform bulk of air in the chamber which was found impracticable, and consequently there was a fluctuating pressure. The two patents granted to Gates, dated September 20, 1870, and April 29, 1873, were for sight-feed devices. In the first patent the feed was measured by water dropping through the oil in a transparent chamber, while in the improved sight-feed described in the later patent the oil passed in drops upward in a column of water inclosed in a transparent chamber. It may be said that Gates was the first inventor of a practical sight-feed in lubricators. In 1871, Nicholas Seibert, assignor of complainants, took out his first patent. This invention shows a balanced steam pressure, but has no sight feed. The discharge pipe is connected directly with the steam-pipe from the boiler, or with the same steam space as the condensing pipe, so that the backward pressure of steam through the

discharge pipe is equal to the forward pressure in the condenser. In 1876, Seibert took out a second patent. This deals with lubricators for railway engines. The specification says:

"My invention relates to lubricators for railway engines, and is an improvement on my invention covered by letters patent No. 111,881, dated February 14, 1871; and it consists in devices for equalizing the steam pressure upon the oil-cup when the steam is shut off from the steam-pipe, as is usually the case on down grades."

In this apparatus the discharge pipe enters the dry pipe of the locomotive, and when the steam is shut off by the throttle-valve there will be little or no back pressure to offset the forward steam pressure from the condenser, and the oil will consequently be forced out of the cup more rapidly than is desirable for a proper feed. To overcome this difficulty is the object of the invention. This is accomplished by what is called an "equalizing pipe," running from the discharge pipe to the condensing pipe, and thus connecting the discharge pipe with the steam from the boiler, or with the same steam space as supplies the condenser. In 1878, Seibert took out another patent for a sight-feed device. On April 22, 1879, the patent in suit was issued to him. This patent covers two improvements,—an improved sight-feed apparatus, and a peculiarly constructed reducing plug, to secure an equable pressure in the discharge pipe. The patent has two claims. The first relates to the sight-feed, and the second is for "the reducing plug, constructed and operating as and for the purposes described." It is only the second claim which is here in controversy. The reducing plug is a device for obstructing the discharge pipe, leaving only a small opening through the pipe. It may be placed at any point in the pipe, though preferably near the steam-chest; and its object is to maintain "a nearly equable pressure in the pipe above the point at which it is placed." The specification then goes on to say:

"The discharge pipe being connected and opening into the steam-chest, (the pressure in which varies somewhat, being the least as the ports are opened to admit steam to the cylinder, and greater while the ports are closed,) and the reducing plug being placed in the discharge pipe, the pressure in the discharge pipe above the reducing plug is maintained at the medium pressure in the steam-chest, since the opening through the plug is so small that, although the pressure is varied in the steam-chest, it permits neither the passage of oil in one direction nor steam in the other quickly enough to reduce or increase the pressure in the oil discharge pipe above that point."

In his 1876 patent Seibert sought to overcome the unbalanced steam pressure arising from shutting off the steam in stopping the locomotive or in going down grade by means of the equalizing pipe, while in his 1879 patent his object was to correct the fluctuations of pressure in the steam-chest when the engine is running, by the introduction of the reducing plug.

The defendants' lubricator is constructed after a patent granted to William H. Craig, April 20, 1886. The parts in this lubricator are arranged in a very compact form. It is only necessary to refer to such features of the apparatus as bear upon the questions in this case. In

the Craig lubricator the discharge pipe is connected with the steam-chest. There is also found an equalizing pipe, such as is seen in the 1876 Seibert patent. In the discharge pipe, near the steam-chest, Craig inserts a spindle valve. At this point the pipe is obstructed or dammed up nearly its whole diameter, leaving only a small orifice. In this small opening is the valve-seat, and by turning the spindle the aperture may be entirely closed. The specification states that the purpose of the valve is for opening or closing this orifice. The contention of the complainants is that this obstruction or dam, having a small opening through it, and situated in the discharge pipe, is a reducing plug, and therefore within the second claim of the Seibert patent of 1879. This position is resisted on two grounds: It is contended,—*First*, that, in view of the prior state of the art and the language of the specification, the Seibert patent must be limited to the special form of reducing plug therein described; and, *second*, that, however this may be, the defendants' valve is not inserted in the discharge pipe for any such purpose as the reducing plug in the Seibert lubricator, and has no such operation.

As bearing upon the first point, it is admitted that reducing plugs inserted in pipes for the purpose of partially obstructing the flow of liquid are old. Further, there is found in the earlier Flower patent of February 19, 1878, an obstructed passage, corresponding to a reducing plug, in the discharge pipe of a lubricator. The specification of the Flower patent leaves the question in doubt whether the discharge pipe is connected directly with the steam-chest, or, as in the Seibert patent of 1871, with the steam-pipe from the boiler. It is admitted, however, that in the Flower lubricator, as constructed, the discharge pipe is connected with the steam-pipe, and, consequently, with the same steam space as the condensing pipe; in other words, the obstruction of the discharge pipe in the Flower apparatus was, in fact, only used in that form of lubricator where the steam in both the condensing and discharge pipes is derived from the same steam space, and therefore the Flower patent is no anticipation of the Seibert reducing plug, because that was intended to overcome fluctuations in pressure in another class of lubricators, where the steam in the discharge pipe comes from a different steam space from that of the condenser, and it is not denied that Seibert was the first to apply a reducing plug to this kind of lubricator. If, with the history of the art before us, the reducing plug of the Seibert lubricator is patentable by reason of the new results it accomplishes, then I am inclined to the opinion that the difference in mechanical form between the Seibert reducing plug and the Craig valve would not relieve the defendants from infringement. The thickened-up discharge pipe, leaving a narrow opening at a point above the steam-chest in the Craig lubricator, seems in construction to be the equivalent of the reducing plug with its screw-thread, and having a narrow opening through it, of the Seibert patent.

But the more important inquiry remains whether the function or operation of these devices is the same in both lubricators. It is upon this question that the case largely turns, and I must confess that it is not free from difficulty. The defendants deny that the part of their

valve which nearly fills up the discharge pipe operates in any such way, or that it was introduced for any such purpose, as the Seibert reducing plug; and, if this proposition is true, then there is no infringement. The Seibert patent declares that the plug is introduced for the purpose of correcting fluctuations of pressure in the steam-chest, thereby securing an equable pressure in the discharge pipe above that point. The main object to be accomplished in a lubricator is to obtain regularity in the flow of oil at the sight-feed,—that is, only a certain quantity of oil should be regularly discharged from the reservoir in a given time; and the chief purpose of the Seibert reducing plug is to secure this result by maintaining an equable pressure in the discharge pipe. Now, the defendants contend that this thing is done in their lubricator by the equalizing pipe, whereby they obtain a balanced steam pressure at the sight-feed from the same steam space, and it must be confessed that this theory is supported by the testimony of the complainants' expert as well as the defendants'. The defendants further say that the purpose of the dam in their valve is to arrest the sudden flow of oil caused by the draft or suction in the pipes, which follows the sudden turning off of the steam from the steam-chest when the locomotive is stopped or is running down grade. And here we reach this contradictory position of the parties to this suit. According to the theory of the complainants and the Seibert patents, the office of the equalizing pipe is to correct the unbalanced pressure caused by suddenly shutting off the steam from the discharge pipe on stopping the engine, or on down grades, which is the Seibert 1876 patent; and the office of the reducing plug is to correct variations of pressure in the steam-chest, when the engine is running, from affecting the feed; or, more exactly stated, to maintain an equable pressure in the discharge pipe above where the plug is located. According to the theory of the defendants, the reverse is the case,—that is, the dam or valve in the discharge pipe secures a balanced pressure when the steam is suddenly cut off from the discharge pipe on stopping the engine, and the equalizing pipe guards against any unbalanced pressure caused by the fluctuation of pressure in the steam-chest affecting the feed while the engine is running. Now it seems to me that the evidence in this case, and the better reasoning, is on the side of the defendants as to the real office of the equalizing pipe and the throttled discharge pipe in their lubricator. I think the defendants have shown, and that it is mechanically true, that their equalizing pipe meets the difficulty springing from the variation of pressure in the steam-chest when the engine is working, and that the main object of the dam in the discharge pipe is to arrest a sudden flow of oil, when a vacuum or partial vacuum exists in the steam-chest, caused by closing the throttle-valve. It may be true that the reducing plug of the Seibert patent in suit will maintain an equable pressure in the discharge pipe above the point of its introduction, and consequently a regular flow of oil at the sight-feed while the engine is running, but it appears uncontradicted in this record that regularity of feed in the observation chamber, under these circumstances, is brought about in the defendants' lubricator by the equalizing pipe;

and therefore the main purpose of the complainants' plug is accomplished in defendants' lubricator by the equalizing pipe. In view of the fact that an obstructed passage-way or reducing plug in the discharge pipe, as applied to one form of lubricators, was old at the date of the Seibert invention, I think the second claim of the patent should be limited to the purpose for which it was mainly introduced by the patentee, and, if the same result is reached in defendants' lubricator by other means, then it is not within the Seibert patent.

There is only one remaining point to consider. The Seibert specification declares that, by means of the reducing plug, an equable pressure from the steam-chest is maintained in the discharge pipe above the plug. The plug may be located at any point in the discharge pipe, though preferably near the steam-chest. Now, while it may be said that the Craig equalizing pipe causes a given quantity of oil to be regularly fed at the sight-feed and down to the point where the equalizing pipe is joined to the discharge pipe, yet from that point in the discharge pipe to the steam-chest the oil would be subject to the fluctuations of pressure in the steam-chest. The main purpose of a lubricator is to provide means whereby only a given quantity of oil shall be taken from the reservoir in a given time, and that this shall flow at regular intervals through the observation chamber. The fact that this given quantity of the lubricant, after it has passed the sight-feed, or after it has passed the point of union between the equalizing pipe and the discharge pipe, should, in its further progress through the discharge pipe to the cylinder, be subject to the variations of pressure in the steam-chest which take place when the engine is running, does not seem to be material. At least, there is nothing in this record which shows that it is material. Seibert himself says in his patent that the plug may be located at any point in the discharge pipe, though he prefers a point near the steam-chest. It also appears that the Craig valve is situated some distance from the steam-chest. Assuming that the cylinder, and the parts connected therewith, is the objective point of the oil, it is manifest that there is a point in all lubricators where the oil will be subject to the steam-chest's fluctuations of pressure. Whether this point is a little further up in the discharge pipe towards the sight-feed, or is near where that pipe enters the steam-chest, does not appear to be important; the essential thing is to regulate the quantity of oil which may be allowed to pass out of the reservoir. If the defendants' theory as to the functions of the equalizing pipe and the spindle valve in the Craig lubricator is wrong, I think the complainants should have shown this by rebutting evidence; but, upon the record as submitted, I feel bound to hold that there is no infringement, and it follows that the bill must be dismissed.

THE PARTHIAN.

THE FLORENCE.

(District Court, D. Massachusetts. September 29, 1891.)

COLLISION—STEAM AND SAIL—FOG-HORNS.

As the steamer Parthian was proceeding northward 50 miles off Sandy Hook, in a thick fog, she heard prolonged blasts resembling those of a steam-whistle on her port bow, and, supposing them to be made by a vessel under steam, slowed down to half speed, and gave two blasts on her whistle, as a signal that she would direct her course to port, and pass on the starboard side. Receiving two short blasts in return, she put her helm hard to starboard, and as she was falling off repeated her signal, which was answered by a single blast. She thereupon threw her wheel hard to port, and reversed her engines full speed astern, but shortly afterwards collided with a sailing vessel. The sounds made by the latter were produced by an instrument blown by steam from a boiler carried in the hold. *Held*, that the use of such an instrument, instead of the usual atmospheric horn, rendered the sailing vessel solely in fault.

In Admiralty. Libel by the owners of the schooner Florence against the steamer Parthian for damages for a collision. Libel dismissed.

E. P. Carver, for the Florence.

L. T. Dabney and *F. Cunningham*, for the Parthian.

NELSON, J. This collision occurred on the 16th of July, 1890, at 8 o'clock in the morning, in a thick fog. The place of the collision was 55 miles S. E. by E. from Sandy Hook. The steamer Parthian, of the Boston & Philadelphia Line, was on one of her usual trips from Philadelphia to Boston. The schooner Florence was bound on a voyage from Bangor to Philadelphia, with a cargo of ice. The wind was light from the north-west. As the Parthian was proceeding on her course to the northward, enveloped in the fog, the men in charge heard on the port bow prolonged blasts, repeated at frequent intervals and coming nearer, resembling blasts made by a steam-whistle, which they took to be the fog-signals of a vessel under steam. The steamer was thereupon slowed down to half speed, and two short blasts were made with her whistle, as a signal that she would direct her course to port, and pass the approaching vessel on her starboard side. Receiving in reply two short blasts, and deeming this to be an acceptance of the proposal indicated by her signal, that the vessels should pass starboard to starboard, her wheel was put hard to starboard. As she was falling off to port under her starboard wheel her signal was repeated, and receiving back a single blast only, her wheel was thrown over hard to port, and her engines stopped and reversed full speed astern; but before she could be stopped the schooner Florence appeared out of the fog crossing the Parthian's bows from starboard to port. Nothing more could be done to prevent a collision, and she struck the Florence on her port side just aft of her main rigging. The sounds which the men on the Parthian had mistaken for the fog-signals of a steamer proved to have come from

the Florence, and were made by a huge copper horn blown by steam supplied from a steam-boiler on board. She had no atmospheric horn on board, but carried instead this instrument blown by steam, to be used for signaling in a fog. The evidence is clear that the sound produced by it closely resembled that of some varieties of whistles used on steam-vessels, and was so similar as to be extremely likely to deceive and mislead those hearing it at a distance, especially in a fog. The men on the Parthian were completely deceived, and none of them, from master to passengers, had the least suspicion that the sounds heard on the port bow were not the fog-signal of a steamer.

There can be no doubt that the course pursued by the Parthian was the usual and proper one under the circumstances, if the Florence had been a vessel under steam instead of a sailing vessel. Nor can there be any doubt on these facts that the disaster happened solely through the fault of those in charge of the Florence in making fog-signals by means of an instrument not sanctioned by the sailing rules. It was plainly her duty to give notice of her presence in the fog by a horn blown by atmospheric pressure, and not by blasts from an instrument closely resembling a steam-whistle. Her horn was substantially a steam-whistle, such as belongs to a vessel under steam, and which a vessel under sail has no right to sound in a fog. The men in charge of the Parthian were not to blame for maneuvers based upon the theory that the approaching vessel was a steamer, and as they fell into this error through the fault of those in charge of the Florence, their excuse is complete. In the cross-libel of the owners of the Parthian against the Florence, an interlocutory decree is to be entered for the libelants, and the libel of the owners of the Florence against the Parthian is to be dismissed with costs. Ordered accordingly.

CONN *et al.* v. CHICAGO, B. & Q. R. Co.

(Circuit Court, S. D. Iowa, W. D. November 13, 1891.)

1. REMOVAL OF CAUSES—ASSIGNMENT OF CLAIM—CITIZENSHIP—EXCESSIVE FREIGHT CHARGES—CHOSES IN ACTION.

A claim against a railroad company for overcharges in freight is not a "chose in action," within the meaning of the provision of the removal act of 1888 that the circuit court shall not have cognizance of a suit on "any promissory note or other chose in action" in favor of an assignee, unless such a suit might have been maintained if no assignment had been made; and an assignee of such claims may sue a non-resident company thereon, without regard to the citizenship of his assignors.

2. SAME—RESIDENCE OF RAILROAD CORPORATIONS—CONSOLIDATION—CONVEYANCE OF ROADS.

When a non-resident railroad corporation purchases and receives conveyances of all the roads in the state owned by a domestic corporation, the fact that it establishes agencies in the state, and operates the roads under the laws thereof, does not make it a domestic corporation, so as to take away its right to remove to a federal court an action brought against it in the state court by a citizen of the state. *Fitzgerald v. Railway Co.*, 45 Fed. Rep. 812, distinguished.

At Law. Action by J. W. Conn against the Chicago, Burlington & Quincy Railroad Company for overcharges in freight, the claims having been assigned to him by the original owners. On plea in abatement to the jurisdiction and the evidence thereon. Plea overruled.

Alanson Clark and Clark Varnum, for plaintiffs.

Smith McPherson, for defendant.

Before SHIRAS and WOOLSON, JJ.

SHIRAS, J. This action was brought originally in the district court of Mills county, Iowa, and was thence removed to this court upon the application of the defendant corporation, on the ground of diverse citizenship, it being averred in the petition for removal that the plaintiffs, when the suit was brought, and ever since, were, and have continued to be, citizens of Nebraska, and the defendant was and is a corporation created under the laws of the state of Illinois. The petition in the action contains a large number of counts, each one being based upon an alleged overcharge for freight shipped over the defendant's line of railroad by a number of individuals or firms, whose claims for damages for such alleged overcharges have all been assigned and transferred to the plaintiffs.

The first question arising upon the record is whether, under the statute now in force, an action based upon assigned claims of this kind can be removed from a state to the federal court, regardless of the citizenship of the assignors of the claims, or whether it is necessary, to sustain the jurisdiction, that it appear on the face of the record that the assignors of the claims, as well as the assignees, are, and were when the suit was brought, citizens of a state or states other than that of the defendant. The proviso in the amendatory act of August 13, 1888, is that the United States circuit court shall not—

"Have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable

to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court if no such assignment or transfer had been made."

The limitation thus enacted in regard to suits upon assigned causes of action is expressly confined to those brought to recover the contents of a promissory note or other chose in action; and in *Ambler v. Eppinger*, 137 U. S. 480, 11 Sup. Ct. Rep. 173, it is held that the phrase "chose in action" cannot be construed to include rights of action founded on some wrongful act or some neglect of duty, causing damage, but must be limited to suits founded upon contracts containing within themselves some promise or duty to be performed. In *Deshler v. Dodge*, 16 How. 622, and *Bushnell v. Kennedy*, 9 Wall. 387, the same construction was given to the similar phrase found in the eleventh section of the act of 1789; so that it is thus clearly decided by the supreme court that the limitation found in the act of 1888, and already cited, cannot be made applicable to claims of the nature of those declared on in the present action, which are for damages resulting from the alleged violation of the duty imposed upon the railway company to charge only legal rates for the transportation of property over its line of railway.

The next proposition presented by the plea to the jurisdiction is that the Chicago, Burlington & Quincy Railroad Company must be deemed to be a citizen and resident of the states of Iowa and Nebraska, as well as of the state of Illinois; that the litigation is not, therefore, between citizens of different states; that the defendant corporation is a resident of Iowa, and, consequently, this court is without jurisdiction. The evidence submitted in support of the plea shows that the defendant is a corporation created under the laws of the state of Illinois, and the evidence on behalf of the defendant shows that under the laws of the state of Illinois the corporation had, from 1865 to 1874, the power to lease and operate connecting lines of railway in states adjoining Illinois, and under the act of March 30, 1875, it had the right to purchase the remaining interests, property, and franchises of the lessors of such railroads in adjoining states, thus enabling it to become in fact the owner of such lines of railway. It further appears from the evidence that there was organized under the laws of the state of Iowa, in the year 1853, a corporation known as the Burlington & Missouri River Railroad Company, which became the owner of a line of railway extending from the city of Burlington, Iowa, to a point within 15 miles of the city of Council Bluffs; that on the 31st day of December, 1872, by a written instrument bearing that date, the Burlington & Missouri River Railroad Company leased to the Chicago, Burlington & Quincy Railroad Company its line of railway, with all the appurtenances, in perpetuity; that on the 31st day of July, 1875, by a written instrument duly executed between the two corporations, the Burlington & Missouri River Railroad Company sold and conveyed to the Chicago, Burlington & Quincy Company its line of railway and appurtenances in the state of Iowa, which has ever since been run and managed by the latter company, and in so doing the defendant corporation has exercised the right of eminent domain in Iowa, has transacted business at many places in Iowa, hav-

ing local establishments and officials in the state. Upon these facts, it is claimed by plaintiffs that the Chicago, Burlington & Quincy Railroad Company has in fact been consolidated with the Burlington & Missouri Company, and by the exercise of corporate power in Iowa has become an Iowa corporation, or, at least, that it must, for jurisdictional purposes, be deemed to be so far adopted as a creation of the laws of Iowa that it cannot claim to be a non-resident of the state.

The ruling and decision of the supreme court in *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 Sup. Ct. Rep. 1004, is decisive of this proposition. In that case it appeared that by act of the legislature of New Hampshire certain persons had been incorporated for the purpose of building so much of a line of railway, extending from Nashua, in New Hampshire, to Lowell, in Massachusetts, as was within the boundaries of the former state; and, by act of the legislature of Massachusetts, the same persons had been incorporated under the same name, for the purpose of building that portion of the line lying within the boundaries of Massachusetts. Some two years later the legislature of each of said states passed acts intended to unite the two corporations, in which the stockholders in the New Hampshire corporation were declared to be stockholders in the Massachusetts corporation, and *vice versa*, and the two corporations were declared to be united into one by the name of the Nashua & Lowell Railroad Company. It also appeared that, by written agreement between the companies, it was provided that the two roads should be operated as a single line by a common agent to be appointed by the directors of both companies, and provision was made for a complete merger of the business and property into one whole, under one joint management. Subsequently the New Hampshire company brought a suit in equity, in the circuit court of the United States for the district of Massachusetts, against the Massachusetts corporation, for a settlement of accounts, and a plea to the jurisdiction was filed, in which it was averred that the original corporations had been consolidated into one joint corporation, which must be deemed to be a citizen of both states uniting in its creation. After a very full consideration of the previous decisions of the court upon the subject of the consolidation of corporations, it was held—

"That, whatever effect may be attributed to the legislation of Massachusetts in creating a new corporation by the same name with that of the complainant, or in allowing a union of its business and property with that of the complainant, it did not change the existence of the complainant as a corporation of New Hampshire, nor its character as a citizen of that state, for the enforcement of its rights of action in the national courts against citizens of other states. Indeed, no other state could, by its legislation, change the character of that corporation, however great the rights and privileges bestowed upon it. The new corporation created by Massachusetts, though bearing the same name, composed of the same stockholders, and designed to accomplish the same purposes, is not the same corporation with the one in New Hampshire. Identity of name, powers, and purposes does not create an identity of origin or existence, any more than any other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute, and to the corporation created by it, there can be but one legislative paterfamilias. * * * From the cases we have cited, it

is evident that by the general law railroad corporations created by two or more states, though joined in their stock, and in the division of their profits, so as to be practically a single corporation, do not lose their identity, and that each one has its existence and its standing in the courts of the country only by virtue of the legislation of the state by which it is created. The union of name, of officers, of business, and of property does not change their distinctive character as separate corporations."

Under the doctrines thus announced, it is entirely clear that the fact that the defendant corporation, created under the laws of the state of Illinois, is engaged in the operation of lines of railroad in the state of Iowa, and in that respect is exercising practically all the corporate powers conferred by the laws of Iowa upon corporations created under such laws, does not make the defendant an Iowa corporation. It remains an Illinois corporation, exercising in Iowa, under the permission and authority of the laws thereof, corporate powers, but it exercises them as a foreign corporation. Even if the evidence showed, which it does not, that the purpose, once entertained, of consolidating the Chicago, Burlington & Quincy and Burlington & Missouri Companies had been carried to a completion, the result attained would have been the union of the two companies in the work done, but not a consolidation of the original corporations into a new corporate entity; for that is declared by the supreme court to be beyond the power of the legislatures of Illinois and Iowa to accomplish. What, in fact, was finally done by the agreements between the Chicago, Burlington & Quincy and Burlington & Missouri Companies was that the latter conveyed its line of railway to the former, which on its part agreed to operate the line under the conditions in the agreement contained. Under the rule laid down in the case just cited, the Burlington & Missouri Company, as an Iowa corporation, could sue the Chicago, Burlington & Quincy Company, as an Illinois corporation, in the federal courts in Illinois, and the latter could sue the former in the federal courts in Iowa.

In the light of this decision, it cannot be successfully argued that, under any conceivable circumstances, the Chicago, Burlington & Quincy Company, created a corporation under the laws of Illinois, can become an Iowa corporation. Being an Illinois corporation, and that only, it is, for jurisdictional purposes, to be deemed to be a citizen of Illinois, and therefore, when sued in the state courts in Iowa by a citizen of a state other than Illinois, it has the right of removal if the suit involves a sum or value in excess of \$2,000.

It is urged, however, that, granting that the defendant company can only be considered to be an Illinois corporation, nevertheless it has become a resident of Iowa, because it is engaged in the transaction of business in Iowa, has established offices in the state, has acquired property in Iowa, and exercises corporate powers and franchises in connection therewith. The supreme court of the United States has repeatedly held that a corporation cannot change its citizenship or residence by engaging in business in states other than that of its creation. For a citation of these decisions, reference may be made to the cases of *Booth v. Manufacturing Co.*, 40 Fed. Rep. 1, and *Myers v. Murray*, 43 Fed. Rep. 695.

The facts of this case do not bring the same within the rule stated by Judge CALDWELL in *Fitzgerald v. Railway Co.*, 45 Fed. Rep. 812, in which it is held that a company formed by the consolidation of three corporations, and engaged in a common enterprise, is to be deemed a citizen of each state by which the separate corporations were created. The rule governing cases of this kind is the same as that applicable to natural persons. If A. is a citizen of the state of Illinois, he does not acquire citizenship in Iowa by becoming interested in business in Iowa, or by buying property therein; and, if he is sued in a state court in Iowa by a citizen of that state, he has the right to remove the cause into the federal court, if the amount involved is sufficient, and such right cannot be defeated by evidence showing the ownership of property by him in Iowa, or the transaction of business by him in that state. But if A., a citizen of Illinois, B., a citizen of Iowa, and C., a citizen of Nebraska, enter into a partnership for the transaction of business in one or all of the named states, and suit is brought against them as partners, for the enforcement of claims or rights existing against the partnership, in a state court of any one of the named states, then the right of removal would not exist, not because the partnership could be said to be a citizen or resident of each one of the named states, but because one of the partners was a citizen of the state wherein the suit was brought, and, by reason of his citizenship and consequent residence, the right of removal would be defeated. If, in like manner, an Illinois corporation, an Iowa corporation, and a Nebraska corporation should enter into a partnership for the purpose of uniting and operating connecting lines of railway owned by them in the three states named, then the company or consolidation thus formed, if sued upon any claim pertaining to the common or partnership business in the courts of any one of the three states under whose laws the corporations forming the partnership had been severally created, could not remove the suit into the federal court, because one of the parties defendant in that case would be a citizen and resident of the state wherein the suit was pending.

The facts shown in evidence in the present case would not justify the court in holding that the Chicago, Burlington & Quincy Company and the Burlington & Missouri Company had entered into a partnership for the operation of the lines of railway originally owned by the named corporations. The two corporations are not in partnership, nor engaged in a joint enterprise. The Burlington & Missouri first leased, and then sold, its line of railway in Iowa to the defendant company, and the latter is the sole corporation engaged in the business of operating the united lines of railway, and it is the only corporation declared against in the present action. It is therefore held that the plea to the jurisdiction is not well taken, and the same is overruled.

WOOLSON, J. I concur in the foregoing opinion.

YOUNG v. SIGLER.

(Circuit Court, S. D. Iowa, C. D. November 13, 1891.)

1. JURISDICTION—BILL TO CANCEL JUDGMENT IN STATE COURT.

When the requisite jurisdictional amount is involved, and the citizenship of the parties is diverse, a federal court has power to grant relief against a judgment obtained in a state court by means of fraud.

2. JUDGMENT—EQUITABLE RELIEF—FRAUD.

A bill for relief against a judgment at law alleged that complainant and another were sued for damages for a joint assault and battery; that complainant's co-defendant therein paid the plaintiff \$100 in full settlement of the damages, and that by agreement between the latter two this settlement was kept secret from complainant, and the suit prosecuted against him for their joint benefit; that judgment was obtained for \$4,000, and partly enforced by execution sales of complainant's lands; that complainant, having thereafter discovered the fraud, applied for a new trial, which was denied; and that he is without remedy in that court. *Held*, that the bill stated a ground for equitable relief against the judgment and sales.

In Equity. Suit by John L. Young against Lyman P. Sigler to set aside a judgment at law on the ground of fraud in procuring it. On demurrer to bill. Demurrer overruled.

Cole, McVey & Cheshire and *T. H. Green*, for complainant.

Kauffman & Guernsey and *Harvey & Parrish*, for defendant.

Before SHIRAS and WOOLSON, JJ.

SHIRAS, J. It is averred in the bill herein filed that on the 19th day of March, 1885, one William Lee brought an action in the circuit court of Decatur county, Iowa, against Lyman P. Sigler, the defendant herein, and John L. Young, the now complainant, to recover damages in the sum of \$10,000 for a joint assault alleged to have been committed upon the person of said Lee by said Sigler and Young; that on the 12th day of October, 1886, while said action was pending and yet untried, the said Sigler and said Lee entered into an arrangement whereby it was agreed that said Sigler should pay to said Lee the sum of \$100 in full satisfaction of all damages caused to said Lee by reason of said alleged assault, and that said sum was paid by said Sigler and by said Lee received in full satisfaction and accord of said cause of action; that it was further agreed between said Sigler and said Lee that the fact of such settlement, payment, and discharge of said joint cause of action should be kept concealed from said Young; that said action for damages should thereafter be prosecuted against said Young for the common benefit of said Lee and Sigler, who should mutually share all the fruits and benefits attainable therein; that complainant was kept in entire ignorance of these facts, and that in October, 1886, he was forced to go to trial, not knowing that the cause of action had been in fact satisfied and the case dismissed as to his co-defendant; that said Lee, with the secret and fraudulent co-operation of said Sigler, and with the perjury and false testimony offered by them, obtained from the jury a verdict for \$4,000; that in fact the said complainant was innocent of the charge laid against him, and that, if said Lee suffered any damages by reason of the alleged assault, the same were due to the acts of the said Sigler; that complain-

ant, although moving to that end, was unable to obtain a new trial in said cause, and is without remedy, according to the rules and practice of the court at law in which this judgment was rendered; that, in pursuance of said fraudulent agreement, the said Lee assigned said judgment, in January, 1888, to one C. W. Hoffman, who in turn, without any consideration paid to him, assigned said judgment to said Sigler; that said Sigler caused execution, from time to time, to be issued on said judgment, and to be levied on the real and personal property of complainant; that by means of such levies and sales thereunder and the assignment of the certificates of sale the said Sigler has caused to be conveyed to himself two lots owned by complainant in the town of Grand River, Decatur county, two lots in the town of Leon, and two hundred acres of land in said Decatur county, the said property being bought in for sums far less than the fair value thereof, and that there is still left due on the record on said judgment the sum of \$2,699.30; that, shortly after the rendition of said fraudulent judgment against him, complainant removed to the state of Colorado, and was kept in ignorance of the levies made upon his property and the sales made thereof, and that he did not obtain knowledge of the settlement and satisfaction of said claim sued on and of the fraudulent combination between Lee and Sigler until in November, 1890. The prayer is that the judgment be set aside and canceled; that the sales of property made on the executions issued thereon be set aside; that the defendant be required to account for the moneys realized from complainant's property, and for other adequate relief. To this bill the defendant demurs, the first ground being that this court has not jurisdiction to entertain a bill attacking a judgment rendered by a state court. When the proceeding is merely the equivalent of a motion for new trial or for a review of alleged errors committed on the trial, or for relief against some informality or irregularity in the proceedings before the state court, then it is settled that the application cannot be made to the federal court; but when the proceeding is to obtain relief by setting aside a judgment for fraud in the obtaining thereof then the federal court may take jurisdiction if the citizenship of the litigants is diverse, and the amount involved is sufficient. *Barrow v. Hunton*, 99 U. S. 80; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. Rep. 619. In this case the complainant is a citizen of Colorado, the defendant of Iowa, the amount or value at issue exceeds \$2,000, and the proceeding is in equity to set aside the judgment for fraud, and hence the court has jurisdiction of the cause.

That courts of equity will grant relief against judgments is not questioned; the point in dispute being in what the fraud must consist, in order to justify the setting aside the judgment at law. In *Insurance Co. v. Hodgson*, 7 Cranch, 332, Chief Justice MARSHALL gave the rule as follows:

"Without attempting to draw any precise line to which courts of equity will advance and which they cannot pass in restraining parties from availing themselves of judgments obtained at law, it may be safely said that any fact which clearly proves it to be against conscience to execute a judgment, and

of which the injured party could not have availed himself at law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

In *Black on Judgments*, 369, the rule is stated in the following terms:

"Where a party, having a good defense to an action at law, is prevented, by the fraud or fraudulent representations of the plaintiff or his attorney, from setting up that defense, and a judgment is obtained against him without any negligence or fault on his part, it is a proper case in equity for relief against the judgment."

See, also, *Hendrickson v. Hinckley*, 17 How. 443; *Embry v. Palmer*, 107 U. S. 3, 2 Sup. Ct. Rep. 25; *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. Rep. 901.

In *U. S. v. Throckmorton*, 98 U. S. 61, the distinction existing between fraud inhering in the very matter that was heard and determined by the court rendering the judgment subjected to attack and fraud extrinsic or collateral thereto is pointed out. In the former class of cases the existence of the fraud is the matter which the court was called upon, or might have been called upon, to hear and determine in the trial of the issue before it, and the judgment of that court upon this issue is final and conclusive. When, however, the fraud complained of was not in issue before the trial court, but is extrinsic or collateral to the issues heard,—as, for instance, if the defendant, by some fraud practiced by the opposing party, is prevented from making a defense open to him, or is fraudulently misled as to the existence of material facts, and thus in fact has been prevented from fully exhibiting his case,—in such and similar cases a court of equity may grant relief. For illustration, suppose two persons sign a promissory note as makers, A. being the real debtor and B. a surety in fact. The note not being paid at maturity, the owner brings suit thereon against A. and B. Thereupon A., without the knowledge of B., pays the note in full, but at the same time enters into an arrangement with the plaintiff in the suit whereby it is agreed between them that the fact of payment is to be kept concealed from B.; that judgment is to be taken for the full amount of the note against B., and payment enforced by execution, and the proceeds realized to be shared equally between the plaintiff and A. B., being ignorant of the fact of payment having been made in full, does not so plead, but sets up that he had been fraudulently induced to sign the note as joint maker by misrepresentations made by the plaintiff and A. Upon this issue the court adjudges against him, and a judgment is rendered for the full amount of the note. After the time for obtaining relief from the court at law has elapsed, B. discovers the fact that the note had been paid in full under the supposed circumstances, and, further, that testimony exists which, if adduced, would clearly sustain the defense that he had been induced to sign the note through fraud. Under the rule announced by the supreme court in *U. S. v. Throckmorton*, *supra*, a court in equity would not grant relief against the judgment based upon the latter ground, because that would, in effect, be retrying the issue in-

volved in the original case. But would not a court of equity grant relief upon the other ground, to-wit, that it now appeared that in fact the note had been paid, and therefore the plaintiff ought not to have further prosecuted the case, but that knowledge of this fact has been intentionally kept from B., in pursuance of a fraudulent conspiracy between A. and the plaintiff, the purpose of which was to compel B. to pay a sum not justly due, and to divide the same between the wrong-doers? Clearly it would be against good conscience to allow a judgment thus obtained to be collected, and the basis for the action of the court in equity would be the fact that the two parties had fraudulently combined together to deprive B. of his property, by obtaining a judgment upon a note which they both knew was already paid in full.

The bill now under consideration avers that the claim sued on by Lee was paid and satisfied in full before the case came to trial, and that Lee and Sigler thereupon entered into the fraudulent combination described, for the purpose of obtaining a judgment against Young upon a claim already paid and discharged. Counsel for defendant argue that the payment of a small sum like \$100 by a joint wrong-doer for his own release should not in equity be deemed to work the release of the other wrong-doers when it is made clear that the actual damages are much larger; that fact being established by the amount of the verdict rendered against him by the jury. How can the court of equity know what the amount of the verdict would have been had the real facts been made known, to-wit, that Lee had released Sigler from all claim for damages for the sum of \$100, leaving aside the question of the legal effect of such release as a satisfaction of the entire claim? But the case does not depend upon this single point. The bill charges a fraudulent combination between Lee and Sigler, entered into for the purpose, not alone of getting full compensation to Lee for any damages caused him, but of giving Sigler one-half of all that could, through his aid and assistance, be collected from Young; and according to the averments of the bill, Sigler has now succeeded in having transferred to himself a large amount of property belonging to Young, the complainant. Certainly nothing is shown which would justify a court of equity in holding that Sigler ought to be allowed to retain property thus acquired. It is argued in support of the demurrer that there was no duty or obligation resting upon Sigler to notify or inform his co-defendant of the fact that he had bought his peace and obtained a release from Young. The query is, what was it the duty of the plaintiff to do? If, in fact, he had, as is charged in the bill, accepted a given sum in full payment and discharge of his claim for damages, so that thereby the same had been released and ended, was he acting in good or bad faith towards the court, whose aid he was invoking, and towards the defendant, when he pressed for judgment on a claim already paid and discharged in full? According to the averments of the bill the defendant, Sigler, by his agreement with Lee in fact became interested as plaintiff, because he was to aid in obtaining the judgment, and was to share in the benefit thereof, and is now the owner thereof on the record. Under these circumstances, it cannot be said that he was

under no obligations to make known the truth. He had entered into a combination to obtain the money or property of Young by becoming an active party in the suit against Young, and in equity he must be deemed to be a co-plaintiff with Lee, and equally chargeable with him with the fraud perpetrated upon the court and the defendant in that action, when a judgment was taken for a large sum upon a claim which the plaintiffs knew had been already fully paid.

If the *gravamen* of the bill was the charge that the judgment had been obtained by perjury committed on the trial of an action at law, the objection urged to the failure to set forth specifically in what the perjury consisted, and by whom it was committed, would be well taken. Such does not seem to be the purpose, however, of these allegations. They are doubtless made in support of the general allegations that in fact the complainant does not now, and never did, owe any sum as damages for the alleged assault, which again is made to negative the idea that might otherwise be urged, that complainant ought to pay the sum actually due before asking relief against the judgment in question. Many of the points urged in argument by counsel for defendant may have weight when the cause is heard upon the evidence, because the facts may then make the propositions advocated by counsel pertinent and proper to be considered; but as the case is now submitted upon demurrer it cannot be said that ground for relief in equity against the judgment and the sale of property based thereon is not shown. The demurrer is therefore overruled, with leave to defendant to answer the bill by next rule-day.

WOOLSON, J. I concur in the foregoing opinion.

WHITE v. BOWER.

(*Circuit Court, S. D. Georgia, E. D. October 17, 1891.*)

EQUITY PLEADING—ANSWER AND CROSS-BILL—AFFIRMATIVE RELIEF—STATE PRACTICE.

Equity procedure in the United States courts is not affected by the laws of the states in which the courts are held; and therefore, in a suit for accounting, discovery, and other relief, the defendant cannot obtain affirmative relief by an "answer in the nature of a cross-bill," drawn in accordance with the state practice. Under equity rule 90, affirmative relief must be sought by cross-bill, as in the English high court of chancery.

In Equity. Bill for accounting, discovery, and other relief. On exceptions to answer.

R. R. Richards and *Jos. A. Cronk*, for complainant.

Denmark, Adams & Adams and *W. M. Hammond*, for respondent.

SPEER, J. The plaintiff filed his bill against the respondent on the 3d of July, 1889. The prayers are for accounting, discovery, and other

relief, with reference to disputed matters growing out of the management of what is known as the "Piney Woods Hotel," in Thomasville, in this state. It is not necessary at this stage of the proceedings to state more at large the nature of the plaintiff's suit. The respondent at September rules, 1889, filed an "answer in the nature of a cross-bill." In this affirmative relief against the plaintiff is sought.

This proceeding appears to have been adopted to accord with the practice of the state courts as defined by section 4181 of the Code of Georgia, the language of that rule being as follows :

"A cross-bill need not be filed in this state. The defendant in every case may set up any matter in his answer which under the English practice should be the subject of a cross-bill, and may require therein any discovery from the complainant he may desire."

The respondent has excepted to that part of the answer which purports to be a cross-bill against the complainant, "upon the ground that such matter constitutes no answer to said bill, or to any part thereof, and, if appropriate subject-matter of a cross-bill, the same should be propounded separately from said answer in and by suitable allegations and prayers, according to the rules and practice in equity." The exceptions were set down for argument, and the argument had, and, having taken time to consider the same, the court has concluded that the exceptions must be sustained, and all portions of defendant's answer by which the affirmative action of the court in her behalf is sought must be stricken.

In *Ford v. Douglas*, 5 How. 166, 167, where an answer in the nature of a cross-bill had been filed, Mr. Justice NELSON, in rendering the decision, observed :

"It is said that in some of the western states an answer like the one in question would be regarded in the nature of the cross-bill, upon which to found proceedings for the purpose of setting aside the fraudulent conveyance. But the practice in this court is otherwise, and more in conformity with the established course of equity. We are of the opinion, therefore, that the appellant mistook his rights in attempting to raise the question of fraud in the probate sales in his answer to the injunction bill, and that instead thereof he should have filed a cross-bill, and have thus instituted a direct proceeding for the purpose of setting aside the sales."

See, also, 2 Daniell's Ch. Pr. 1647.

This is unquestionably the rule of the English high court of chancery, and equity rule 90 of this court provides :

"In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same can reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rule, but as furnishing just analogies to regulate the practice."

The state statute upon this subject does not help the answer.

In *Noonan v. Lee*, 2 Black, 499-509, it is held that—

"The equity jurisdiction of the courts of the United States is derived from the constitution and laws of the United States. Their powers and rules of decision are the same in all the states. Their practice is regulated by them—

selves, and by the rules established by the supreme court. This court is invested by law with authority to make such rules. In all these respects they are unaffected by state legislation." *Neves v. Scott*, 13 How. 270; *Boyle v. Turner*, 6 Pet. 658; *Robinson v. Campbell*, 3 Wheat. 223.

It follows, therefore, that to obtain the benefit of her averments, and of the prayers set out in the answer seeking affirmative action against the plaintiff, the respondent should have filed a cross-bill in accordance with the rule. *Railroad Co. v. Bradleys*, 10 Wall. 299.

Let order be taken in accordance with this holding.

FINANCE CO. OF PENNSYLVANIA v. CHARLESTON, C. & C. R. Co.

(Circuit Court, D. South Carolina. November 19, 1891.)

RAILROAD COMPANIES—FORECLOSURE OF MORTGAGE—LIENS FOR SUPPLIES—PRIORITIES.

Persons who furnish labor, supplies, and materials to a railroad, in order to keep it a going concern, are entitled to payment out of the earnings thereof before the payment of any interest on the mortgage bonds; and if, in a suit to foreclose, it appears that money due upon claims of this nature has been paid out as interest on the bonds, or for permanent improvements, whereby the bondholders have been benefited, the court will order an amount equal to the sum so diverted to be paid upon such claims out of any earnings in the hands of the receiver, or, failing these, out of the proceeds of the sale.

In Equity.

Suit by the Finance Company of Pennsylvania against the Charleston, Cincinnati & Chicago Railroad Company to foreclose a mortgage. Mr. D. H. Chamberlain was appointed permanent receiver of the road February 25, 1891. See 45 Fed. Rep. 436. The hearing is now upon interventions by the Pocahontas Canal Company, Atlanta Rubber Company, Westinghouse Air-Brake Company, Fairbanks, Morse & Co., Smith & Courtney, Hermann Baruch, the Mecklenburg Ice Company, Wm. Bird & Co., and others, claiming superior liens for supplies, etc., furnished prior to the receivership.

B. A. Hugood, A. M. Lee, Huger G. Sinkler, and Buist & Buist, for claimant.

Samuel Lord, for defendant.

SIMONTON, J. These are all interventions in the main case. Each of them is for supplies and materials, necessary for the maintenance of a railroad. With very few exceptions, the supplies and materials were furnished within the six months preceding the appointment of the receiver. They pray payment out of the income of the road while it is in the hands of the receiver, and, failing this, that they may be paid out of the proceeds of the sale when it is made, in priority to the mortgage debt, or that receiver's certificates may now be issued to them in payment.

This doctrine seems to be established in the decisions of the supreme court, and laid down in those of the circuit courts of the United States: Railroad property, when the railroad is a going concern, differs from all other property, in this: If the mortgage creditors ask the aid of the court in foreclosing their lien, they can be put upon terms. Before the property is taken out of the hands of the legal owner and put into that of a receiver, provision must be made for the payment of balances due to connecting lines, and for the satisfaction of certain favored claims, such as wages for laborers, employes, and the like, accruing within a certain time before the application for a receiver. This condition seems to be imposed within the discretion, and to rest only in the discretion, of the court. *Thomas v. Railway Co.*, 36 Fed. Rep. 817. And if in the course of investigation it shall appear that there are still unpaid creditors who furnished supplies and materials necessary for running the road, and that interest has been paid on mortgage bonds, or permanent improvements made, out of the earnings during the period when such debts were contracted, the court which has appointed the receiver will order the amount so used for interest or improvements to be brought in for the benefit of this class of creditors, either from earnings in the hands of the receiver, or, failing these, from the *corpus* of the property. *Fosdick v. Schall*, 99 U. S. 235; *Thomas v. Railway Co.*, *supra*, 818, 819, where all the authorities are collected. The principle is this: A railroad is of public concern. It is operated and kept in operation for the benefit of stockholders, mortgage bond holders, and the public. All of them are deeply interested in keeping it a going concern. This is the object for which it was chartered, was clothed with great privileges, and was finally constructed. Those who contributed to keeping it a going concern frequently continue their contributions when ordinary enterprises would lose all credit. They deserve and receive all the assistance the courts can give them without violating the essential right of property. So, when made a going concern a railroad earns an income; that income must first be applied to the expenditures necessary to keep it going. After these are paid, and not before, the earnings may be applied for the benefit of the mortgage creditors by way of interest on their bonds, or by enhancing their security by permanent improvements on the property, and to the payment of dividends to stockholders. This is the normal and just disposition of the earnings of a railroad company. Notwithstanding this, if the company be not declared insolvent, or if no application be made in its behalf for the assistance of a court of equity, the persons holding claims for labor and necessary supplies and materials have no position superior to any general creditor. They have no lien or claim upon the earnings, and if they seek payment, and it be refused, are put to their suit at law as an ordinary creditor. But if the railroad company come into or is brought into court, and it appears that within a reasonable time before this the normal and just disposition of its earnings has been disturbed, and that the mortgage bondholders have received interest from these earnings, or that, in part or in whole, these earnings have been used for their advantage, or for that of stockholders, leaving laborers, material-

men,—persons who have furnished necessary supplies,—unpaid; then the courts create an equity in favor of this latter class. They follow the sums so diverted from the just and normal mode of distribution. They order it restored, primarily, out of such earnings as the receiver may have. If these prove deficient, the restoration is made out of the *corpus*, which has been improved or made productive by the diversion. Necessarily this equity springs out of, depends entirely on, the diversion. Were it not for this diversion,—this taking of the money justly applicable to one class and using it for the benefit of another,—the equity could not exist. If there be no earnings, or if the earnings are insufficient to pay expenses, and there be no permanent improvements made, and no interest whatever paid, upon no principle of law or equity could the bondholder be made to pay out of his own property the debts of the common debtor. This would be not only a thorough disregard of the sanctity of a contract obligation, (*Kneeland v. Trust Co.*, 136 U. S. 97, 10 Sup. Ct. Rep. 950,) it would be confiscation of property. So all these conditions must concur before the equity will be applied. The railroad company must have been kept a going concern. The creditor must have aided with necessary material, supplies, or equipment in so keeping it a going concern. It must have made earnings. These earnings must have been used, in whole or in part, in the payment of interest, or in making permanent improvements, or for the benefit in some way of the mortgage creditors or stockholders. See *Burnham v. Bowen*, 111 U. S. 782, 4 Sup. Ct. Rep. 675. When all these concur, a court of equity, which is called upon to foreclose the mortgage or to administer the affairs of the company, will see to it that all earnings which may have been diverted from their proper disposition will be restored from earnings in the hands of the receiver, and, these failing, from the *corpus*.

In the present cases there was developed at the hearing great difference as to certain facts. Let G. W. Dingle, special master, inquire whether the Charleston, Cincinnati & Chicago Railroad ever earned any income. Was any portion of it, and when, applied to the payment of interest, or to any permanent improvement of the property, or in any way for the benefit of the bondholders? How much? And let him report this with all convenient speed.

JOHNSON STEEL STREET-RAIL CO. v. NORTH BRANCH STEEL CO.

(Circuit Court, W. D. Pennsylvania. November 12, 1891.)

1. WITNESS—SUBPŒNA DUCES TECUM—SPECIAL EXAMINERS.

When, under the 67th rule in equity, a court has appointed a special examiner to take testimony in another district, a *subpœna duces tecum* may issue from the clerk's office of the latter district in the usual way, without a direct order of court, and the court of that district has power to punish a disobedience thereof. Rev. St. U. S. § 866, requiring an order of court for the issuance of such a subpœna, does not apply, as it is restricted to the taking of depositions *de bene esse*, or *in perpetuum rei memoriæ* and under a *dedimus potestatem*, according to the provisions of sections 865 and 866.

2. SAME—DISCLOSURES AFFECTING PRIVATE BUSINESS.

A *subpœna duces tecum*, requiring a witness not a party to the suit to produce certain drawings, must be obeyed, although the papers relate to a valuable secret method of producing a manufactured article.

3. SAME—MATERIALITY OF THE EVIDENCE—SUIT FOR INFRINGEMENT OF PATENT.

In a suit for infringing a patent upon steel rails, where the defense is want of invention, in view of the prior state of the art; and that rails of the kind patented were in public use more than two years before the application, and it appears that rails of that general character were manufactured by a certain company for several years prior thereto, it is *prima facie* material to inquire into the exact shape of such rails, and therefore a *subpœna duces tecum* will issue to compel the production of drawings descriptive thereof.

4. SAME—TO WHAT APPLICABLE—MODELS—FORMS.

A *subpœna duces tecum* can only be used to require the production of documents, and a piece of metal in the nature of a form or model is not the subject thereof.

In Equity. Bill by the Johnson Steel Street-Rail Company against the North Branch Steel Company for infringement of a patent. Heard upon a rule for attachment of John Fulton for contempt in refusing to obey a *subpœna duces tecum*.

John R. Bennett, for rule.

Geo. J. Harding and P. C. Knox, opposed.

REED, J. A bill in equity for infringement of certain letters patent having been filed in the circuit court for the eastern district of Pennsylvania, and the defendant having answered, Samuel Bell, Esq., was appointed by that court as a special examiner, upon the application of the defendant, to take testimony in this district. John Fulton, who is the general manager of the Cambria Iron Company, a corporation, not a party to the suit, was duly served with a *subpœna duces tecum*, directing him to produce at the hearing before the examiner certain drawings and templates. Mr. Fulton refused to produce them, although appearing at the hearing in person in obedience to the subpœna. Upon the argument of the rule taken by the defendant's counsel to show cause why an attachment for contempt should not issue, counsel for Mr. Fulton appeared, and the several positions taken in opposition to the rule will be considered.

It was argued that the subpœna had improperly issued from the clerk's office; that a *subpœna duces tecum*, in such a case as the present, could only be issued by order of court, upon petition or application of one of the parties. A circuit court in one district has power, under the 67th

rule in equity, to appoint a special examiner to take testimony in another district, (*Railroad Co. v. Drew*, 3 Woods, 691; *In re Steward*, 29 Fed. Rep. 813;) and the court in the latter district has power to issue a subpoena commanding a person living in its district to appear and testify before an examiner or master who has been appointed by the court of the former district, and who is discharging the duties of his appointment in the latter district; and such court also has power, under the 78th rule in equity, to punish such person for refusing to obey such subpoena, (*In re Steward, supra.*) Nor do I think it necessary that, in such a case, an application must be made to the latter court for an order directing the subpoena *duces tecum* to issue, but such a subpoena may issue in the usual manner from the clerk's office, as in ordinary cases.

"If documents, the production of which is desired, are in the possession of one not a party to the suit, he may be compelled by a subpoena *duces tecum* to produce them, and if the subpoena is not obeyed he will be punished for contempt, on proof by affidavit that the documents are in his custody." 3 Greenl. Ev. § 305.

And such a subpoena is in ordinary and general use, and is of compulsory obligation and effect, in courts of law, (*Amey v. Long*, 9 East, 473; *Russell v. McLellan*, 3 Woodb. & M. 157,) and also in courts of equity, (1 Daniell's Ch. Pr. 906; *U. S. v. Babcock*, 3 Dill. 566;) and, by the 78th rule in equity, subpoenas may be issued by the clerk in blank, and filled up by the commissioner, master, or examiner, requiring the attendance of the witness at the time and place specified, and this applies as well to subpoenas *duces tecum*. Section 869 of the Revised Statutes, providing for an order of court, upon which the subpoena *duces tecum* shall issue, applies to cases where depositions *de bene esse* are taken under the provisions of section 863, or in *perpetuam rei memoriam* and under a *dedimus potestatem*, under section 866. *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. Rep. 724. It does not apply to testimony taken, as in the present case, under the general powers of a court of equity, and in the mode prescribed by the equity rules. An examination of the act of January 24, 1827, (4 St. at Large, 197,) the second section of which was re-enacted as section 869 of the Revised Statutes, shows that it was not intended to apply to all cases.

The subpoena having properly issued, the remaining question is as to the validity of the reasons given in support of the refusal of the witness to obey the subpoena. The affidavit of Cyrus Elder, Esq., attorney for the Cambria Iron Company, which, it was understood at the argument, should be treated as though it were the answer of Mr. Fulton, says that he instructed the witness not to produce the articles called for by the subpoena, and his instructions were intended solely to prevent the disclosure of valuable business secrets of said Cambria Iron Company, and that the disclosures of the witnesses called for, and which the witnesses were required to answer and produce, related to a method of manufacturing a rail, which method has been developed by the Cambria Iron Company with great labor and expense, and that it is said company's valuable private property. In the case of *Bull v. Loveland*, 10 Pick. 9,

the supreme court of Massachusetts discussed the question, and held that the witness was bound to answer a question pertinent to the issue, where his answer will not expose him to criminal proceedings, or tend to subject him to a penalty or forfeiture, although it may otherwise adversely affect his pecuniary interests, and said:

"There seems to be no difference in principle between compelling a witness to produce a document in his possession, under a *subpoena duces tecum*, in a case where the party calling the witness has a right to the use of such document, and compelling him to give testimony when the facts lie in his own knowledge. It has been decided, though it was formerly doubted, that a *subpoena duces tecum* is a writ of compulsory obligation, which the court has power to issue, and which the witness is bound to obey, and which will be enforced by proper process to compel the production of the paper, when the witness has no lawful or reasonable excuse for withholding it, (*Amey v. Long*, 9 East, 473; *Corsen v. Dubois*, 1 Holt, N. P. 239;) but of such lawful or reasonable excuse the court at *nisi prius*, and not the witness, is the judge."

In *Baird v. Cochran*, 4 Serg. & R. 396, the supreme court of Pennsylvania held that a witness in a civil suit may be compelled to give evidence which may affect his interest, provided it does not tend to convict him of a crime, or subject him to a penalty, saying:

"With these exceptions, every man may be compelled, on a bill filed against him in equity, to declare the truth, although it affect his interest. Why, then, should he not be compelled at law, except where he is a party to the suit? [Parties could not then under the laws of Pennsylvania testify or be called to testify.] The court in which he is examined will take care to protect him from questions put through impertinent curiosity, and confine his evidence to those points which are really material to the question in litigation. So far, his neighbor has an interest in his testimony, and no further ought he to be questioned."

In *Ex parte Judson*, 3 Blatchf. 89, the witness objected to testifying, for the reason that the suit was an amicable and fictitious suit, got up to enable the parties to examine the witness, to obtain evidence from him to be used, not in that suit, but in other cases, then pending, in which the witness was interested, and in which such evidence might be used to his prejudice; but the court held that the evidence might be material, that it was bound to assume that the case which, as in this case, was pending in another court, must be presumed to be genuine litigation, and that the witness must answer. In *Wertheim v. Railway, etc., Co.*, 15 Fed. Rep. 716, Judge WALLACE held that a corporation, not a party to the suit, might be compelled to produce its books and papers in evidence, which might be necessary and vital to the rights of litigants, and that considerations of inconvenience must give way to the paramount rights of parties to the litigation.

It was further contended by counsel for the witness that the articles called for by the subpoena were not such as could be the subject of a *subpoena duces tecum*. The subpoena required the production of certain drawings and templates. A template, as stated upon the argument, is a piece of sheet iron, the contour of which corresponds to the opening between the rolls. It was held in the *Case of Shephard*, 3

Fed. Rep. 12, that a *subpoena duces tecum* can only be used to compel the production of written instruments, papers, books, or documents, and that patterns for stove castings were not the subject of such a writ. I think that the subpoena cannot be enforced as to the templates. A document, however, is defined as—

"An instrument upon which is recorded, by means of letters, figures, or marks, matter which may evidentially be used. In this sense the term applies to writings; to words printed, lithographed, or photographed; to seals, plates, or stones on which inscriptions are cut or engraved; to photographs and pictures; to maps and plans. So far as concerns admissibility, it makes no difference what is the thing on which the words or signs offered may be recorded. They may be on stones, or gems, or on wood, as well as on paper or parchment." 1 Whart. Ev. § 614.

So far as material, then, the drawings called for by the subpoena should be produced, and the final question is how far they are material.

The bill in this case is based upon an allegation of infringement of a patent granted March 29, 1887. Defense is made that the patent is void for insufficiency of invention, in view of the prior state of the art, and also that the invention claimed has been in public use for more than two years prior to the date of the application, which was made August 12, 1886. It appears in testimony that rails of the general character of that covered by the patent in controversy were rolled by the Cambria Iron Company, under an arrangement with the plaintiff company, for the latter company, in 1882, and from that time down to the date of the patent. It would seem to be material and pertinent, therefore, to the issue, to inquire into this matter, and the defendant is entitled to the production of such drawings as will show the form of rolls used for that purpose, down to the date of the patent. The form of rolls used since has not been shown to be material to the issue. My conclusion upon this subject is based upon the presentation of the case by counsel, upon only a part of the testimony, and is not intended to, in any manner, anticipate or influence the decision by the circuit court for the eastern district of the materiality or relevancy of the testimony, of which it alone must finally judge. When the witness produces the drawings called for by the subpoena, in accordance with this opinion, and pays the costs of this application, the rule will be discharged, it appearing that no disobedience of the subpoena was intended; but this mode was taken by counsel to test the questions involved.

JOHNSON STEEL STREET-RAIL CO. v. NORTH BRANCH STEEL CO.

(Circuit Court, W. D. Pennsylvania. November 12, 1891.)

WITNESS—SUBPENA DUCES TECUM.

The president of a corporation which is a party to a suit in equity may be compelled, by *subpœna duces tecum*, to produce drawings of the company material to the issue.

Sur Rule for Attachment of A. J. Moxham.

John R. Bennett, for rule.

George I. Harding and P. C. Knox, opposed.

REED, J. The difference between this rule and that in the case of John Fulton, (48 Fed. Rep. 191,) is that Mr. Moxham is the president of the plaintiff company, as well as the patentee named in the patent in suit, and the drawings and templates called for by the *subpœna duces tecum* are those in the possession of Mr. Moxham, or of the plaintiff company. The general rule seems to be settled that a party to the suit, or the officer of a corporation party, may be subpœnaed to bring such documents as are material to the issue. In *Murray v. Elston*, 23 N. J. Eq. 212, it is said that a party to a suit can be compelled by a *subpœna duces tecum* to produce papers and documents to be used on the trial as evidence, the court saying that, on general considerations of expediency and policy, it is difficult to perceive why documents and books whose production would elucidate the issues involved in the suit should be more guarded or inaccessible in the hands of parties than in the custody of others, but that the statute of New Jersey making parties competent witnesses put the matter beyond doubt. In *Bischoffsheim v. Brown*, 29 Fed. Rep. 343, the court said:

"Parties to suits in equity, as well as in suits at law, are now competent witnesses in the courts of the United States, by statute, and may now be examined at the instance of their adversary. As a witness a party can be compelled, by a *subpœna duces tecum*, to produce books, documents, and papers in his possession, the same as any other witness. *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201. He is bound to obey the writ, and be ready to produce the papers in obedience to the summons."

In the case of *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 44 Fed. Rep. 294, and 45 Fed. Rep. 55, Judge LACOMBE required the production of documents by the officers of the corporation plaintiff, upon a *subpœna duces tecum*. In *Wertheim v. Railway, etc., Co.*, 15 Fed. Rep. 716, the court held that the officers of a corporation might be compelled, by a *subpœna duces tecum*, to produce books and documents of the corporation, material to the issue. For the reasons set forth in the opinion in the matter of rule upon John Fulton, the witness must, in my judgment, produce before the examiner all drawings, in his possession or that of the plaintiff company, of rolls used in the manufacture of rails by or for the plaintiff, or the witness, as called for by the subpœna, down to the date of the patent in suit. When this is done, and the costs of this application are paid, the rule will be discharged.

JOHNSON STEEL STREET-RAIL CO. v. NORTH BRANCH STEEL CO.

(Circuit Court, W. D. Pennsylvania. November 12, 1891.)

WITNESS—CONTEMPT—SPECIAL EXAMINERS.

On an examination before a special examiner a witness will be compelled, by proceedings in contempt, to answer questions that seem to be material to the issue.

Sur Rule for Attachment of George Hamilton for contempt.

John R. Bennett, for rule.

George I. Harding and *P. C. Knox*, opposed.

REED, J. In my judgment the witness Hamilton should answer the questions submitted to the court. They related to a period prior to the date of the patent in suit, and seem material and relevant to the issues of anticipation, and prior and public sale and use, raised by the defendant. In the case of *Robinson v. Railroad Co.*, 28 Fed. Rep. 340, Judge BUTLER said:

"In applications such as this [to compel witnesses before an examiner to answer] the court generally inclines towards the application, and requires an answer wherever it seems probable the testimony may be relevant. Care, however, must be exercised to avoid any unnecessary and improper inquiry into private affairs."

—And such I understand to have been the view entertained by him in the case of *Dobson v. Graham*, cited by plaintiff's counsel from a copy of the record in that case. The defendant should, however, confine his examination to the period prior to the date of granting the patent in suit. The ultimate decision, as to the effect and materiality of the testimony, of course rests with the circuit court for the eastern district, in which the case is pending, and I simply pass upon the questions so far as involved in this application, and upon a partial presentation of the case. When the witness answers the questions and pays the costs of this application the rule will be discharged.

ENGLISH *et al.* v. SPOKANE COMMISSION CO.

(Circuit Court, D. Washington, E. D. November 2, 1891.)

SALE—BREACH OF WARRANTY—WAIVER—ACCEPTANCE OF GOODS.

In an action for the price of goods, where the seller claims damages for breach of warranty, it is a question for the jury whether he waived his claim for damages by accepting the goods after he had the opportunity to inspect them and discover their defective condition.

At Law. On motion for new trial.

Jones & Voorhees, for plaintiffs.

Turner & Graves and *A. G. Avery*, for defendant.

HANFORD, J. This case has been tried before the court and a jury, and a verdict rendered for the plaintiffs. The defendant moves for a new trial on the ground of error in law in the instructions and rulings of the court upon the trial, and because the verdict is contrary to the evidence. The plaintiffs are commission merchants, residing and doing business at Omaha, in the state of Nebraska. The defendant is a corporation engaged in the commission business and dealing in farm produce at the city of Spokane, in this state. The defendant ordered from plaintiffs a car-load of eggs and several car-loads of potatoes, which it required for resale to its customers, and the plaintiffs agreed to sell and deliver said merchandise to the defendant at Spokane. All of the eggs and potatoes were to be selected by the plaintiffs, and forwarded without previous inspection by the defendant; and I hold that, upon the admitted allegations of the pleadings and the facts established by proof, the contract as made included a warranty of the quality of the goods, and that the plaintiffs were bound to deliver only strictly fresh eggs and good merchantable potatoes, all in marketable condition. The goods were sent and received by the defendant after payment of the contract price for the eggs and all charges for freight on the potatoes. The plaintiffs brought this action to recover the contract price of the potatoes, and the defendant pleaded a counter-claim for damages on account of losses sustained by reason of the bad condition of the goods, and introduced evidence tending to prove that a large portion of the eggs were stale and unfit for use, and that a part of each car-load of potatoes were decayed and in bad condition.

By the instructions given, the jury were called upon to decide, as a question of fact, whether the defendant had an opportunity to inspect the potatoes, and ascertain their condition and quality, after their arrival at Spokane, and before payment of the charges for freight; and the court stated the law to be that if the defendant did have such opportunity for inspection, and failed to reject the entire consignment, any claim which it might have had for damages on account of the bad condition or quality of the potatoes was waived, and the case was submitted to the jury upon that theory. It is my opinion now that I was led into error by the authorities before me during the trial, and especially the summary given in Benjamin on Sales of the English cases of *Couston v. Chapman*, L. R. 2 H. L. Sc. 250, and *Grimoldby v. Wells*, L. R. 10 C. P. 396. 2 Benj. Sales, (6th Amer. Ed.) §§ 977, 978. In note 29, on page 856 of the same volume, it is shown by a collection of American cases that the courts in this country hold the law to be that, if the buyer accepts goods tendered him in fulfillment of an executory contract with warranty, he may recover on the warranty in case of loss sustained by reason of inferiority of the goods. *Parks v. Morris & Co., etc.*, 54 N. Y. 586, is a case directly sustaining this proposition. The rule is also affirmed in a recent decision of the supreme court of this state in the case of *Tacoma Coal Co. v. Bradley*, 27 Pac. Rep. 454, and in the case of *Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. Rep. 372, and *Morse v. Moore*, (Me.) 22 Atl. Rep. 362; and see Central Law Journal, vol. 33, p. 281, editorially

referring to the case last cited, and approving it. I think a clear and true statement of the law governing this case is contained in the following extracts from the editorial and decision last referred to:

"The doctrine that, in an executory contract for the sale of goods, an acceptance by the vendee is a waiver of deficient performance by the vendor, applies only where the deficiency of performance is formal, rather than essential, such as may relate to the time, place, and manner of delivery, or affect the taste and fancy of the purchaser merely, or consist of some omission that produces no essential loss or injury." 33 Cent. Law J. 282.

"If the goods be accepted without objection at the time, or within a reasonable time afterwards, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defects, and the defects are material, the inference of waiver would be altogether repelled; but acceptance accompanied by silence is not necessarily a waiver. The law permits explanation, and seeks to know the circumstances which induce acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to so act as a matter of expediency; placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury, under the direction of the court." Opinion by PETERS, C. J., in *Morse v. Moore*.

The instructions given certainly contained error prejudicial to the defendant. I see no way of escape from the conclusion that the verdict must be vacated, and the motion for a new trial granted, and it is so ordered.

CHICAGO SUGAR REFINING Co. v. AMERICAN STEAM-BOILER Co.

(Circuit Court, N. D. Illinois. November 23, 1891.)

1. INSURANCE—CONSTRUCTION OF POLICY—"EXPLOSION AND ACCIDENT."

A policy of insurance upon a sugar refinery provided for indemnity against loss by "explosion and accident," and, by a condition on the back thereof, declared that the term "explosion" included only a "rupture of the shell or flues of the boiler or boilers, caused by the action of steam." *Held*, that where, in an attempt to extinguish a blaze originating in a starch kiln heated by steam-pipes, a cloud of starch dust was stirred up, which came in contact with the flame and exploded, this was an "accident," within the meaning of the policy, and the insurer was liable for damage to the property caused directly by the explosion, and by a fire which resulted therefrom, notwithstanding a further provision that no claim should be made for "any explosion or loss caused by the burning of the building," or "for any loss or damage by fire resulting from any cause whatever."

2. SAME—INSURANCE AGAINST LIABILITY FOR PERSONAL INJURIES.

Under a clause insuring against "personal injury and loss of human life," for which the assured is liable in damages, and "which shall be caused by said boilers, or any machinery of whatever kind connected therewith and operated thereby," the insured could recover the amount it has paid out for loss of life and injuries caused by the explosion, since the kilns were heated by steam-pipes connected with the boilers.

At Law. Action by the Chicago Sugar Refining Company against the American Steam-Boiler Company, upon a policy of insurance. Jury waived, and trial by the court. Judgment for plaintiff.

J. N. Jewett and Jewett Bros., for plaintiff.

Gregory, Booth & Harlan, for defendant.

GRESHAM, J. In consideration of the surrender of two unexpired policies and the payment of \$450 in cash, the American Steam-Boiler Company, on October 18, 1889, insured the Chicago Sugar Refining Company, for 12 months, in a sum not exceeding \$250,000,—

"Upon the 21 steam-boilers, and the 34 filters, tanks, converters, etc., on the premises occupied by the assured as a sugar refinery, situate in the city of Chicago, state of Illinois, and upon the steam-pipes, and the 9 engines, the shafting, belting, hangers, pulleys, and the two elevators connected therewith and operated thereby, against explosion and accident, and against loss or damage resulting therefrom to the property, real and personal, of the assured, and to all property of other persons for which the assured may be liable; and against accidental personal injury and loss of human life, for which injury or loss of life the assured may be liable to his employees, or to any other persons whomsoever, and which shall be caused by said boilers, or any machinery of whatever kind connected therewith and operated thereby."

So much of the third condition, or covenant, indorsed on the back of the policy, as need here be noticed, reads:

"That by the term 'explosion,' as used in this policy, is to be understood a sudden and substantial rupture of the shell or flues of the boiler or boilers caused by the action of steam, and no claim shall be made, under this policy, for any explosion or loss caused by the burning of the building or steamer containing the boiler or boilers, engines, elevators, or machinery, or for any loss or damage by fire resulting from any cause whatever."

The assured was engaged in the manufacture of starch and dextrine in two buildings, one of which, the mill-house, was 1 story high, 25 feet wide, and 40 feet long, and the other, the drying-house, was 2 stories high, 50 feet wide, and 200 feet long. The latter house contained two dextrine kilns in which prepared starch was exposed to steam heat in oven-like rooms, 8 feet high, 8 feet wide, and 18 feet long, bricked in on the sides and top, and closed in front by iron doors. A high degree of temperature is necessary in the manufacture of dextrine, to secure which steam-pipes connected with the boilers passed through the kilns. A fire, which was observed in one of the kilns while the factory was in operation, was extinguished by directing upon it a stream of water. The day following, the kiln was cleaned of the charred and wet mass, and the next day it was recharged with fresh starch. Late in the afternoon of the latter day, the foreman of the factory reported to the superintendent that a blaze was again observable in the same kiln, and the latter opened the door, and directed the contents of a Babcock fire extinguisher upon the fire. His efforts were apparently successful, but the flames soon developed further back in the kiln, and, in his endeavors to extinguish them, a cloud of starch dust was raised, which came in contact with the flames and exploded. The explosion extended through the open door of the kiln to the outer part of the buildings, resulting in the substantial destruction of a portion of the property insured, the buildings in which it was, and the death of a number of employees,

and the serious injury of many others. Proofs of loss and damage were seasonably made by the assured and tendered to the insurer, but it refused to recognize any liability under the policy. The assured thereupon assumed the responsibility of adjusting and paying the claims presented for death and personal injuries, and, in partial satisfaction of them, expended \$21,392.86. It is agreed that the assured is still liable for \$6,500 on unsettled death and personal injury claims. The wreck caught fire, and, in part, was consumed. The buildings were erected at a cost of \$13,537.23; the machinery in them covered by the policy cost \$17,239.39; and the stock in process of manufacture, at the time of the accident, was worth \$2,737.78. There was salvage of \$3,000 on the buildings, \$6,035.50 on the machinery, and \$961.95 on the stock, and the assured collected, on a fire policy covering the same property, \$7,176.77; the amount realized from salvage and fire insurance being \$17,174.22. The total loss, by reason of the accident, on the buildings, machinery, and stock, was \$16,349.23, to recover which, and the \$21,392.86, paid in settlement of claims for death and personal injuries, and \$6,500, the amount of claims of the latter class, for which the assured is still liable, this suit was brought.

A statute was enacted by the legislature of New York in 1853, authorizing the formation of companies to issue policies "upon steam-boilers, against explosion, and against loss or damage to life or property resulting therefrom." The defendant was organized under that statute, and, while operating under it, issued the two policies which were surrendered. The statute was enlarged in 1889 by an amendment authorizing insurance "upon steam-boilers, and upon pipes and machinery connected therewith or operated thereby, against explosion and accident, and against loss or damage to life or property resulting therefrom." The policy in suit was issued after this enactment went into force. A demand doubtless existed for insurance affording greater protection to manufacturers, and it was to enable companies operating under the statute of 1853 to issue policies like the one in suit that the statute was amended. On its face it is for indemnity against explosion and accident, and loss or damage resulting therefrom to the property, real and personal, of the assured, and to all property of others for which the assured may be liable, and against accidental personal injury and loss of life for which the assured may be liable to its employes or to any other person, caused by the boilers, or any machinery of whatever kind connected with and operated by them. The word "explosion," as defined by the third condition, or covenant, on the back of the policy, means a sudden and substantial rupture of the flues of the boilers, caused by the action of steam. But neither that, nor any other condition, defines or in any wise restricts the ordinary meaning of the word "accident." That word, used as it is, in its usual sense, covers loss due to the breaking or injury of the machinery, and injury to the boilers not due to explosion. The explosion of the starch dust in the kiln, the force of which threw down the walls of the buildings and substantially destroyed the machinery, was as much an accident to it, within the meaning of

the policy, as if the walls had been demolished by an earthquake, or the force of the wind. If the defendant's construction of the policy is correct, it is not liable for any loss which is not due to an explosion of the flues of the boilers, caused by the action of steam, or a break of the machinery owing solely to its weakness, and not from external force. In other words, no explosion is an accident, and only loss due to an explosion of the boilers and the breaking of the machinery from its own weakness, and not from external violence, can be recovered. If, owing to the action of steam, a pipe had exploded, resulting in loss and liability to the assured, however great, the insurer would not have been liable; nor would it have been liable if an enemy had destroyed or injured the machinery and boilers by exploding dynamite or gunpowder under them. A fair reading of the policy does not justify this construction.

The third condition further provides that "no claim shall be made, under this policy, for any explosion or loss caused by the burning of the building or the steamer containing the boiler or boilers, engines, elevators, or machinery, or for any loss or damage by fire resulting from any cause whatever." It is urged by the defendant that even if the explosion of the starch dust was an accident, within the meaning of the policy, the loss sustained by the plaintiff was a fire loss. No property was consumed or damaged by fire until after the explosion, and no recovery is sought in this action for damage by fire to the wreck. That loss was adjusted and paid under a fire policy. The property insured was intact when the explosion occurred. The starch dust came in contact with the fire in the kiln, as already stated, and exploded, wrecking the machinery and buildings. A lighted lamp at the door of the kiln might have produced results no less disastrous, and it could have been urged, with equal propriety, that the loss was a fire loss. The policy was carefully prepared, executed, and delivered by the insurer to the assured, and it is a familiar rule of construction that, when the meaning of such instruments is uncertain or doubtful, they should be construed most strongly against the insurer.

The plaintiff is entitled to recover the amount it has paid in satisfaction of claims for deaths and personal injuries "caused by said boilers, or any machinery of whatever kind connected therewith and operated thereby." The kilns were heated by steam-pipes passing through them. These pipes were part of the machinery, and by means of them the kilns were connected with the boilers, and operated by them. Without the kilns, or something like them, connected with the machinery and co-operating with it, the plaintiff could not have operated its factory. It was while the machinery was in operation that the accident to it occurred, which resulted in the death of some of the employees, and the personal injury of others.

The ascertained, but unsatisfied, death and personal injury claims, amounting to \$6,500, which I understand are to be treated as paid, the amount actually paid in satisfaction of claims of the same character, and the loss on the buildings, machinery, and stock, on account of the

accident, make a total of \$44,241.09. Interest on this amount would be equal to depreciation in the value of the buildings and machinery, if there was depreciation, and interest is not allowed. Finding and judgment for the plaintiff for the amount above shown due.

VAN DRESSER v. OREGON RY. & NAV. Co. et al.

(Circuit Court, D. Washington, S. D. November 12, 1891.)

1. CORPORATIONS—WHERE SUABLE.

A corporation created by an act of congress may be sued in the federal courts in any district where it is doing business, and has an agent upon whom service can be made, notwithstanding that its principal office is in another state.

2. WRITS—CORPORATION DOING BUSINESS IN STATE—SERVICE ON AGENT.

The Union Pacific Railway Company, having formed a combination, under the name of the "Union Pacific System," with various other companies, including the Oregon Short Line Company, which operates a railroad in Washington, and being engaged in making contracts therein for freight and passenger service under the name of the system, must be considered as doing business in that state, and a service of summons upon an agent therein, who is authorized to act for all the companies of the system, is a service upon the corporation.

3. SAME—SERVICE ON LESSEE.

When a domestic corporation owning a railroad in the state leases the same to another company without the authority or consent of the state, but continues its corporate existence, and receives a revenue under the lease, its lessee must be considered as its agent to carry on the business; and in an action for a tort committed in operating the road, service of summons upon the agents of the lessee is service upon the lessor company.

4. SAME—SERVICE ON FOREIGN CORPORATION.

When a state law provides that service may be made upon a foreign corporation doing business therein by serving the summons upon its agents, any foreign corporation subsequently doing business in the state is deemed to consent to this condition, and is bound by a service in the method prescribed.

5. SAME—FOLLOWING STATE PRACTICE.

The rules of procedure prescribed by a state for obtaining service upon a foreign corporation doing business therein govern the federal courts, and service in the manner prescribed confers upon them jurisdiction over such corporation.

At Law. Action for damages for personal injuries by Elmer L. Van Dresser against the Oregon Railway & Navigation Company, the Oregon Short Line & Utah & Northern Railway Company, and the Union Pacific Railway Company. On pleas to the jurisdiction. Overruled.

Thomas H. Brentz and M. M. Godman, for plaintiff.

W. W. Cotton, for defendants.

HANFORD, J. The Oregon Railway & Navigation Company is a corporation created and existing under the laws of the state of Oregon, and is the owner of a line of railway in this state, which is being operated pursuant to a lease thereof by the Oregon Short Line & Utah & Northern Railway Company, a corporation created by an act of congress, having its principal office at Cheyenne, in the state of Wyoming. The Union Pacific Railway Company is also a corporation created by an act of congress, having its principal office at Boston, in the state of Massa-

chusetts, and is connected with the other corporations by being a party to the lease above mentioned, and also by reason of the fact that it and the Short Line Company, and several other railway companies, are associated together, for their mutual convenience and profit, in the carrying business, under the name of the "Union Pacific System." These three corporations, which, for the sake of brevity, I will designate the "Oregon Company," the "Short Line Company," and the "U. P. Company," are charged in the complaint in this action with negligence in the running of a train of cars on the line of road in this state, of which the Oregon Company is the owner, and the Short Line Company is the lessee, causing a personal injury to the plaintiff, for which he sues to recover damages. Each of the defendants has appeared specially, and filed a separate plea in abatement, denying the jurisdiction of the court. By stipulation of the parties a jury was waived, and the case has been tried before the court, and submitted upon the pleas, replications thereto, and evidence.

The Short Line Company is the central figure in this litigation, by reason of the fact that it was at the time of the injury complained of engaged in operating the railroad referred to, and, by its servants and agents, had the management and control of the train of cars upon which the accident happened. By its plea challenging the jurisdiction of the court this corporation assumes to be in this state a foreign corporation, by reason of the fact that it has a principal place of business, where its seal is kept, in another state. It contends that, by the provisions of the act defining the jurisdiction of the circuit courts of the United States, it is not suable by original process in a circuit court of the United States in any district other than the one in which it has its legal residence. If it were true that this corporation is legally a citizen of the state of Wyoming, and not an inhabitant of this state, I think the case would be cognizable in this court, by reason of the diverse citizenship of the parties, the plaintiff being a citizen of this state. But the argument is based upon false premises. This corporation is a creature of congress, and is within the territorial limits of this state, transacting business under and by virtue of national authority. It is, in every state and territory of the Union in which it may lawfully exercise its powers, a domestic institution. 2 Mor. Priv. Corp. § 984. I hold that it is liable to be sued in the national courts in any district wherein it may be found doing business, and having an agent or representative upon whom service of process can be made. It is not denied that in this case process has been served, in the manner provided by the laws of this state, upon an authorized agent of the defendant, having at the time the management and superintendence of its business. I must conclude, therefore, that it is bound to answer the complaint in this action.

The U. P. Company bases its plea upon the same ground, and also upon a denial of the fact that the person upon whom the process was served was or is its agent; and it denies that it is transacting business, or that it has any agent authorized to receive service of process for it, in this state. The testimony shows, and I have found as a fact, however,

that this corporation is an active competitor for the through freight and passenger traffic between all points in this state and Omaha, Kansas City, Chicago, and all points east; and, to aid in securing as large a share as possible, it has formed a combination with the Short Line Company, operating lines of railway and steamers in this state, and other corporations operating connecting railways in other states, under the name of the "Union Pacific System." It is the owner of a line of railway which is part of the system, and engaged in operating it. Every contract made in that name, for a passage or for transportation of freight over its railway, must be regarded as its contract, and is binding to the same extent as if made in its corporate name. The evidence shows that such contracts are being made in this state continually, for its benefit and profit, with its knowledge and consent, and the person upon whom the summons was served in this case was at the time a duly-authorized ticket and freight agent of each and all the associated companies composing the Union Pacific System. I hold, therefore, that the U. P. Company is a corporation doing business in this state, and that it should not be allowed to repudiate the agency of the officer through whom it is transacting business and receiving gains.

The Oregon Company admits that the case is one of which the court would have jurisdiction, by reason of the diverse citizenship of the parties, and the residence of the plaintiff within this district, if the summons had been served upon any officer or agent authorized to represent it within this state; but it denies the agency of the person upon whom the papers were served, and denies that it has any agent, or is doing business, within this state. Against these denials are the incontrovertible facts that it is an existing corporation; that, under and pursuant to the laws of this commonwealth, it constructed within the territorial limits thereof, and put in operation, lines of railway, of which it is now the lessor, and from the continued operation of which it is receiving revenue. It is in fact the owner of portions of the public highways of this state, having a franchise from the state to maintain and operate the same for public convenience, as well as for the pecuniary benefit of its stockholders. As the owner of such franchise, it is invested with part of the sovereign powers of the state. True, it has made a contract with the other defendants, whereby it has leased for a definite period its lines of railway, and authorized another party to manage and operate the same. The state has not, however, by any law authorized or ratified the making of this lease, or consented to the transfer of the franchise, or relieved this corporation from responsibility as owner of its railway lines. Without such authority and consent, the lease introduced in evidence is binding only upon the parties to it. As between themselves, it may limit their rights and fix their responsibilities; but this plaintiff, as a member of the public, is in no way affected by it. His rights are the same as if no such contract had been made or attempted. *Lakin v. Railroad Co.*, (Or.) 11 Pac. Rep. 68; *Breslin v. Railroad Co.*, (Mass.) 13 N. E. Rep. 65; *Palmer v. Railway Co.*, (Idaho,) 16 Pac. Rep. 553; *Railroad Co. v. Brown*, 17 Wall. 445; *Railroad Co. v. Crane*, 113 U. S. 433,

434, 5 Sup. Ct. Rep. 578; *Oregon Ry. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409.

By the laws of this state foreign corporations doing business here are required to have within the state an agent authorized to accept service of process, to bind the corporation in any case to which it is a party. It is also provided by statute that in suits against any railroad corporation a summons may be served by delivering a copy thereof, with a copy of the complaint in the action, to any station, freight, ticket, or other agent of such corporation within the state; and that in suits against foreign corporations service may be made by delivering the papers to any agent, cashier, or secretary thereof. By numerous decisions, it is established as part of the common law of this country that, where a state makes conditions upon which foreign corporations may do business, and provides a method whereby the courts of the state may acquire jurisdiction over them by service of process upon designated agents within the state, a foreign corporation, subsequently doing business in the state, is deemed to consent to the conditions, and to be bound by the service of process in the manner specified by the statute. *Gibbs v. Insurance Co.*, 63 N. Y. 114; *McNichol v. Mercantile Agency*, 74 Mo. 457; *Ehrman v. Insurance Co.*, 1 McCrary, 123, 1 Fed. Rep. 471; *Bank v. Huntington*, 129 Mass. 444; *Insurance Co. v. French*, 18 How. 404; *Railroad Co. v. Harris*, 12 Wall. 81; *Ex parte Schollenberger*, 96 U. S. 369; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354; *Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. Rep. 737. In harmony with these principles, I hold that the Oregon Company, by constructing and acquiring the ownership of its lines of railway in this state, and transacting its business here, consented to become subject to the laws of this state governing the commencement and prosecutions of suits in the courts of the state, and to be bound by the service of process upon its agents in all cases in which it should be a party. I hold, further, that, as its franchise has not been transferred with the consent of the state, whoever, with its knowledge and consent, has the actual control and superintendence of its railway, must be regarded as its authorized agent and representative, and that it will be bound by the service of process upon such an agent. *Thomas v. Mining Co.*, 65 Cal. 600, 4 Pac. Rep. 641. The laws of the state providing for the service of process of the state courts in actions at law furnish the rules for procedure in such cases in this court, so that whatever would be lawful service of process to bring a party into court, if the action were in a court of competent jurisdiction under the state government, is lawful and sufficient for the purpose in actions commenced in this court. *Ex parte Schollenberger*, 96 U. S. 369; *Insurance Co. v. Woodworth*, 111 U. S. 146, 4 Sup. Ct. Rep. 364; *In re Louisville Underwriters*, 134 U. S. 493, 10 Sup. Ct. Rep. 578; 2 Mor. Priv. Corp. § 983.

It is my conclusion that this defendant is an existing corporation, doing business in this state by and through an authorized agent; that the laws of the state provide that it may be sued in the courts of the state, and prescribe a mode of serving process, by which it may be brought

within the jurisdiction of said courts; and that in this case service has been made in the mode so prescribed. These are the essentials of jurisdiction, and all that is necessary to bring the case and the defendant fully within the jurisdiction of the court. *U. S. v. Telephone Co.*, 29 Fed. Rep. 35.

The pleas are all bad, and will be overruled.

OHIO & M. RY. CO. v. PRESS PUB. CO.

(Circuit Court, S. D. New York. November 17, 1891.)

1. LIBEL—WHAT IS ACTIONABLE—RAILROAD COMPANIES—NEGLIGENCE.

Language which charges a railroad company with such incapacity or neglect in the conduct of its business that belief in its truth would prevent persons from employing it as a common carrier is actionable without proof of special damage.

2. SAME—ACTION—PLEADING—FRIVOLOUS DEMURRER.

Where the complaint in an action by a railroad company for libel alleges that defendant maliciously published the false statement that more than half the ties in plaintiff's road were rotten, and that it was dangerous to run trains fast thereon, a demurrer thereto as failing to state a cause of action is frivolous.

At Law. On motion for judgment on demurrer.

Action by the Ohio & Mississippi Railway Company against the Press Publishing Company for libel. Defendant demurred to the complaint, on the ground that "it appears on the face of the complaint that the said complaint does not state facts sufficient to constitute a cause of action." Plaintiff moved for judgment on the demurrer as frivolous.

Butler, Stillman & Hubbard, for plaintiff.

Lowrey, Stone & Auerbach, for defendant.

LACOMBE, Circuit Judge. The demurrant has wholly mistaken the cause of action set forth in the complaint. Defendant's publication is not declared upon as a "libel on a thing." A corporation, though an artificial person, may maintain an action for libel; certainly for language concerning it in the trade or occupation which it carries on. *Insurance Co. v. Perrine*, 23 N. J. Law, 402; *Mutual Reserve Fund Life Ass'n v. Spectator Co.*, 50 N. Y. Super. Ct. 460; *Omnibus Co. v. Hawkins*, 4 Hurl. & N. 87, 146; *Bank v. Thompson*, 18 Abb. Pr. 413. It is elementary law that every legal occupation from which pecuniary benefit may be derived creates such special susceptibility to injury by language charging unfitness or improper conduct of such occupation that such language is actionable, without proof of special damage.

The complaint avers that plaintiff is a railway corporation, duly organized and existing under the laws of the states of Ohio, Indiana, and Illinois, and a common carrier of goods and passengers, and that it maintains and operates certain lines of railroad. The occupation of the plaintiff, therefore, is the proper, safe, and business-like maintenance and operation of its railroad, so that it may reasonably discharge its

duties as such common carrier of goods and passengers. Language which charges the plaintiff with such incapacity or neglect in the conduct of its business that belief in the truth of the charges would, as a natural and proximate consequence, induce shippers of goods and passengers to refrain from employing the plaintiff as such common carrier, is actionable without proof of special damage. The particular language complained of here is the statement in defendant's newspaper that "over one-half of the ties in the road-bed [of the plaintiff] are rotten, and it is dangerous to run trains very fast." Such a publication is manifestly within the principle above laid down; and, as the complaint further avers that the statement was "false, * * * malicious, and made for the purpose of injuring the credit and business of the plaintiff," a cause of action is set forth in the complaint.

Motion for judgment on the demurrer as frivolous is granted.

UNITED STATES v. HOUSTON *et al.*

(District Court, D. Kansas, First Division. November 23, 1891.)

1. JUDGMENTS—DEATH OF PARTY—REVIVOR—JOINT DEFENDANTS.

Gen. St. Kan. § 4528, declares that on the death of a defendant pending an action wherein the right survives against his personal representatives, revivor shall be had against them; and section 4536 provides that, if a defendant dies after judgment and before satisfaction thereof, his personal representatives may be made parties in the same manner as is prescribed for reviving actions before judgment. *Held*, that under these sections, where one of several joint defendants has died after judgment, the judgment may be revived against his personal representative without joining the other defendants, for section 1101 provides that in all cases of joint obligations suit may be brought against any one or more of those liable.

2. LIMITATION OF ACTIONS—TEMPUS NON OCCURRIT REGI.

Where the United States has recovered judgment against several defendants, its right to revive the judgment against the executor of one of them, since deceased, is not affected by Gen. St. Kan. § 2890, providing that actions against executors and administrators shall be commenced within three years from the time of notice of appointment and giving bond, and that otherwise the claim shall be forever barred.

At Law. *Scire facias* by the United States against Mrs. J. F. Streeter, as executrix of James Streeter, deceased.

J. W. Ady, U. S. Dist. Atty.

J. W. McClure, for defendant.

PHILIPS, J. This is a proceeding to revive a judgment against Mrs. J. F. Streeter, executrix of James Streeter, deceased. It appears from the petition that on the 13th day of October, 1880, the United States, to its own use, recovered judgment in this court on the bond of Samuel D. Houston, James Streeter, and Samuel M. Strickler. Since the rendition of said judgment, to-wit, the 16th day of July, 1886, said James Streeter died, testate, in the state of Kansas, and his will was admitted to probate on the 29th day of July, 1886. The defendant, Mrs. J. F. Streeter, was made the executrix of said estate. She is a resident of

the first division of the United States district of the state of Kansas. The other defendants in said judgment are now non-residents of the state of Kansas. To this petition for revivor Mrs. J. F. Streeter appears, and moves to quash the motion for various reasons.

It appears that said Houston was a receiver of public moneys of the United States, and that James Streeter and S. M. Strickler were sureties on his official bond; and the judgment in question was rendered against them for breach of the conditions of said bond. The first contention of the defendant is that the United States cannot revive this judgment against one of the defendants thereto without proceeding against all. The common-law rule, it must be conceded, is that, if the judgment sought to be revived was rendered against two or more joint defendants, the *scire facias* must follow the judgment, and all of the defendants, if living, should be made defendants to the writ; and, where one has died, the writ should be against the survivors and the heirs or personal representatives of the deceased. 1 Black, Judgm. par. 491. This results from the idea that the legal effect of a judgment on *scire facias* to revive a judgment, where the judgment remains without process or satisfaction, is to remove the presumption of payment arising from lapse of time, and that it adds nothing to the validity of the judgment, only leaving it as it was when rendered. *Ex parte Pile*, 9 Ark. 337. It has been held, that "this would not be so, however, if one of the defendants was dead, or subsequently discharged by bankruptcy, or a *feme sole* defendant had become covert, and a new party in consequence had been, in a proceeding by *sci. fa.*, introduced upon or taken off the record." *Greer v. Bank*, 10 Ark. 457. And in *Hanson v. Jacks*, 22 Ala. 549, it is also held that a proceeding to revive the judgment against the representative of the deceased party is the same as an action on the judgment, where the Code of Practice permits a separate action on the judgment against one of the defendants. The statute of Kansas has made radical changes in the old common-law doctrine of contracts and the modes of procedure in civil actions. "All contracts which by the common law are joint only shall be construed to be joint and several." Section 1098, 1 Gen. St. 1889. "And in the case of the death of one or more joint obligors or promisors the joint contract or debt shall survive against the heirs, executors, and administrators of the deceased obligor or promisor, as well as against the survivors." Section 1099. "In all cases of joint obligations and joint assumptions of copartners or others, suits may be brought and prosecuted against any one or more of those who are so liable." Section 1101. And then, by section 1102, it is provided that the release of one of the parties jointly liable shall not discharge the others. By section 4162 it is provided that, if the action be against defendants jointly indebted upon contract, the plaintiff may proceed against the defendant served, unless the court otherwise directs; and, if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far as it may be enforced against the joint property of all, and the separate property of the defendant served; and, if the action be against defendants

severally liable, he may, without prejudice to his rights against those not served, proceed against the defendants served, as if they were the only defendants. Following up this same policy of the Code, section 4536 provides that, "if either or both parties die after judgment and before satisfaction thereof, the representatives, real or personal, or both, as the case may require, may be made parties in the same manner as is prescribed for reviving actions before judgment; and such judgment may be rendered and execution awarded as might or ought to be given or awarded against the representatives, real or personal, or both, of such deceased party." The mode of revivor on the death of a defendant pending the action is prescribed by section 4528: "Upon the death of a defendant in an action, wherein the right, or any part thereof, survives against his personal representatives, the revivor shall be against them, and it may also be against the heirs and devisees of the defendant, or both, when the right of action, or any part thereof, survives against them,"—from which it is apparent, to my mind, that the mode of reviving a judgment after the death of one of the defendants under the Code is the same as the process of revivor *pendente lite*, which is simply upon suggestion of the death and motion for revival against the representatives alone of the deceased party. So in *Read v. Jeffries*, 16 Kan. 534, it was held that, if the judgment was against two parties, the action could be maintained upon it against either of the judgment debtors. This conclusion is fortified by the succeeding section, 4537: "If a judgment become dormant it may be revived in the same manner as is prescribed for reviving actions before judgment." The plaintiff unquestionably, after the lapse of the period in which execution might run under the local statute on its judgment, could maintain its action at law for a new judgment against either one of the defendants without bringing in the others, and I think the Code contemplates the same right in the proceeding to revive.

The next contention of counsel for defendant is that the right of action to thus proceed for a revivor is barred by the statute of limitation of the state. It is held by the supreme court of the state that an action cannot be maintained on a dormant domestic judgment, or a revival of the same had, when more than three years have elapsed from the death of the judgment creditor and the appointment of an administrator of the estate of the judgment creditor. *Mawhinney v. Doane*, 40 Kan. 676, 17 Pac. Rep. 44. And by section 2890, concerning executors and administrators, it is provided that suits against executors and administrators shall be commenced within three years from the time of notice of appointment and giving bond; and that all claims not exhibited for allowance within three years shall be forever barred, etc. Section 2865. The question to be decided is: Do these special statutes of limitation have any application to a demand in favor of the United States? The maxim *nullum tempus occurrit regi* is of universal application, except where by express statute a period of limitation is prescribed. I do not find that the statute of Kansas has made any such prescription respecting actions in favor of the state; and, if it had, such local regulation could

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have no application to the rights of the general government. As aptly said by Judge STORY, in *U. S. v. Hoar*, 2 Mason, 312:

"It is not to be presumed that a state legislature mean to transcend their constitutional power; and therefore, however general the words may be, they are always restricted to persons and things over which the jurisdiction of the state may be rightfully exercised."

So Mr. Justice GRAY, in *U. S. v. Railway Co.*, 118 U. S. 125, 6 Sup. Ct. Rep. 1006, observed:

"It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of officers or agents to whose care they are committed—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless congress has clearly manifested its intention that they should be so bound."

While a judgment in favor of the United States, rendered in this court, would cease to be a lien on property in the state within the same period prescribed by the statute as to such liens in general, it is by reason of positive enactment by congress. So the modes of proceeding in civil causes in the United States courts are to conform, as near as may be, to those existing at the time in the courts of record of the state. Section 914, Rev. St. U. S. And a party recovering judgment in a common-law cause in any circuit or district court of the United States is entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are provided in like causes by the laws of the state in which the court is held. Section 916, Rev. St. U. S. It does not follow that such forms of procedure and such remedies are to be cut off or denied by lapse of time or by positive legislative enactment of the state, as it respects a cause of action in favor of the United States, or a judgment recovered by it to its own use and benefit. It does not appear from the motion in this case that the administration in question by the executrix has been closed. There is no legal presumption that it has been. Be that as it may, the right of the United States to proceed for the enforcement of this demand against the estate to reach assets that have come into the hands of the executrix, if undistributed, or to reach property which has gone by devise or descent to the heirs, is in no wise affected. *Payne v. Hook*, 7 Wall. 425. What course for the collection of this debt, the United States attorney may take after the revivor, is not before the court. Section 3466, Rev. St. U. S., provides, *inter alia*, that whenever the estate of any deceased debtor of the United States in the hands of executors or administrators is insufficient to pay all the debts due from the deceased, the debt due the United States shall be first satisfied. Section 3467 provides that every executor or administrator who pays any debt due by the estate for which he acts before he satisfies and pays the debts due to the United States from such estate shall become answerable in his own person and estate for the payment of the debt so due to the United States. And the succeeding section provides that where any surety on a bond given to the United States

pays to the United States the money due upon such bond, such surety, his executor or administrator, shall have the same priority of right against the principal debtor which the United States would have had. Debts due the United States are the sources of revenue needful for the maintenance and successful operation of the government. Every essential right of procedure, remedy, and preference is accorded to it upon the highest considerations of public policy. The motion is sustained, and the order of revivor is directed.

Ex parte EMMA.

(District Court, D. Alaska. July 25, 1891.)

1. UNITED STATES COMMISSIONERS—JURISDICTION IN ALASKA—PROBATE PROCEEDINGS.

Under the organic act of Alaska, United States commissioners have jurisdiction, in the first instance, subject to the supervision of the district judge, in all testamentary and probate matters, in accordance with the laws of Oregon, applicable to that territory, and are vested with the jurisdiction of the county court of Oregon pertaining to probate courts.

2. SAME—APPRENTICING MINORS.

If the power to bind minors as apprentices pertain to probate courts, it should be exercised by the United States commissioner. If it does not, it belongs to "county business," and can only be exercised by the county judge and county commissioners, sitting together. There are no counties nor county commissioners in Alaska. In either case, the district court is without jurisdiction to bind minors as apprentices.

Application for Writ of Habeas Corpus.

F. H. Harrington, for petitioner.

C. S. Johnson, for respondent.

BUGBEE, J. The petition in behalf of Emma, an Indian girl, alleges that she is detained and restrained of her liberty by one William A. Kelly, superintendent of the Indian mission school at Sitka, without warrant or authority in law. The return of said Kelly alleges that he is the superintendent of the board of home missions of the Presbyterian Church, and also of the Indian Industrial and Training School at Sitka, which has for its object and mission the maintenance and education of native Indian children of Alaska territory, and as such superintendent he has certain control and custody of said Emma, who is, and for more than three years has been, an inmate of and attendant at such school, by virtue—*First*, of a written agreement made by her mother; *second*, of a contract between respondent, as such superintendent, and a former judge of this court; and, *third*, of the order of this court. The facts are that the child is the issue of Shawet Kunah, a native woman, and an Indian chief, with whom she consorted without legal marriage, but according to the customs of her race; that, after separating from him, she was married, under the sanction of the laws governing this territory, to one Bogue; that after such marriage the mother placed the child in the Indian school

at Juneau, conducted by the Presbyterian mission, and, by a writing, signed by herself alone, gave the child into the charge of the Presbyterian mission, at Juneau, to be placed in the Sitka Industrial and Training School, promising, if it can be deemed a promise, to make no effort to remove her till she reached the age of 18; she being then of about the age of 8 years. The agreement bears no date. A copy of it was annexed to the return, but it was neither put in evidence, nor relied upon by respondent. Thereafter, on the 28th day of September, 1889, an order was made by this court, which, after reciting that some 50 destitute and orphan children, whose ages ranged from 5 to 17 years, had a residence and settlement in Alaska and were chargeable upon the district, "decreed that all of the said children be apprenticed to the Presbyterian board of home missions by contract in writing, to be signed by the judge of this court in duplicate, and by the superintendent of the mission and training school at said board of home missions at Sitka, until the females of said children shall reach the age of eighteen years, and the males until each shall reach the age of twenty-one years," etc. Nothing, except the names given to some of the children, indicates their nativity, and nothing indicates that any of the children, or their parents or guardians, had notice of or consented to the proceedings. The girl Emma is named as one of the 50 subjects of the order. On the same day an order was made by my predecessor in office, and signed by him as judge of this court, entitled "In the Matter of Emma, a native destitute minor child," reciting that—

"Emma, an orphan, a minor child of the age of eighteen years, is a poor person, having a residence and settlement in Alaska, and is actually chargeable upon the district, and without male or female parent capable of furnishing said support, subsistence, and means of education. And whereas, the district attorney being present in court, and the superintendent of the mission and training school of the board of home missions of the Presbyterian Church of the United States is willing to accept said minor child as an apprentice, according to the provisions of chapter 18 of Title 4, as embodied in 'Hill's Annotated Laws of Oregon, page 1334.'"

—And ordering "that the said Emma, an orphan, shall be bound as an apprentice to the said mission and training school by written contract until she shall reach the age of eighteen years." The order made special provisions as to the contract and other matters not necessary to be recited here. On the same day a contract was executed, in accordance with the order, by the judge of the court in behalf of the child, and the board of home missions of the Presbyterian Church, by and through the respondent, as its superintendent; and under this contract, and the order above mentioned, the child is claimed to be held.

From the evidence it appears that the child was not destitute, nor was she an orphan; her father, mother, and her mother's legal husband were then and are still living, and the mother and her present husband were then and are still living, and the mother and her present husband were then and are now competent and willing to provide for her maintenance and education. Moreover the child was not chargeable upon the district, nor likely to become so. The state of the mother's health de-

mands the services of her child, and the child, who seems intelligent and affectionate, desires to return to her mother. Under this state of facts, it would seem that the child ought, in simple justice, to be released at once; but without going beyond the judgment of the court to inquire into the circumstances, even if the court were in these proceedings permitted to do so, I am convinced that the jurisdiction of the court has been exceeded, and that the orders were and are void; and, if that be so, they may be set aside by this court, notwithstanding the length of time that has elapsed and the number of terms that have intervened since they were made. *Ladd v. Mason*, 10 Or. 308. Under the act of congress entitled "An act providing a civil government for Alaska," passed May 17, 1884, and generally known as the "Organic Act," it is provided "that the general laws of the state of Oregon now [May 17, 1884] in force are hereby declared to be the law in said district so far as the same may be applicable, and not in conflict with the provisions of this act, or the laws of the United States." The act also provided for the appointment of four commissioners for the district, who have the jurisdiction and powers of commissioners of the United States circuit courts, and who have also jurisdiction, subject to the supervision of the district judge, in all testamentary and probate matters. Organic Act, § 5. Section 12 of article 7 of the constitution of Oregon provides that the county courts of that state—

"Shall have the jurisdiction pertaining to probate courts and boards of county commissioners, and such other powers and duties, and such civil jurisdiction, not exceeding the amount of value of five hundred dollars, * * * as may be prescribed by law. But the legislative assembly may provide for the election of two commissioners to sit with the county judge whilst transacting county business."

Following this constitutional provision, the legislature enacted that the court should be held by the county judge except when county business was being transacted therein, and then it was to be held by such judge and two commissioners designated by law, or a majority of such persons. Civil Code Or. § 867; Gen. Laws, p. 282. It defined its jurisdiction of actions at law, (section 868,) and its exclusive jurisdiction in the first instance, pertaining to a court of probate, (section 869;) also its authority and powers pertaining to county commissioners to transact county business, (section 870.) It prescribed that its business should be docketed and disposed of in the following order: (1) Cases at law; (2) the business pertaining to a court of probate; (3) county business,—and that its proceedings and records concerning these three classifications of business should be kept in separate books. Section 876. The legislature also provided for the election of two commissioners of the county court. Gen. Laws Or. p. 694.

In *Monastes v. Catlin*, 6 Or. 119, it is said:

"The phrase [the jurisdiction pertaining to probate courts] has no legal definition. Courts of probate had no existence at common law. * * * Under the provisional government of Oregon, up to the time of the adoption of the constitution, the appointment of guardians for minors and for insane persons was a part of the jurisdiction pertaining to probate courts."

The granting and revoking letters of guardianship, and the directing and controlling the conduct and settling the accounts of guardians of minors and of lunatics, are especially defined as functions of the county court pertaining to a court of probate. Civil Code Or. § 869. The authority of the court to bind minors as apprentices or servants is not, in terms, placed in the same category. Neither is its authority to authorize the adoption of children; but it would be difficult to find a reason why such powers do not pertain to a court of probate quite as much as the power to appoint guardians. If they lie within the probate jurisdiction of the Oregon county court, they lie within the exclusive jurisdiction, in the first instance, of the United States commissioners for the district of Alaska, subject to the supervision of the district judge; and for this court or its judge to assume original probate jurisdiction would be an unwarranted usurpation of power. If the binding of minors as apprentices or servants under the laws of Oregon is not a power pertaining to a court of probate, there is but one other classification of the business of the county court of Oregon to which it can be assigned, and that is "county business," which is not transacted by the county judge alone, but by the judge and county commissioners sitting together. To them, as "county business," is granted the power to provide for the maintenance and employment of the county or transient paupers in the manner provided by law. This territory has no counties and no county commissioners, nor has it any court, tribunal, or officer corresponding to the county court of Oregon sitting as county commissioners for the transaction of county business. If in the case of this child, Emma, the power to bind her pertained to a court of probate, it should have been exercised by the United States commissioner, and not by this court, nor by its judge. If the power belonged to a county court having the authority and powers pertaining to county commissioners to transact county business, it could not have been rightfully exercised in this territory, because no court or officer has been vested with such power. It follows, therefore, that the jurisdiction of the court and of the judge in making the orders apprenticing this minor has been exceeded; that the orders as well as the contract of apprenticeship were and are void; and that the child must be discharged from the custody of the respondent.

Let an order be entered accordingly.

UNITED STATES v. REYNOLDS.

(District Court, D. South Carolina. November 17, 1891.)

1. PENSIONS—ILLEGAL FEES—INDICTMENT.

Under Rev. St. U. S. § 5485, providing that any agent or attorney "or other person, instrumental in prosecuting any claim for pension," who charges or receives for his services more than the fees allowed by law, shall be guilty of a high misdemeanor, an indictment charging simply that defendant was instrumental in prosecuting a certain pension claim is sufficient to bring him within the act, without specifying in what way or capacity he was instrumental.

2. SAME.

An indictment charged that defendant was instrumental in prosecuting a claim for arrears of pension, and retained a greater compensation "than is provided for in the title pertaining to pensions, * * * to-wit, the sum of \$53." *Held* that, as this sum was greater than allowed in any case by the pension laws, it was unnecessary to state whether or not the arrears were procured after the allowance of the original pension.

3. SAME—CONFLICTING EVIDENCE.

The only testimony as to the retention of the money being that of the person entitled thereto that defendant did not pay it to her, and that of defendant that he did, the verdict of the jury cannot be disturbed.

At Law. Indictment of Thomas J. Reynolds for receiving excessive fees for procuring a pension. On motions in arrest of judgment and for a new trial. Overruled.

Abial Lathrop, U. S. Atty.

Miller & Lee, for defendant.

SIMONTON, J. The defendant was indicted for the violation of section 5485 of the Revised Statutes of the United States, and convicted. The section under which he was indicted is in these words:

"Sec. 5485. Any agent or attorney or any other person, instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive or retain, any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land-warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall, for every such offense, be fined not exceeding five hundred dollars, or imprisonment at hard labor not exceeding two years, or both, at the discretion of the court."

The indictment contained three counts. The first two charge, in effect, that, being instrumental in the prosecution of a claim for pension for one Sina Green, the widow of a soldier in the war of 1861, the defendant did then and there unlawfully contract for, demand, receive, and retain from said Sina Green, to whom a pension was granted under the act of congress 4th July, 1862, and an act of congress 7th June, 1888, a greater sum than is provided in the title pertaining to pensions. The first count charged that his said compensation fixed by him was greater than the sum of \$25. The second count, that it was greater than \$10. The third count charges that he was instrumental in prosecuting a claim for arrears of pension for Sina Green, widow of a soldier, etc., and "did then and

there unlawfully contract for, demand, receive, and retain from the said Sina Green, to whom a pension for arrears of pension was granted under an act of congress" 7th June, 1888, "a greater compensation for his services and instrumentality in prosecuting the said claim of the said Sina, as the widow, etc., than is provided in the title pertaining to pensions; that is to say, a compensation, to-wit, the sum of fifty-three dollars, for his services and instrumentality in prosecuting said claim, contrary," etc.

The motion in arrest of judgment is based on two grounds: (1) Because they state that defendant was instrumental in getting the claim, but do not state in what capacity or in what way he was instrumental. The precise question was made in *U. S. v. Koch*, 21 Fed. Rep. 873, before BREWER, J., and overruled. I concur in this conclusion. (2) Because the counts are fatally defective in that they are drawn without the use of the exact and material words of the special section of the statutes under which the charge is made. The language of these counts is that of section 5485. No rule is more familiar than that an indictment for a statutory offense may, in charging the offense, merely use the language of the statute. *U. S. v. Mills*, 7 Pet. 138; *U. S. v. Britton*, 107 U. S. 661, 2 Sup. Ct. Rep. 512. In *U. S. v. Wilson*, 29 Fed. Rep. 236, a similar objection was made to an indictment, on grounds somewhat stronger than in this case, and it was overruled.

(3) Another objection is to the third count of the indictment, in that it does not charge that the arrears of pension therein mentioned was obtained and allowed subsequent to the allowance of the original pension. If this count charged as an offense that the defendant made a charge for obtaining the arrears of pension, this objection would hold, because no charge in many instances can be made simply for obtaining arrears of pension. But this is not the charge. The *gravamen* is that he retained and received a greater compensation than that provided in the title pertaining to pensions, a compensation, to-wit, of \$53. This brings up these issues: Was he instrumental in getting for Sina Green the arrears of pension under the act of congress stated? Did he receive and retain as compensation therefor the sum of \$53? If so, he has violated the section, whether the lawful compensation be \$25, or \$10, or nothing. The motion in arrest of judgment is refused.

The motion for new trial goes to all the counts and the evidence upon them. There is no evidence that defendant was ever instrumental in getting a pension for Sina Green under the act of 1881, as charged in the first two counts of the indictment. The verdict, if it be sustained, must be on the third count. There can be no doubt that section 5485 deals with two offenses in a person employed as agent or attorney, or who is instrumental in obtaining a pension. One is the obtaining compensation greater than that allowed by law, either by contracting for it, demanding it, receiving it, or retaining it. *U. S. v. Brown*, 40 Fed. Rep. 458. The other is withholding it under any other pretense or without pretense. The count charged that the money was claimed or retained as compensation. Unless there was evidence to sustain that, there must be

a new trial; not that this evidence should seem conclusive to the presiding judge, nor even that the preponderance of evidence in his opinion should support the verdict; but was there enough evidence, if the jury believed it, to sustain the verdict? The testimony disclosed these facts: Sina Green was granted arrears of pension,—so much as widow of a soldier, and so much as the mother of a soldier's child. She consulted with the defendant, and he was instrumental in getting the arrears for her. The letter inclosing her check came to his care, and he got it from the post-office. Sending for her, he opened the letter in her presence, and took out the check. She indorsed it in his presence. Somehow she was under the impression that her child was entitled to a part of the money. There is no evidence whatever that she got this impression from defendant. She asked the defendant to ascertain "what was Flora's share," and finally she instructed him to have the check cashed, and to deposit the rest for her in bank, with the exception of a sum she wanted in hand. The check was for some \$612. The defendant took out \$190, and deposited the remainder, less the discount on the check. With this \$190 we have to deal. Out of it he gave Sina's husband, as directed, \$50. He charged \$10 for services and \$10 more for money advanced for expenses, and says that he gave Flora, the daughter of Sina, \$120. Here arises a conflict of testimony. Flora says that he gave her but \$87. The jury were carefully instructed at this point. They were told that the case turned on the disposition of the \$120. If he paid it to Flora, as he said, this ended the matter, and they must acquit. If, however, they believed that he did not pay her more than \$87, yet, if he *bona fide* allotted to her in his discretion the \$120 as her share, and had withheld it from her as a loan, or without any intention of repaying her, they could not convict him in this indictment; that to do this they must believe that he retained the money as an indirect way of obtaining larger compensation. If it was thus retained by way of compensation, he was guilty. The verdict of the jury solved the conflict in the evidence, and was responsive to this last question. The evidence of Flora contradicted that of the defendant. This was the only evidence on this crucial point.

The motion is refused.

UNITED STATES *v.* NEWTON *et al.*

(District Court, S. D. Iowa, C. D. November 17, 1891.)

1. CONSPIRACY TO DEFRAUD THE UNITED STATES—TRANSPORTING MAILS—INDICTMENT.

Rev. St. U. S. § 5440, provides that "if two or more persons conspire, either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable," etc. Rev. St. U. S. § 4002, provides that railway companies shall be paid for carrying the mails upon a basis of the average weight carried; such weight to be ascertained by actually weighing the mail carried during a certain number of days, to be fixed by the postmaster general. *Held*, that an indictment charging railway officials with conspiring to deceive the postal officers and defraud the United States by sending over the line a large amount of old newspapers, etc., in order to increase the mails at a time when they were being weighed, is sufficient, under section 5440, since it describes a conspiring to commit the "offense against the United States," which is defined by Rev. St. U. S. § 5438, providing a punishment for any persons combining to defraud the United States by "obtaining, or aiding to obtain, the payment of any false or fraudulent claim."

2. SAME.

It was not necessary that the indictment should aver that the contemplated fraud was successful, or the fraudulent mail matter of sufficient weight to entitle the railway company to increased compensation, or that the forwarding of the matter would not be continued beyond the period fixed for weighing the mails.

3. SAME.

An indictment of railway officers for conspiring to defraud the United States, by "deceiving the officials" having charge of the mails as to the amount of mail matter carried over the line, need not aver what particular officer was intended to be deceived.

At Law. Indictment for conspiracy to defraud the United States. On demurrer to indictment. Overruled.

Lewis Miles, Dist. Atty., for the United States.

Kauffman & Guernsey, for defendants.

Before SHIRAS and WOOLSON, JJ.

SHIRAS, J. By section 5440 of the Revised Statutes it is enacted that—

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable," etc.

Section 4002 provides the method by which the compensation to be paid to railway companies for the transportation of mail matter is to be ascertained, the average weight of the matter transported being the controlling factor; and, for the purpose of ascertaining such weight, it is enacted that the average weight is to be ascertained by the actual weighing of the mails for such a number of successive working days, not less than 30, and at such times as the postmaster general may direct, but not less frequently than once in four years.

In the indictment now under consideration it is charged that John C. Newton was, at the times therein named, the vice-president and general manager of the Des Moines & Kansas City Railway Company, a corporation engaged in operating a line of railway from Des Moines, Iowa, to Cainville, Mo., and over which line the public mails of the United

States were and are transported; that, for the purpose of ascertaining and fixing the rate of compensation to be paid by the United States to said railway company for the transportation of the mails over its line of road from and after July 1, 1891, the proper officers of the postal department ordered that the mail matter passing over the line of said railway should be weighed for 30 successive working days from and after April 1, 1891, and that such weighing was done in accordance with such lawful order, and for the purpose aforesaid; that the defendants well knew that such weighing of the mails was about to be made for the purposes aforesaid, and, for the purpose of deceiving the officials of the United States having charge of such weighing of the mails, and for the purpose of defrauding the United States by falsely causing it to appear that the average weight of mail matter transported over such line of railway was largely in excess of the actual average amount usually carried over such road, and thereby causing the United States to pay to said railway company a compensation largely in excess of the amount actually earned, the said defendants did conspire together to defraud the United States, by sending, and causing to be sent, over such line of railway, during the days the mail matter thereon was being weighed, a large amount of old newspapers, periodicals, and other like materials, weighing many hundred pounds; the same being so sent, not for the purpose of being delivered to the parties to whom it was addressed, for their use and benefit, but solely that it might be weighed during transportation, and thus fraudulently increase the weight of mail matter for which the company would be paid after the transportation of such material had ceased. To this indictment a demurrer has been filed upon several grounds, the principal one being that the object of the conspiracy is not shown to be criminal, under the laws of the United States, nor is it made to appear that the means made use of or contemplated in the carrying out of the conspiracy were in themselves criminal.

A very able argument has been made by the counsel for the defendants in support of the propositions that to make out a case of indictable conspiracy to defraud the United States, under the provisions of section 5440, above cited, it must appear that the object of the conspiracy is to accomplish some act which the laws of the United States declare to be a crime or fraud; that it is not competent for the court or jury to define the acts which, if brought about, or attempted to be brought about, by means of a combination or conspiracy, will constitute a crime under this section, as being a criminal fraud; that to constitute a crime it must appear that when the acts complained of were done there was in existence a statute forbidding the doing thereof; that it cannot be supposed that congress, in enacting the general terms found in section 5440, relative to a conspiracy to defraud the United States, meant to declare that all acts which a jury might find would work a fraud upon the United States were therefore to be deemed crimes, and to be punishable as such, but that the true construction of the section is to hold that the same forbids and punishes all conspiracies to commit any offense against the United States,—that is, a conspiracy to do an act, which, if done, would itself be

a violation of the criminal laws of the United States,—and further, all conspiracies to do acts or accomplish results which are forbidden by the statutes of the United States, and which, if done or accomplished, would defraud the United States in any manner, or for any purpose. In support of these views are cited, among others, *State v. Jones*, 13 Iowa, 269; *State v. Potter*, 28 Iowa, 555; *State v. Stevens*, 30 Iowa, 391; *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Britton*, 108 U. S. 199, 2 Sup. Ct. Rep. 531; *In re Wolf*, 27 Fed. Rep. 606; *U. S. v. Watson*, 17 Fed. Rep. 145.

Without entering upon a specific discussion of the general propositions thus advocated by counsel for defendants, we may say that we do not concur in the practical conclusions sought to be based thereon. We have cited so far only the provisions of section 5440, because counsel assume that the same constitute the only foundation for the present indictment; but this is not the logical result of the very line of reasoning employed by counsel in support of the general propositions already stated. If the object sought to be accomplished by the alleged conspiracy to defraud is declared to be a punishable crime by any section of the statute of the United States, then counsel admit that, under section 5440, an indictment charging a conspiracy to defraud the United States by means of some act, which, if done, would be thus punishable, is sustainable; it being also charged that some overt act in furtherance of the conspiracy has been done: What then, in fact, does the indictment aver was the object of the conspiracy charged against the defendants? Briefly stated, the object of the conspiracy is averred to be the aiding the Des Moines & Kansas City Railroad Company in obtaining payment from the United States of a false and fraudulent claim for services in transporting the public mails over the line of its railway. The means by which it was proposed to accomplish this end are fully set forth in the indictment, and the statement of the means employed show that, if they had been permitted to work out their intended and natural consequences, there would have been obtained from the United States the payment of a false and fraudulent claim,—false, because it would have included a large amount never earned, and fraudulent, because such amount had been intentionally increased by the nefarious means set forth in the indictment. The object of the conspiracy was not, as is suggested by counsel, to increase the amount of mail matter passing over the line of railway, but to increase the amount of the claim against the United States for the transportation of mail matter over such railway from and after July 1, 1891, or, in other words, the defendants are charged with the offense of entering into a combination or conspiracy to defraud the United States, by aiding the Des Moines & Kansas City Railroad Company in obtaining payment of a false and fraudulent claim, which would be a violation of the provisions of section 5438, which enacts that “every person * * * who enters into any agreement, combination, or conspiracy to defraud the United States, or any department or officer thereof, by obtaining, or aiding to obtain, the payment of any false or fraudulent claim,” shall be punished by fine or imprisonment; in other words, the entering into

any agreement or combination to obtain, or aid in obtaining, the payment of a false or fraudulent claim from the United States is declared, by this section of the statute, to be a criminal defrauding of the United States, to be punished by fine or imprisonment. Therefore, an indictment which charges two or more parties with entering into a conspiracy to defraud the United States, by means of a combination to obtain, or aid in obtaining, the payment of a false or fraudulent claim from the United States, the doing of some overt act in furtherance of the conspiracy being also charged, is sustainable under the provisions of section 5440, according to the doctrine of the authorities relied on by counsel for defendants, and no good reason is now perceived why it would not be good under the provisions of section 5438. The indictment under consideration in apt language avers that the defendants conspired together to defraud the United States by means of a combination or agreement between themselves and others, whereby they purposed to place, or caused to be placed, in the mail-car used for transporting the mail over the line of the Des Moines & Kansas City Railroad Company, during the days when the weighing of the mail matter was to be done under the orders of the postal authorities, a large amount of old newspapers, the same not being mailed for any legitimate purpose, but solely that thereby the claim on behalf of the railway company for compensation for carrying the mails after July 1, 1891, should be largely and fraudulently increased, and that thereby the railway company would be enabled to obtain from the United States payment of a false and fraudulent claim, and the overt acts done in furtherance of such fraudulent conspiracy are set forth at length; in other words, the indictment charges a conspiracy to defraud the United States by means of an agreement or combination intended to aid the Des Moines & Kansas City Railroad Company in obtaining payment of a false and fraudulent claim for mail service from the United States; and, as the combining or agreeing together to obtain payment from the United States of a false or fraudulent claim is itself a crime defined in the statutes of the United States, the indictment in this case contains all the requisites contended for in the argument of counsel for defendants and the authorities cited in support thereof.

It is further contended in support of the demurrer that the indictment is fatally defective in that it is not averred that the defendants conspired to deceive any named person, or that it was the purpose of the conspiracy to secrete the object and purpose of the conspiracy; that it is not shown that necessarily the United States would have been defrauded, as the postal authorities were not bound by the weighing done during the named 30 days, but might have ordered another weighing; that it is not averred that the matter illegally weighed was of a weight sufficient to have entitled the railroad company to increased compensation; or that it was not contemplated that the mail matter illegally forwarded should be continued to be forwarded after the expiration of the 30 days during which the weighing was done. None of these exceptions are well founded. To sustain a charge of conspiracy to defraud, it is not necessary to show that the contemplated fraud has been carried

to a successful issue, nor, when the charge is of a conspiracy to defraud the United States by aiding in obtaining payment of a false claim, is it necessary to prove that payment was in fact obtained, nor is it required that the indictment should aver what particular official might have been deceived if the conspiracy had been carried to a successful issue. If the indictment was intended to charge a conspiracy to defraud some particular person, by practicing a deceit upon him, then, as argued by counsel, it might be necessary to aver the particulars of the intended deceit, and that the same would operate to deceive the named person; but the indictment against the present defendants charges a conspiracy to defraud the United States, the means to be employed being the aid given the railway company in obtaining payment from the United States of a false claim for services in transporting the mails. The indictment avers the party intended to be defrauded, to-wit, the United States, and that is all that is required in this particular.

Without further extending this opinion, it is sufficient to say that we think the indictment charges an offense against the laws of the United States, and states the facts relied on with fullness of detail sufficient to advise the defendants of the accusation laid against them. This being so, the demurrer thereto must be overruled; and it is so ordered.

WOOLSON, J. I concur in the foregoing opinion.

FALK v. SCHUMACHER *et al.*

(Circuit Court, S. D. New York. November 12, 1891.)

1. COPYRIGHT OF PHOTOGRAPH—INFRINGEMENT—PLEADING.

In a bill for an injunction against infringing the copyright of a photograph, an allegation that complainant "is the author, inventor, designer, and proprietor of a certain photograph and negative thereof, known and entitled 'Photograph No. 23 of Lillian Russell, by B. J. Falk, N. Y.," is sufficient without giving a detailed description of the method of producing the photograph, or attaching a copy thereof to the bill.

2. SAME—INSCRIBED NOTICE.

It is sufficient if the notice of copyright inscribed on a photograph reads, "1889. Copyrighted by B. J. Falk, New York," instead of "Copyright, 1889, by B. J. Falk," as required by the literal directions of the statute.

In Equity. Suit to restrain infringement of copyright. On demurrer to bill. Demurrer overruled.

Isaac N. Falk and Roland Cox, for plaintiff.

John B. Talmage and Augustus T. Gurlitz, for defendants.

COXE, J. The complainant, as the proprietor of a photograph of Lillian Russell, prays for an injunction restraining the defendants from infringing his copyright. The first objection taken by the demurrer, that the bill does not show that the complainant, at the time he pro-

duced the photograph, was a citizen of the United States or a resident therein, (Rev. St. U. S. § 4952,) is fairly met by the allegation "that your orator, at all times hereinafter stated, was and still is a citizen of the United States and a resident therein, residing in the city, county and state of New York." The bill alleges further that the complainant "is the author, inventor, designer and proprietor of a certain photograph and negative thereof, known and entitled 'Photograph No. 23 of Lillian Russell, by B. J. Falk, N. Y.'." It is thought that this allegation is sufficient without entering into a detailed description of the *modus operandi* adopted by him in taking the photograph. It is not necessary in a suit upon a patent to allege the preliminary steps and experiments which culminated in the invention, and there is no reason why one who sues upon a copyright should be more explicit. The complainant was not required to attach a copy of the photograph to his bill any more than an author would be required to attach a copy of his book. If the photograph is not the subject of a copyright the defendants can allege and prove it.

The allegations of the bill regarding the mailing of the title and printed copies of the photograph to the librarian of congress, and particularly the allegation regarding the recording of the title by him, as required by section 4957 of the Revised Statutes, might well have been more full and complete, and, yet, it is thought that this paragraph of the bill cannot be held bad on demurrer. "A deposit of two copies of the article or work with the librarian of congress, with the name of the author and its title-page, is all that is necessary to secure a copyright." *Lithographic Co. v. Sarony*, 111 U. S. 53, 59, 4 Sup. Ct. Rep. 279. The bill alleges that the notice inscribed upon each copy of the photograph was, "1889. Copyrighted by B. J. Falk, New York." The notice required by the statute, if followed literally, was, "Copyright, 1889, by B. J. Falk." Why, with this simple provision of the law before him, the complainant saw fit to inscribe his photograph with a notice which not only is a departure from the strict letter of the statute, but is less symmetrical and concise, is indeed amazing. However, under the decision in *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. Rep. 177, the notice is sufficient. "The statute was substantially complied with."

The only specific relief demanded is an injunction. Such an action is permitted by section 4970 of the Revised Statutes.

Although the bill might be more artistic and complete if some, at least, of the criticisms pointed out by the demurrer were observed, it is thought that in its present form it states a cause of action. The demurrer is overruled. The defendant may answer within 20 days.

FALK v. SEIDENBERG *et al.*

(Circuit Court, S. D. New York. November 12, 1891.)

In Equity. Suit to restrain infringement of copyright. On demurrer to bill. Demurrer overruled.

Isaac N. Falk and Roland Cox, for plaintiff.

John B. Talmage and Augustus T. Gurlitz, for defendants.

COXE, J. The decision in *Falk v. Schumacher*, 48 Fed. Rep. 222, disposes of this cause also. The demurrer is overruled. The defendants may answer within 20 days.

BRUSH-SWAN ELECTRIC LIGHT CO. *et al.* v. THOMSON-HOUSTON ELECTRIC CO.

(Circuit Court, D. Connecticut. November 7, 1891.)

PATENTS FOR INVENTIONS — LICENSE TO SELL — RIGHTS OF ASSIGNEE — SUIT FOR INFRINGEMENT — PARTIES.

An Ohio corporation owning an electric light patent gave another company an exclusive license to sell the patented article in New England. Afterwards a Connecticut corporation owning other electric light patents obtained a controlling interest in the stock of the licensor. *Held*, that the licensee, in a suit in the district of Connecticut against the Connecticut corporation for selling an infringing article within its territory, had *prima facie* implied authority, by virtue of the license, to join the licensor as a party plaintiff against the latter's will; especially as the latter, being out of the jurisdiction of the court, could not be served as a party defendant.

In Equity.

Morris W. Seymour and Wm. G. Wilson, for Brush-Swan Company.

F. L. Crawford and Charles R. Ingersoll, for Brush Electric Company.

SHIPMAN, J. This is a bill in equity, which is brought under the patent laws, to restrain an alleged infringement of letters patent No. 219,208, dated September 2, 1877, to Charles F. Brush. The bill alleges that the Brush-Swan Electric Light Company of New England, a New York corporation, which will hereafter be called the Brush-Swan Company, is vested with the exclusive license and agency for the sale of the described patented improvement throughout a specified territory of the United States, by virtue of sundry contracts, which are annexed to the bill, with the Brush Electric Company, an Ohio corporation, hereinafter called the Cleveland Company, which is, by assignment, the sole owner of the patent. These two corporations are the complainants. The bill further alleges that the defendant, the Thomson-Houston Electric Company, a Connecticut corporation, is and has been making, selling, using, and renting to others to be used, infringing electric lamps within the territory named in said contracts.

The matter now under consideration is the Cleveland Company's motion to strike out its name as a party complainant, because the bill has been filed without its authority or consent. It is conceded that the bill was brought by the solicitors of the Brush-Swan Company without the knowledge of the Cleveland Company, and that no express authority to bring suits in its name had been given either in said contracts or otherwise; but it is contended that, by virtue of the license, the licensee has the implied consent and authority to use the name of the owner of the patent as a co-complainant, and a vested right to bring a suit in its name, whether with or against its will. The facts in this case are peculiar. The various contracts "of license and agency" give to the Brush-Swan Company an exclusive agency and license for the sale, within a specified territory, of "the dynamo electric machines and apparatus made and sold by, or the patents for which are controlled by, the parties of the first part." The patents are described. The Brush-Swan Company is not to sell apparatus of the described character, except that sold by the Cleveland Company, without its consent. The Cleveland Company is to fix prices, and the agent is to have a discount of 20 per cent. The parent company has no right to sell machines or apparatus within the specified territory, except under circumstances to be mutually agreed upon, and in such case it pays to the Brush-Swan Company the 20 per cent. discount. The contracts are, in their important features, contracts of agency between a principal manufacturer and a selling agent. In some of their features they have the appearance of contracts between a manufacturer and a person who is, under certain limitations, to have the exclusive right to purchase and deal in the manufactured articles within a specified territory; but they are probably contracts of license, under the patent laws, to sell within a specified portion of the United States a patented improvement manufactured by the owner of the patent. The licensor became distrustful of the licensee; thought that it had broken its contract; desired to put an end to the agency; and declared the contracts to be terminated. Litigation ensued in the southern district of New York, which has proceeded to an interlocutory decree, and has thus far resulted favorably to the Brush-Swan Company. The entire capital stock of the Cleveland Company is \$2,500,000, of which \$2,000,000 are common and \$500,000 are preferred stock. During the year preceding January 19, 1891, about nineteen-twentieths of the common stock went into the hands of the defendant in this case, the Thomson-Houston Electric Company. It thus appears that the defendant is in control of the Cleveland Company.

Upon the motion, the Brush-Swan Company contended broadly that the licensee to sell a patented device within a specified territory has an absolute implied right, under all circumstances, to join the owner of the patent, against his will, in a bill in equity against a person who is alleged to infringe the entire patent-right of the owner by making, selling, using, and renting infringing devices. This general question I do not intend to decide. It is obvious that if the licensee of the bare right to sell has, under all circumstances, by the mere agreement to license, such

an absolute, implied power, which cannot be controlled by a court of equity, it is a large power. He can, by joining the owner of the entire legal and remaining equitable right in the patent, compel him to enter into an expensive and perilous litigation, or to submit to an adjudication in regard to the validity or the construction or the extent of his patent, which may be injurious to his pecuniary interests. If the interest of the owner, who has merely given his agent a license to sell within a specified territory, and who is still the owner of the substantial and important portion of the patent, can be, against his will and without the service of process, subjected to litigation and judicial decree, there is danger that the power of the licensee will be wantonly exercised. On the other hand, it is reasonably certain that a licensee can, in an action at law, use the name of the owner of the patent, (*Wilson v. Chickering*, 14 Fed. Rep. 917; *Goodyear v. McBurney*, 3 Blatchf. 32; *Same v. Bishop*, 4 Blatchf. 438,) and it has also been declared with positiveness that a licensee of a patent cannot bring a suit in his own name, at law or in equity, for its infringement by a stranger, (*Birdsell v. Shaliol*, 112 U. S. 486, 5 Sup. Ct. Rep. 244.) In this case, the Cleveland Company is really a co-defendant, in view of the Thomson-Houston Company's controlling ownership of its stock; but, being a resident of Ohio, it cannot be served with process, as a co-defendant, in this suit. Though it cannot be compelled to come into court as a defendant, "a court of equity looks at substance rather than form." When it has jurisdiction of the parties, it grants the appropriate relief, whether they come as plaintiff or defendant," (*Littlefield v. Perry*, 21 Wall. 205,) and places them accordingly to the real positions which they respectively occupy in the controversy.

The necessity of making the owner of the patent a party in an action for infringement is authoritatively declared in *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 384, as follows: "In equity, as in law, when the transfer amounts to a license only, the title remains in the owner of the patent, and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as when the patentee is the infringer and cannot sue himself." In this case, it is true that the Cleveland Company is called upon to attack the acts of its controlling owner, and, in a certain sense, to sue for its own infringement; yet the two corporations are separate legal entities; one can sue the other; and it is not necessary for the licensee to sue alone, in order to prevent an absolute failure of justice. When the owner is not the infringer, and therefore cannot be made a defendant, if the licensee is to have an opportunity to assert his alleged rights he is at a great disadvantage, unless he has the power of bringing a suit in equity in the name of the owner, though against his will. In my opinion, he has, *prima facie*, such an implied power. Whether a court of equity would permit a wanton or unjust or inequitable use of the name of the owner of the patent, by the licensee of the bare right to sell within a limited territory, is a question which does not apparently arise, and upon which I express no opinion. The motion is denied.

DUGAN v. GREGG.

(Circuit Court, S. D. New York. November 16, 1891.)

1. PATENTS FOR INVENTIONS—INVENTION—BOOK AND INDEX.

Letters patent No. 383,543, issued May 29, 1888, to Robert M. Rigby, for a combined book and index so arranged by uniting one edge of the cover leaf of the index to the outer edge of one of the leaves of the book, that the index may be withdrawn from between the covers of the book and again returned to its place, without turning the pages of the book or losing the reader's place, involved a patentable invention, and not a mere mechanical adaptation.

2. SAME—CONSTRUCTION OF CLAIM—INFRINGEMENT.

The claim was for "the combination, with a book provided with a leaf, C, free of the book-cover, to its rear edge," of an index united by its cover-leaf to the leaf, C. In the specifications the patentee says: "The book will preferably be provided with a special leaf, of considerable strength, and bound or united firmly to the book cover, B, at the point, A, or at such a point distant from the edge of the cover, B, as will provide room enough to receive the index when folded there between." *Held*, that the claim should be construed to mean that the leaf, C, should be free of the book-cover to the leaf's rear edge, and not to the book-cover's rear edge; and hence an index connected with a leaf which is united to the book-cover some distance from the cover's rear edge constitutes an infringement.

In Equity. Suit by George Dugan against Thornton F. Gregg for infringement of a patent.

Edwin H. Brown, for complainant.

Francis Forbes, for defendant.

COXE, J. This is an equity suit for the infringement of letters patent No. 383,543, granted to Robert M. Rigby, May 29, 1888, and by him assigned to the complainant. The invention relates generally to a combined book and index where the index is independent of the book, but combined with it so that both can be referred to at the same time. The object of the inventor was to connect the two so as to facilitate a more ready and convenient handling thereof. This is accomplished by "uniting one edge of one of the leaves of the index to the edge of one of the leaves of the book, whereby the index may be confined or withdrawn from between the covers of the book after reference or other use." The advantage claimed for the invention is that at any time the index may be pulled out beyond the book by a simple movement of one hand and returned by the same movement to its position in the book without necessitating the turning of any of the pages of the book and without losing the place in the book which the reader is consulting. The claim is as follows:

"In a combined book and index, the combination, with a book provided with a leaf, C, free of the book-cover, to its rear edge, of an index provided with a leaf or cover, F, the free edge of the latter being flexibly united to the free edge of the leaf, C, whereby the index is independent of the book-cover and may be inserted and confined between the book-cover and the leaf, C, with the front edges of its leaves outermost, substantially as described."

The defenses are non-infringement and lack of novelty and invention.

Rigby's contribution to the art was a simple one, and yet he accomplished a useful result in a better way than it had been done before. As defendant's expert puts it:

"I find that to facilitate the ready handling of the index it can be withdrawn from between the cover and leaves, or inserted therein without necessarily handling the book or turning its leaves."

This is the invention in a nut-shell. The inventor's aim was to provide a simple and inexpensive mode of connecting the index with the book so that the user, by two simple motions of one hand, can pull out and open the index, and, after examining it, return it, by a similar operation, to its place. In this aim he succeeded. Of course books, and books combined with indices, were old; but nothing in the prior art anticipates the combination of the patent. No one before attached the outer edge of the cover of the index to the outer edge of a leaf of the book. The devices of Draper, Tebbetts and McDonald, if made now for the first time, would not infringe. The feature which gives Rigby's device its principal claim to novelty is wanting in all of these. The complainant's expert referring to these prior structures says, and I think correctly, that in no one of them "is the free edge of the cover leaf of the index secured to the free edge of a leaf connected at its inner edge with the book, and no one of the structures described is capable of being drawn out or pushed in without opening the book to any extent, and also when so drawn out of having its leaves turned and inspected without covering the book, or the leaves of the book, while the book can be inspected and its leaves turned without disturbing the leaves of the index."

The question of patentability is not so clear. The invention is, certainly, not a great one. It is not many degrees removed from mechanical skill and yet it is thought that the ingenious arrangement pointed out in the patent would not have occurred to the skilled workman. To produce it required an exercise of the mental faculties. It involved invention. *Magowan v. Packing Co.*, 57 O. G. 845, 12 Sup. Ct. Rep. 71.

The question of infringement turns upon the construction of the claim. The defendant has a patent, No. 432,700, for a device for attaching the index to the inner surface of the back cover of the book. The sale by him of a letter-press copying book with an index attached as described in his patent is conceded. The leaf to which his index is attached is not bound into the book like the other leaves, but is gummed to the inside of the book-cover, at a point about half an inch from the rear edge of the cover. If the claim requires that the leaf shall be free of the cover all the way to the cover's rear edge the defendant's book does not infringe. It does infringe, however, if the claim requires only that the leaf shall be free of the cover to the leaf's rear edge. The defendant contends that the language relating to the leaf, C, must be construed as follows: "A leaf, C, free of the book-cover, to the book-cover's rear edge." The complainant insists that the following is the proper construction. "A leaf, C, free, to its rear edge, of the book-cover." I am convinced that the latter is the proper construction both from a grammatical and equitable point of view. The idea might have been more clearly expressed, but there is little doubt as to the patentee's meaning. The subject he is considering is the leaf, C. He then proceeds, parenthetically

ally, to describe it as a leaf which is free all the way to its rear edge of the book-cover. The subject is not changed. At all times it is the leaf, C, and not the book-cover. Moreover, the limitation suggested by the defendant was not required by anything in the prior art. It can hardly be presumed that a rational inventor would place such an unnecessary restriction, voluntarily, upon an already narrow claim. But the subject is not left to presumption. The specification repeatedly makes allusions which are wholly inconsistent with defendant's construction. For instance, the patentee says:

"The book will preferably be provided with a special leaf of considerable strength, and bound or united firmly to the book-covers, B, at the point, *a*, or at such a point distant from the edge of the cover, B, as will provide room enough to receive the index when folded there between, as in Fig. 2."

The location of the point of contact of the leaf, C, to the book is not of the essence of the invention. There is no reason for locating it at the one point suggested by defendant. If the index happens to be smaller than the book, and the leaf, C, is attached as defendant says it must be, the leaf will buckle, the index will be hidden and the whole contrivance will become inoperative. If the leaf, C, must be free of the cover from the front edge to the rear edge of the cover, it cannot be attached to the cover at all. To construe the claim thus narrowly is to put a premium upon infringement and render the patent valueless. An infringer would escape by simply pasting a narrow strip of the leaf to the rear edge of the cover. Even if it be conceded that the language is doubtful it would still be the duty of the court to resolve the doubt in favor of the patent by placing a liberal and reasonable construction upon the claim. The complainant is entitled to the usual decree.

MCGILL v. UNIVERSAL PAPER-FASTENER CO. *et al.*

(Circuit Court, N. D. Illinois. July 13, 1891.)

1. PATENTS FOR INVENTIONS—NOVELTY—PAPER-FASTENERS.

Letters patent No. 162,183, issued April 20, 1875, to George W. McGill, for an improved metallic paper-fastener made by placing two blanks with semi-circular heads, back to back, and bending a metallic cap over the heads so as to hold them together, the shanks being in close parallel contact, and pointed at the ends, so as to make but one hole in the paper, is void for want of novelty, it appearing that complainant used such caps for two years before he applied for the patent, and that substantially the same device is shown in a patent issued to one Gilford in May, 1870.

2. SAME—ANTICIPATION.

Claim 1 of letters patent No. 337,182, granted March 2, 1886, to George W. McGill, describes a paper-fastener made from a blank, which is split lengthwise from both ends, leaving a narrow connecting neck, the parts being then folded over back to back, and a head made by bending over the parts above the neck; and also having one shank shorter than the other, for convenience in separating them after they are passed through the paper. *Held*, that this invention was anticipated by the Pack & Van Horn patent of November 23, 1875, the Lindsay patent of January 25, 1876, and patent No. 199,085, issued to McGill January 8, 1878.

In Equity. Suit by George W. McGill against the Universal Paper-Fastener Company and others for infringement of a patent. Bill dismissed.

Joshua Pusey and Parke Simmons, for complainant.

West & Bond, for defendants.

BLODGETT, J. The bill in this case charges the defendant with the infringement of patent No. 162,183, granted to complainant April 20, 1875, for an "improvement in metallic paper-fasteners," and patent No. 337,182, granted to complainant March 2, 1886, for a "metallic fastener," and seeks an injunction and accounting. In the specifications of the first-mentioned patent the matter of the invention covered thereby is stated as follows:

"My invention relates to that class of metallic fastenings known to the trade as 'McGill's paper-fasteners,' wherein the shanks of the fasteners are flat, and in close contact with each other, and make only a single hole in the papers which it is designed to connect; the two shanks opening from each other after passing through the papers, and confining said papers between said shanks and the head of the fastener. * * * The shanks of the fasteners so formed are run through the papers or other articles to be connected, and are separated on the other side of the same, and thus confine said articles between the said shanks and the head of the fastener."

The fasteners described in the patent are made by cutting two blanks from thin, flexible sheet-metal of suitable width for the purpose required, which are made pointed at one end, and on the other end is a semi-circular piece, which, on being bent at a right angle, makes a semi-circular head. These two blanks are placed back to back, so that they present a circular head or top, and over those is turned a concave metal cap, which gives the top or head of the fastener a button-like appearance, and holds the shanks of the two blanks in close parallel contact. Another mode of making the fastener, as described in the specifications, is to cut a slit in the middle of the metal cap of the proper shape and size to allow the two shanks to be passed through it, so that the heads of the two shanks shall rest in the cap, and then turn the flange of the cap up over these heads. There is but one claim in this patent, which is:

"The within-described metallic fastener, formed of the two blanks, *ab*, *ab*, and the cap or shell, *c*, bent and connected together as herein shown and described, the ends of the shanks, *b*, *b*, of the blanks being in close parallel contact, and pointed so as to make only a single hole in the articles it is designed to connect, substantially as described."

The other patent shows a blank for a metallic fastener cut from thin, flexible sheet-metal, preferably sheet-brass, split from both ends in a manner to leave a neck between the two cuts, so that two pointed shanks project in one direction and two arms in the other direction from this neck. This blank is then folded over in such a way that the shanks are brought back to back, in close parallel contact, the neck holding them in this position. The arms are then bent at right angles in opposite directions, and a metal cap is closed over these arms, thus making a

head for the fastener. This metal cap may be round or oblong in shape; may be placed on top of the arms, and its flange turned down over them; or a slit may be made in the middle of the cap, through which the shanks may be passed, and then the flange of the cap turned upward over the arms. The specifications say:

"The fastener is operated by forcing its double shank through the articles to be bound or fastened until the under side of its covered head rests on one side of the same, and then separating the blades of the shank on the other side of the material and bending them down flat, in opposite directions, on the same, so as to bind the material between them and the fastener head. One of the shanks of the fastener is made longer than the other, so that it will project beyond the shorter one when both shanks are folded in close parallel contact, to admit of the ready separation of the shanks in applying the fastener, as described. The connecting neck holds the parts of the fastener together, thereby facilitating the capping or covering of the same. It also binds or locks together the tops or fold of the fastener shanks, and prevents their parting at that point while the shanks proper are being separated in applying the article to the uses intended."

Infringement is charged only as to the first and second claims of the patent, which are:

"(1) A metal fastener blank, split centrally through its length from both ends in manner to form a connecting neck, *a*, having two shanks, *b, b*, of different lengths, projecting in one direction, and two arms, *c, c*, in the opposite direction, substantially as set forth. (2) As an improved article of manufacture, a metallic fastener consisting of a metal fastener blank split centrally through part of its length from both ends, one of the split ends forming the two shanks, *b, b*, of different lengths, and the other end the arms, *c, c*, the shanks, *b, b*, being folded back to back, in close parallel contact, and the arms, *c, c*, folded over in opposite directions at right angles from the shanks, *b, b*, and permanently secured in such position by a metal cap, substantially as described."

The defenses insisted upon are: (1) That the patents are both void for want of novelty; (2) that defendants do not infringe.

The proof shows that the initial step in the art to which these devices belong was a fastener made of thin, flexible metal, pointed at one end, and a portion of the other end bent at a right angle, thus leaving a pointed single shank, which could be thrust through the paper and bent sideways, so that the paper was held between the head and bent shank. The proof also shows that in July, 1866, a patent was granted to complainant for a metallic paper-fastener, which was made by bending a strip of thin, flexible metal in such a manner as to form a head, and two shanks project back to back downward from the middle of the head. This is described in the patent as a "T-shaped fastener;" thus making a fastener with two shanks, instead of one, which could be thrust through one hole in the paper or material to be held together, and the material firmly held between the head and shanks by bending the shanks sideways in opposite directions. And the proof also shows that for more than two years before complainant applied for patent No. 162,183, of April 20, 1875, he had made and put upon the market paper-fasteners made sub-

stantially like those described in his patent of July, 1866, over the heads of which had been turned a metal cap, thus giving the heads a button-like appearance. It is true, he states that he had used this metal cap merely as an ornament, and that it performed no such function as it performed in patent 162,183, where the cap held the two shanks of the fastener together. The proof also shows that in May, 1870, a patent was granted to one Gilford for a button, where two metal shanks, with the upper ends bent at right angles, are held together by turning the flange of the middle cap over them; and it is obvious, even to superficial inspection, that these shanks, thus united by a cap, only needed to be pointed to make the fastener described in complainant's patent 162,183. The complainant's admission that he had used the metal caps on the heads of fasteners made under the 1866 patent, seems to me sufficient to answer any claim of novelty in the idea of capping the heads of the shanks shown in patent 162,183. It involved no invention to use a cap for the purpose of holding the two shanks of the 1875 patent together when the same kind of cap had been turned over the head of the 1866 fastener, even if in the latter the cap was merely ornamental. But I doubt if the cap was a merely ornamental appliance to the 1866 fastener. The heads of its fasteners were made by merely bending a flat piece of metal into a T-shape, and would be naturally loose and easily displaced, and the cap necessarily gave firmness and strength to the structure, and the inference is certainly a natural one that the statement of merely ornamental use was made in the exigency of his case for the purpose of securing the issue of the patent No. 162,183, the application for which was then pending, and had been reported adversely upon in the patent-office. With a metal cap, used by complainant himself for over two years on T-shaped paper-fasteners made under his patent of July 24, 1866, and with the Gilford patent of May 24, 1870, showing two button shanks, held together by a metal cap, I am of opinion there was no novelty in the fastener covered by the patent No. 162,183, granted April 20, 1875. The first claim of the patent of March 2, 1886, is upon the metal blank split centrally lengthwise from one end to form the shanks of a fastener, one shank being shorter than the other, and also split centrally from the other end to form arms, leaving a connecting neck between the two slits, thus making a blank which, on being folded over on the line of the slits, brings the two shanks of the fastener closely together, face to face, and on which a head can be formed by bending the arms above the necks in opposite directions at right angles, and covering them with a metal cap. This claim is most clearly anticipated in the Pack & Van Horn patent of November 23, 1875, in the Locks patent of December, 1883, in the Lindsay patent of January 25, 1876, and in the complainant's patent No. 199,085, granted January 8, 1878, so far as the slitting of the metal is concerned, so as to leave a connecting neck between the two shanks; and in complainant's patent No. 56,587, granted July 24, 1866, the drawings show one of the pointed shanks of the T-shaped fastener there described as shorter than the other; and in com-

plainant's patent, No. 308,368, granted November 25, 1884, he not only shows in his drawings, but particularly describes, a two-shanked fastener, with one shank made shorter than the other, "for convenience in separating the shanks for the purpose of clinching them down." So that it appears clearly from the proof that a blank for a metal fastener with these two features—the connecting neck, with one shank shorter than the other—was certainly old at the time the patent No. 337,182 was applied for and obtained. The second claim of this patent, No. 337,182, is for a metallic fastener as a new article of manufacture, made from the blank described in the first claim, and the head covered by a metal cap. As the metal cap in this claim is of the same kind, and performs no other function, than the cap called for in complainant's patent, No. 162,183, granted April 20, 1877, not to mention those which he applied to his fasteners of his July, 1866, patent, and is also found in his patent of January, 1878, there was certainly no novelty in the use of such cap at the time complainant applied for and obtained his patent No. 337,182.

I will add that the proof shows that this complainant has taken out over 100 patents upon metallic fasteners intended to fasten paper or textile material together, but, so far as the two patents now before the court are concerned, the two-shank fasteners covered by the old patent of July 24, 1866, with the head covered by a metal cap turned over portions of the top of the strip, bent at right angles, so as to form the button-like head, anticipates both the structures now under consideration. The idea once conceived and illustrated by a capped T-shaped fastener, and with two flexible shanks arranged to pass through the same hole in the paper or other material to be held together and clinched by bending the shanks apart from each other, can afterwards be applied in a variety of ways. Thus a T-shaped two-shank fastener could be made by bending thin, flexible metal in many ways, so as to secure two shanks to the head; and these changes involve no invention, but mere mechanical skill. Improvements they may have been, but not inventions. I am therefore clearly of opinion that both these patents are void for want of novelty, and that the bill should be dismissed upon that ground alone, but, if not void for want of novelty, it is very clear to me that the defendant's patent does not infringe either of the complainant's patents now in suit, as it is made of a blank formed substantially like the blank described in the 1866 patent, except that one shank is not made shorter than the other, and only one of the defendant's shanks is pointed. If it was patentable to make one shank shorter than the other in a paper-fastener, it certainly does not infringe that patent to point one shank, and leave the other square at the end which is to be passed through the paper, thereby giving an opportunity to take hold and separate the shanks by reason of the metal being cut away from one. The bill is therefore dismissed for want of equity.

SHAW STOCKING CO. v. PEARSON.

(Circuit Court, D. Massachusetts. November 10, 1891.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—WEB-HOLDERS FOR KNITTING-MACHINES.

Letters patent No. 218,460, issued August 12, 1879, to the Shaw Stocking Company, as assignee of Benjamin F. Shaw, for improvements in web-holding mechanism for knitting-machines, the claim being, among other things, for web-holders with "downwardly curved tail-pieces," is not infringed by a machine in some respects similar, but having web-holders with straight tail-pieces.

2. SAME—AMENDING CLAIM—WAIVER.

When a broad claim is rejected by the patent-office because of anticipation by certain other patents, and thereupon the applicant amends his specification and claim, and accepts a patent thereon, he waives the broad invention, and cannot afterwards, in an action for infringement, claim that his invention was really made before the anticipating patents were issued.

In Equity. Bill for infringement of patent. Dismissed.

Frederick P. Fish, for complainant.

Joshua Pusey, for defendant.

COLT, J. This bill in equity is founded upon the alleged infringement of letters patent No. 218,460, granted August 12, 1879, to the complainant, as assignee of Benjamin F. Shaw, for improvements in web-holding mechanism for knitting-machines. For a number of years Shaw was engaged in the production of a machine for knitting seamless stockings, and his inventions are covered by several patents. The patent in suit is for a part of this mechanism, and relates to devices for holding down the fabric during the operation of the needles. In the old circular knitting-machines, the requisite tension was brought to bear on the web by means of weights hanging upon it, and these answered the purpose for plain tubular work. In the production of the heel of a seamless stocking, however, it is necessary to run only a part of the needles, while the rest remain stationary. Under these conditions, the weights might pull effectively on the side of the web where the needles are at rest, but they would not produce the proper tension during the widening and narrowing operation on the side of the web which is being lengthened. To meet this difficulty Shaw substituted what he calls "web-holders" in place of the weights. The web-holder is made of a thin, flat strip of metal, and it has a turned down tail-piece at its forward end, and an overhanging hook or finger on its upper side. The tail-piece is downwardly curved or made blunt, so that it may not penetrate or hold the web as it is moved over the end of the tail, and through the hollow needle-bed or cylinder. A web-holder is inserted between each pair of adjacent needles. The tail-pieces always remain in the rear of the needles, near the upper edge of the web, where the knitting takes place, and the projecting fingers, co-operating with the needles, press upon the edge of the web, and hold it down during the operation of knitting.

These web-holders have a forward and back movement, caused by lugs upon their under side engaging with a rotary cam, and they are fitted in radial grooves in an annular web-holder bed attached to the upper part of the needle-bed. As the needles rise through the fabric, the web-holders move forward, their downwardly curved tail-pieces bearing upon the fabric, and the web-holders continue to advance until the overhanging fingers on the top engage with the edge of the web on each side of the needle. By this means also the loop held on the needle is drawn back away from the open or latch side of the needle, thus insuring that the needle shall carry its shank through the loop in its upward passage, instead of permitting it to slip off the latch side, as it might if not so held back. As the needle continues its upward movement through the loop, preparatory to taking the yarn for a new loop, it tends to lift the fabric with it, owing to friction, but the overhanging fingers of the web-holders rest above the edge of the web on each side of the needle, and thus prevent it from being lifted up by the needle. About the time the needle has reached its descent, or before it begins to ascend, the web-holders are retracted or moved outward, so that they may be again moved inward to engage with the web and co-operate with the needle. The specification declares that the invention has special reference to a combination, and the elements of the combination are set forth in the claim of the patent, as follows:

"In a circular knitting machine, a cylindrical, hollow, unobstructed needle-cylinder, adapted to permit the free passage down through it of a knitted web and a series of latched needles, a separate web-holding bed provided with radial grooves, and a web-holder operating cam, combined with longitudinally reciprocating web-holders placed and made movable within the grooves of the web-holder bed, the said web-holders being provided with points, *g*, and downwardly curved tail-pieces, *h*, adapted to remain always within and at the rear of the series of needles, and to press against, but not penetrate, the web as it is drawn over the said web-holders and out through the hollow cylinder, the cam to move the web-holders being shaped to operate as and for the purpose described."

This case turns upon the construction which should be given to the claim, and especially to the words, "downwardly curved tail-pieces," as applied to the web-holder. It is important in this connection to examine the file-wrapper and contents of the patent. In his first application Shaw claimed broadly the combination of a series of independently acting web-holders with a series of independently acting needles adapted to co-operate together to knit the web, and hold it down; also a series of web-holders notched to hold the web down, in combination with a series of needles adapted to be actuated independently, and with a cam to retain the web-holders forward during the time that the needles rise and fall adjacent to the web-holders. This application was rejected by the Patent Office on the ground that the invention was anticipated by the Burson and Nelson patent of November 30, 1875, the Hollen patent of October 10, 1876, and the English patents granted to White, May 16,

1863, and to Mellor, November 7, 1863. Shaw thereupon amended his specification and claims, but the patent was again refused. After further amendments, the patent was finally allowed in its present form. By these proceedings Shaw waived the broad invention covered by the claims in his first application, and limited his invention to the combination of elements found in the claim of the patent. I am aware that the complainant seeks to cut under to a great extent the prior art, as exhibited in these patents, by proving that Shaw made his invention in 1867, or 10 years before he filed his application. The difficulty with this position is that, having acquiesced in the decision of the Patent Office, and obtaining his patent on that condition, it is now too late to try and broaden its scope by showing that his invention antedated some of the patents cited by the examiner. Whatever the date of the invention, it must be construed with the limitations imposed by the Patent Office as a condition of the grant, or, in other words, it must be limited to the combination set forth in the claim of the patent; and, so interpreted, I agree with the statement of complainant's expert, Mr. Livermore, that all the elements composing the claim of the Shaw patent were old at the date of the patent, and that the only new and patentable feature lies in the "specific construction of some of those elements."

The inquiry remains, does the defendant's machine embody this combination? The defendant uses a web-holder having a straight tail-piece rounded at the end, but not downwardly curved. If the downwardly curved feature of the Shaw tail-piece is immaterial, so far as the successful working of the machine is concerned, and was so regarded by the inventor, it might be that the court should consider the defendant's tail-piece as the equivalent of Shaw's, and so within the patent; but if it should turn out that this peculiar construction of the tail-piece was necessary to the practical operation of the Shaw machine as organized, and was so regarded by the inventor, then the absence of this feature in the defendant's web-holder has a very important bearing on the question of infringement, especially in view of the scope of the Shaw patent as shown by the file-wrapper and contents.

Turning to the record in this case, we find in the affidavit of Henry P. Hardy, (the mechanic who built the first machine covering this invention under the direction of Shaw,) filed in the Patent Office in connection with the Shaw application, the following language:

"Though there is apparent similarity in outline, the omission in the English device of that which in Mr. Shaw's constitutes the difference between them (position and modes of operation being not considered) is of the utmost significance, for the drooping edge constituting what is called the 'tail' of the web-holder is indispensable to its use as a practical device for holding the web during the process of knitting."

To the same effect is the language used by the solicitors of Shaw in a communication addressed to the commissioner of patents pending his application:

"The particular construction of the Shaw tail-piece is, in practice, a matter of very great importance, the perfect operation of the machine largely depends upon it, and such novel web-holder and tail-piece is certainly patentable."

Further, Hardy testifies in this case, and it is not denied, that the web-holder first tried in the Shaw machine had a straight tail-piece rounded at the end, and that it did not work well because the end would penetrate the fabric, and sometimes tear a hole in it, and that, therefore, Shaw suggested to make the web-holders with a downwardly curved tail to keep the points from penetrating the web and making torn work, and that by so doing the machine worked first-rate. These facts explain why Shaw was so particular to state in the specification and claim of his patent that the tail-pieces should be downwardly curved. In his view, as demonstrated by actual experiment, the machine would not produce a merchantable product without this specific feature, and was therefore worthless. It results from this that Shaw has made the peculiarly constructed tail-piece a material and necessary element of the combination claim of his patent.

But the question may be asked, how does it happen that, if Shaw could not produce satisfactory work on a machine having a web-holder with a straight tail-piece, the defendant can do it on his machine? The answer lies, I think, in the somewhat different organization of the two machines. In the defendant's machine the cam is so constructed that the web-holders are drawn back from the knitting operation just as the needles begin to descend, and consequently the web hangs loosely or is not drawn down taut in front of the web-holder as it advances on the rising of the needle, and so the end of the tail-piece will push the web away rather than penetrate it. In the Shaw machine the web-holder remains in its advanced position upon the web, thereby keeping it taut, until the needle has about completed its descent, when the holder is withdrawn only to be immediately advanced again as the needle begins to rise. The degree of the effect produced upon the looseness of the web at the end of the advancing tail-piece, owing to this difference between the two machines, I do not know, because the complainant has not introduced in evidence any model of the Shaw machine; but, whatever this difference may be, an inspection of the working model of the defendant's machine in evidence shows that the fabric hangs loosely in front of the end of the tail of the advancing web-holder, and that, therefore, there is little danger from penetration; and this position is fortified by the successful operation in the presence of the court of one of defendant's machines, in which a portion of the tail-pieces have a round end, another portion a square end, and another portion a beveled end.

It is urged by the complainant that the Shaw tail-piece is narrow, while that used in defendant's machine is broader, and that consequently one would penetrate the web while the other would not. There may be some truth in this, but it only goes to show another difference in the organization and construction of the two machines. Upon the descent of the needle in the Shaw machine, as the web-holders are still in their

advanced position, the loop carried by the needle is drawn across the wider part of the web-holder or back of the overhanging finger, and therefore the loop would be too long except for coarse work, unless the web-holder was narrow; while in the defendant's machine, owing to the earlier retraction of the web-holder, the loop on the descending needle is drawn over the tail-piece, and this enables the defendant to use a broader web-holder without injuriously affecting the size of the loop. I do not think there is any infringement in this case,—*First*, because the downwardly curved tail-piece of the web-holder is made a necessary and fundamental part of the combination described in the first claim of the Shaw patent, without which the machine would be practically inoperative; and, *second*, because the defendant has so changed the organization of some of the parts in his machine as to permit of the successful working of a straight tail-piece.

As to the second defense, of public use, I need only say that, in my opinion, it is not made out upon the evidence. The first Shaw knitting-machine, made in 1877, was never put into public use, or its products sold, for the reason that it was defective. It was not until about 10 years later that a working machine was completed, and all previous efforts were experimental. While there was a long delay largely caused by the pecuniary embarrassments of Shaw before the machine was perfected, it does not appear that he ever abandoned the invention. Upon the ground of non-infringement, and for the reasons given, I must dismiss the bill.

COOP *et al.* v. DR. SAVAGE PHYSICAL DEVELOPMENT INST., Limited.*(Circuit Court, S. D. New York. November 17, 1891.)***PATENTS FOR INVENTIONS—INFRINGEMENT—INTERROGATORIES AND ANSWER.**

Where a bill for infringing a patent for an improvement in walking tracks for gymnasia propounds interrogatories as to whether defendant is using a track of a particular construction, and, if not, of what construction, they must be answered by stating the facts, and a general denial of infringement is insufficient.

In Equity. Bill by William L. Coop and others against the Dr. Savage Physical Development Institute, Limited, for infringement of a patent. On exceptions to answer. Exceptions sustained.

Fowler & Fowler and Charles N. Judson, for plaintiffs.

A. D. Kiddle, for defendants.

WHEELER, J. This suit is brought upon letters patent No. 358,483 for an improvement in walking tracks for gymnasia, and interrogatories as to whether the defendant has made, or caused to be made and used, walking tracks of a particular construction, and, if any not of that, of what other, construction, were annexed to the bill, and required to be answered. The defendant has answered, denying the infringement generally, without otherwise answering the interrogatories, and the answer is excepted to for this lack. The exceptions have now been heard. The interrogatories have been approved on demurrer, heard by Judge SHIRMAN. *Coop v. Institute*, 47 Fed. Rep. 899. The denial of infringement is a conclusion, and not an answer of facts from which it is drawn. The conclusion may not follow from the facts when given, and whether it does or not may be a question in the case. The plaintiffs seem to be entitled to the facts, and not to be bound by the conclusion, or to overcome it.

Exceptions sustained.

THE PROGRESSO.
STREET *et al.* v. THE PROGRESSO.*(District Court, E. D. Pennsylvania. September 21, 1891.)***1. WITNESSES—FEES AND MILEAGE IN ADMIRALTY CASES.**

In admiralty causes in the eastern district of Pennsylvania, mileage will not be allowed to witnesses brought from beyond the district, except as to 100 miles of the distance.

2. SAME—FEES AND MILEAGE OF PARTY.

A party is not entitled to either witness fees or mileage when his presence has not been required by the opposite party.

In Admiralty. Libel by Street Bros. against James M. Waterbury, owner of the steam-ship *Progresso*. Upon exceptions to the clerk's taxation of costs.

Libelants claim witness fees and mileage from Charleston to Philadelphia and return for Thomas Street, one of the libelants; also mileage for another witness, Paul Fatman, from the same place and return. The clerk disallowed Street's witness fees and mileage, and Fatman's mileage, except as to 100 miles.

N. Dubois Miller and Biddle & Ward, for libelants.

Coulston & Driver, for claimant.

BUTLER, J. The exceptions must be dismissed. As respects the mileage of witnesses brought from beyond the district, the clerk's ruling corresponds with our practice. Depositions might have been taken abroad and the costs avoided. Inasmuch as the testimony could only be heard by deposition, there was no advantage in bringing the witness here. The rule on this subject is not harmonious throughout the country, but any discussion of the subject in support of our practice, in view of what has been said heretofore respecting it, would be a waste of time. In *The Vernon*, 36 Fed. Rep. 115; *Wooster v. Hill*, 44 Fed. Rep. 819; *Haines v. McLaughlin*, 29 Fed. Rep. 70; *Buffalo Ins. Co. v. Providence & Stonington Steam-Ship Co.*, Id. 237,—the subject was fully discussed.

As relates to the \$4.50 claimed by the libelant for his attendance as a witness, the clerk's ruling is sustained. Ordinarily, where a party is present at the taking of testimony, his presence is, presumably, necessary on his own behalf, whether his personal testimony is required or not. The instances must be rare where he can safely absent himself, and where he does not avail himself of the opportunity thus afforded of forwarding his interest in the cause generally. Parties have not been allowed witness fees in this district, and I think should not be, except in case their presence is required by the other side.

RICHMOND v. BROOKINGS.

(Circuit Court, D. Rhode Island. November 28, 1891.)

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—FOREIGN ATTACHMENT.

Although the judgment in an action commenced in a state court against a non-resident by foreign attachment without personal service can bind the property only, and not the person of the defendant, yet the latter is a party to the suit in such sense that the same may be removed to the federal circuit court on the ground of diverse citizenship.

2. SAME—DISMISSAL.

If the defendant could not in such case be considered a party for the purposes of removal, this would not be a ground for dismissing the cause in the federal court, but only for remanding to the state court.

3. SAME—JURISDICTION OF CIRCUIT COURT—NON-RESIDENT OF DISTRICT.

Act Cong. 1888, § 1, (25 St. U. S. p. 433,) providing that no suit shall be brought in the circuit court "against any person by any original process * * * in any other district than that whereof he is an inhabitant," applies only to suits commenced in that court; and, in a case removed to it from a state court, its jurisdiction is not affected by the fact that defendant was not a resident of the district, and that the state court had acquired jurisdiction by foreign attachment without personal service. *Bank v. Fagenstecher*, 44 Fed. Rep. 705, followed.

4. ATTACHMENT OF LAND—SERVICE ON NON-RESIDENT.

The Rhode Island statute in regard to attaching real estate requires personal service on the defendant or service by leaving a copy with some person at his residence, or, if he have no residence within the precinct of the officer, then by mailing a copy to him, and serving a like copy on the person, if any, in possession of the real estate. *Held*, that when the return shows service of a non-resident by mailing a copy to him, but makes no allusion to serving any person in possession of the land, the court has no jurisdiction.

5. SAME—AMENDING RETURN.

The return may, however, be amended so as to show that no person was in possession of the lands, upon affidavits showing such to be the fact.

6. MOTION TO DISMISS—DEMURRER.

The question whether the declaration states a cause of action cannot be considered upon a motion to dismiss, but must be raised by demurrer.

At Law. Action by William H. Richmond against Wilmot W. Brookings, commenced by process of foreign attachment. On motion to dismiss. Conditional order of dismissal.

E. D. Bassett, for plaintiff.

C. H. Hanson, for defendant.

CARPENTER, J. This action was commenced in the court of common pleas for the county of Providence, in the state of Rhode Island, by attachment of real estate of the defendant. The defendant was not personally served with process. He appeared specially, and filed a plea denying the jurisdiction of the court, and also a petition whereby the action was removed into this court. He now, still appearing specially, files a motion to dismiss the action "on the ground that he is not a resident or citizen of said state of Rhode Island, and was not found, or served upon personally with process, in said state or district of Rhode Island."

In support of this motion the defendant first contends that this court can have no jurisdiction of any action wherein the defendant is not personally served with process, and cites *Perkins v. Hendryx*, 40 Fed. Rep. 657. I have already had occasion to consider this question in *Bank v.* v.48f.no.4—16

There are two other alleged grounds for dismissal which were argued at the hearing, but not referred to in the written motion. The first is that the return of the sheriff does not show that the writ was duly served. The statute of Rhode Island provides that the officer shall "leave an attested copy of such writ * * * with the defendant personally, or with some person at his last and usual place of abode, if any he have, within the precinct of the officer, or, if he have none, then such officer shall send such copy by mail to such defendant, * * * and shall also in the last-named event leave a like copy with the person, if any, in possession of such real estate." In this case the officer returned that, the defendant having no last and usual place of abode within his precinct, he had sent the required copy by mail, but made no return as to a copy to any person in possession. I think this return is insufficient. It is argued that, as the defendant is a non-resident, it is to be presumed that no person was in the possession of his real estate; but I see no possible ground for such a presumption. If, therefore, the return stands as at present, the action must be dismissed. The plaintiff, however, moves that the officer may amend the return by adding a statement that no person was in possession. This motion will be granted if properly and seasonably supported by affidavit to the effect that such an amended return is in accordance with the facts, the defendant having notice of the filing of the affidavit, and an opportunity to contradict it. The second ground which was argued is that the declaration does not set out a sufficient cause of action. I think this question is not properly raised by a motion to dismiss, but must be argued on a demurrer. The action will be dismissed, unless affidavit in support of the motion to amend be filed within 10 days.

[illegible]

1. The first of the two main types of the *Staphylococcus aureus* is the *Staphylococcus aureus* which is the most common cause of skin infections. It is a Gram-positive, spherical bacterium which is found in the nose, on the skin, and in the environment. It is a facultative anaerobe, meaning it can grow with or without oxygen. It is a highly contagious bacterium, and it can spread from person to person, from animal to person, and from the environment to person. It is a common cause of skin infections, such as impetigo, folliculitis, and abscesses. It can also cause more serious infections, such as pneumonia, sepsis, and endocarditis.

MCBEE *et al.* v. MARIETTA & N. G. RY. Co. *et al.*

(Circuit Court, E. D. Tennessee, N. D. December 10, 1891.)

1. JURISDICTION OF FEDERAL COURTS—DISTRICTS—NON-RESIDENT DEFENDANT.

Act Aug. 13, 1888, § 1, declares, among other things, that no civil suit shall be brought before the federal circuit or district courts against any person by original process in any other district than that whereof he is an inhabitant; but section 5 provides that nothing in this act shall be construed to repeal or affect any jurisdiction or right mentioned in Act March 3, 1875, § 8. This section provides that in any suit to enforce any legal or equitable lien on, or claim to, or to remove any lien or cloud upon, property situated in the district where the suit is brought, defendants who are not inhabitants thereof may be made parties, and brought into court by the methods there prescribed. *Held*, that this latter section applies to an original bill, brought for the purpose of enforcing various liens upon part of a railroad lying in the district as against the lien of a general mortgage, which is about to be foreclosed in the same court by a suit ancillary to another suit in a different district and state; and such original bill may be maintained, although some of the defendants are non-residents of the district.

2. SAME—CITIZENSHIP OF PARTIES—SUPPLEMENTARY PROCEEDING.

While such bill is an original bill within the meaning of that term as used in equity pleading, yet the suit, in its essence, is supplementary to the ancillary foreclosure suit, which it seeks to oppose, and hence the court's jurisdiction is unaffected by the fact that when the parties are arranged according to their interests in the suit, some who are residents of the same state will be found on opposite sides of the controversy.

In Equity. Bill by V. E. McBee and others against the Marietta & North Georgia Railway Company, the Central Trust Company of New York, and others, setting up certain liens upon a railroad, and opposing the foreclosure of a mortgage thereon, as injurious to their rights. On motion to dismiss the bill. Denied.

Washburn & Templeton, Green & Shields, J. W. Caldwell, and W. T. Welcker, for plaintiffs.

Henry B. Tompkins and G. N. Tillman, for defendants.

KEY, J. The Central Trust Company of New York, 13th January, 1891, filed its bill in this court against the Marietta & North Georgia Railway Company, alleging that it had lately filed its bill in the circuit court of the United States for the northern district of Georgia for the foreclosure of a mortgage executed by said railway company January 1, 1887, to secure its bonds to the amount of \$3,821,000 upon its entire lines of road, property, and franchises; interest upon the bonds to be paid semi-annually. The bill shows that the property covered by the mortgage extends from Marietta, Ga., to Knoxville, Tenn.; that the railway company is a corporation created by the laws of Georgia and North Carolina. The main line of road is 205 miles long, of which 95½ miles lie in Georgia and 109½ miles in Tennessee. How or by what authority the railway company came into Tennessee the bill does not disclose. The bill alleges that the defendant has made default in the payment of its interest, and is insolvent; asks to have this bill filed as ancillary to the suit in Georgia to have a receiver appointed, the mortgage foreclosed, and the money arising therefrom applied to the payment of the bonds. On the 16th of January, 1891, complainants McBee *et al.* filed

their bill against the complainant and defendant in the first-named bill and against a large number of firms and corporations, in which it is alleged that the portion of the railroad aforesaid which is within the limits of Tennessee was built by the Knoxville Southern Railroad Company, a corporation created by the laws of Tennessee; that complainants and most of the defendants to the bill are lien creditors of said road; that the mortgage in favor of the bondholders aforesaid is void so far as the line of road in Tennessee is concerned, or, if not void, is subject to the prior liens of the creditors of the Knoxville Southern Railroad. They resist the relief sought by the trust company; oppose the filing of the trust company's bill as an ancillary proceeding to the bill in Georgia; say the Knoxville Southern Railroad Company owns the line of road in Tennessee, its property, etc.; ask for the appointment of a receiver, for the sale of that road, for the application of the proceeds to the debts of complainants and such other creditors as are parties or may become parties to the cause. The bill also prays for an injunction against the Central Trust Company to prevent it from prosecuting its ancillary suit in this court, and from having a receiver appointed on the part of the line of railroad in Tennessee. On the 22d day of January, 1891, an order was made appointing a temporary receiver, which recites that—

"These causes came on to be heard and were heard together by order of the court. It is further ordered that the bill of *V. E. McBee et als. vs. Knoxville Southern Railroad Company et als.* be treated and regarded as an insolvent bill, and that all creditors of said Knoxville Southern Railroad Company or of George R. Eager, as contractor, be ordered to file their claims in this court, duly proven. But those creditors who have already instituted proceedings to fasten a lien upon said property under the statutes of the state are permitted to prosecute said suits to judgment, but no further. This order is granted without prejudice to any party or corporation in interest to plead, answer, or demur to said bill of *V. E. McBee et als.*; or to take any other appropriate proceedings in said cause."

March 16, 1891, the Central Trust Company filed an amendment to its bill, in which it avers "that the defendant corporation was also formed by the consolidation of the Marietta & North Georgia Railway Company, a corporation duly chartered under the laws of Georgia, and the Knoxville Southern Railroad Company, chartered under the laws of Tennessee." March 30, 1891, the Central Trust Company, the Marietta & North Georgia Railway Company, and the Knoxville Southern Railroad Company filed a demurrer to the McBee bill, which was overruled by the circuit judge. In overruling the demurrer he says:

"The bill is filed by lien claimants of the Knoxville Southern Railroad Company, and its general scope and purpose is to have enforced all liens upon the property of the company, which is alleged to be an insolvent corporation. The statutory liens asserted by complainants and alleged to exist in favor of many of the defendants for work and labor done and material furnished are claimed to have priority over the lien of the bonds secured by the mortgage which the Central Trust Company of New York filed its bill herein to enforce on January 13th, 1891. The present complainants were not made parties to that proceeding. They therefore bring their own suit to have the priority of liens upon the Knoxville Southern Railroad declared, to avoid a mul-

tiplicity of suits, to save waste and useless expense, and to have a single sale of the property. The bill may very properly be heard and considered with that of the Central Trust Company of New York, just as though complainants had intervened in the suit of the trust company for the purpose of asserting the priorities of the statutory lien claims. When the priority of liens are to be declared and adjusted, it is proper to bring all lien claimants, so far as possible, before the court having custody of the property and the authority to determine their relations and respective rights. This is the general object of the bill, and the general and special demurrer thereto are, in the opinion of the court, not well taken."

Afterwards the demurring parties answered the bill, but now the Central Trust Company comes and moves to dismiss the bill—

1. Because it is an original bill in equity, filed by persons claiming to be citizens of North Carolina, against persons who are citizens of Tennessee, against citizens of the state of Georgia, against citizens of New York, and against a citizen of Massachusetts. It is true that section 1 of the act of August 13, 1888, as well as that of March 3, 1887, in regard to the jurisdiction of federal courts, provides that "no person shall be arrested in one district for trial in another in any civil action before a circuit or district court, and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." Section 5 of these acts, however, provides "that nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned in section 8 of the act of March 3, 1875," and that section says "that when, in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon, or claim to, or remove any incumbrance, lien, or cloud upon, real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within said district," such defendants may be made parties, and prescribes the method of bringing them into court. This suit is of the nature indicated in this section, and such non-residents as have claims upon the property in litigation are proper parties to the suit.

2, 3. It is insisted that to arrange the parties to the suit according to their interests in the subject-matter of controversy the result is that parties who are citizens of the same state are upon both sides of the controversy. Suppose we admit these facts as apparent from this bill, does it follow that the bill should be dismissed? The complainant in the first bill, the Central Trust Company, seeks to reach the entire proceeds of the property in Tennessee for the satisfaction of its bonds, and makes only one defendant to its bill, and that defendant, according to the bill, is not a citizen of Tennessee, and that defendant is not indebted to the creditors of the Knoxville Southern Railroad Company. That company, or any of its debtors, are not mentioned in its bill, and, of course, are not made parties to it. The trust company prayed to conduct its suit as ancillary to its action in Georgia. Apparently there is no dispute or controversy between the trust company and the Marietta & North Georgia Railway Company. Both parties to the suit are interested in

avoiding the claims of the creditors of the Knoxville Southern Railroad Company. Those creditors see that an effort is being made to place the railroad on which they claimed their liens in the hands of a receiver whose allegiance belonged to other parties and another jurisdiction. Their debtor was not a party to the suit. They could not join the complainant, nor could they unite fortunes with the defendant. The prayer for ancillary jurisdiction was futile. The jurisdiction of this court over the property within this state was as plenary as that of the court in Georgia over the property in that state. The suit of the Central Trust Company was an original, independent action or bill in equity. Nothing is better settled than that a bill may be filed on the equity side of this court to regulate or restrain a judgment or suit at law in the same court. Such a proceeding is not an original suit, but ancillary and dependent and supplementary merely to the original suit; and such a bill may be maintained without reference to the citizenship or residence of the parties. *Logan v. Patrick*, 5 Cranch, 288; *Dunn v. Clarke*, 8 Pet. 1; *Clarke v. Mathewson*, 12 Pet. 164; *Freeman v. Howe*, 24 How. 450-460; *Johnson v. Christian*, 125 U. S. 642, 8 Sup. Ct. Rep. 989, 1135. Nor is this all that may be done. "So, too, in many instances, where the jurisdiction originally depends on the citizenship of the parties, if the proceedings happen to affect the interests of other persons not original parties, the latter may often be brought before the court, and made parties, irrespective of their citizenship. This rule arises from the necessity of the case and to prevent failure of justice; for since, when a court has once obtained jurisdiction of a cause, it cannot suffer any other court to disturb its proceedings or interfere with property in its custody, a party aggrieved, if he could not be heard in the court where the judgment was rendered, or in which the property is held, would be without redress." *Cornwell v. Canal Co.*, 4 Biss. 195; 11 Myer, Fed. Dec. 249. In *Minnesota R. Co. v. St. Paul R. Co.*, 2 Wall. 609, it is held that when a bill in equity is necessary to have a construction of the orders, decrees, and acts of a United States court, the bill is properly filed in such court, as distinguished from any state court; and that it may be entertained in such national court, even though the parties would not, for want of proper citizenship, be entitled to proceed by original bill of any kind in a court of the United States. Mr. Justice MILLER, in delivering the opinion of the court, said:

"In contemplation of law this property is still in the hands of the receiver of the court. If in the hands of a receiver of the circuit court, nothing can be plainer than that any litigation for its possession must take place in that court, without regard to the citizenship of the parties. * * * The question is not whether the proceeding is supplemental and ancillary, or is independent and original, in the sense of the rules of equity pleading, but whether it is supplemental and ancillary, or is to be considered entirely new and original in the sense in which this court has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the state courts. No one, for instance, would hesitate to say that according to the English chancery practice a bill to enjoin a judgment at law is an original bill in the chancery sense of the word, yet this court has decided many times

that when a bill is filed in the circuit court to enjoin a judgment of that court it is not to be considered as an original bill, but a continuation of the proceeding at law."

Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. Rep. 27, supports by cogent reasoning the foregoing authorities.

The cases referred to have reference to judgments or suits at law assailed by proceedings upon the equity side of the court. *Pacific Railroad v. Missouri Pac. Ry. Co.* is of a different character. One Ketchum had brought a suit in the United States circuit court of the eastern district of Missouri to foreclose a mortgage on a railroad, making the railroad (a citizen of Missouri) and others defendants. There was a decree of sale, a sale, and its confirmation. The corporation appealed to the supreme court, and the case was affirmed, April, 1880. In June, 1880, the corporation filed a bill in the circuit court above mentioned against another Missouri corporation, a citizen of Missouri, and other citizens of Missouri, alleging fraud in fact in the foreclosure suit. This bill was filed to impeach a decree in an equity cause, and the parties on both sides were citizens of Missouri. Upon demurrer the court said:

"Upon the question of jurisdiction there can be no doubt that the circuit court, as the court which made the Ketchum decree, and had jurisdiction of the Ketchum suit, as this court in *Railroad v. Ketchum*, 101 U. S. 289, held it had, has jurisdiction to entertain the present suit to set aside that decree on the grounds alleged in the bill, if they shall be established as facts, and if there shall be no valid defense to the suit, although the plaintiff and some of the defendants are citizens of Missouri. This bill falls within recognized cases which have been adjudged by this court, and have been recently reviewed and reaffirmed in *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27. On the question of jurisdiction the suit may be regarded as ancillary to the Ketchum suit, so that the relief sought may be granted by the court which made the decree in that suit without regard to the citizenship of the present parties, though partaking so far of the nature of an original suit as to be subject to the rules in regard to the service of process which are laid down by Mr. Justice MILLER in *Pacific Railroad v. Missouri Pac. Ry. Co.*, 1 McCrary, 647. The bill, though an original bill in the chancery sense of the word, is a continuation of the former suit on the question of the jurisdiction of the court." 111 U. S. 521, 522, 4 Sup. Ct. Rep. 583.

If a court of equity has the inherent authority to impeach and set aside its own decrees in the manner stated in this case, may not the court, by like appropriate proceedings, prevent the rendition of a wrongful decree? When the Central Trust Company came into this court voluntarily for the purpose of prosecuting its suit and obtaining a decree, it made itself thereby subject to any control the court may find it equitable to exercise over its suit and over the matters involved in it, to the extent that no wrong or injustice may be done to others. If the rights and interests of third persons should become complicated with the litigation in regard to the subject-matter of the suit or any property in the custody of the court, or any abuse or misapplication of its process, and no state or other court has power to guard or determine those rights and interests without a conflict of authority, especially if it be a federal court, the national court, from the necessity of the case, and to prevent

a failure of justice, will give such third parties a hearing, irrespective of their citizenship. Equity regards the substance, rather than the form, of things. The rights and priorities of the parties to the property in the hands of the receiver can be ascertained, declared, and enforced under the existing bills as effectually as in any form of proceeding that might be adopted; and the McBee bill may, without any strain upon the principles and definitions announced by the supreme court, be regarded as auxiliary to and dependent upon the bill of the Central Trust Company. The conclusion reached is that the motion to dismiss the McBee bill should be overruled. It follows also that the demurrer to and the motion to dismiss the amended bill in the *McBee Case* should both be overruled, and it is so ordered.

REND v. VENTURE OIL CO.

(Circuit Court, W. D. Pennsylvania. November 18, 1891.)

1. PRELIMINARY INJUNCTION—COAL MINES—SINKING OIL AND GAS WELLS.

The drilling of an oil or gas well through a part of a coal mine from which all the coal has been extracted except what is necessary for the props would not by its mere physical damage to the mine, or its effect as an obstruction, threaten such an injury to one owning the coal and the right to mine it as would warrant the issuance of a preliminary injunction:

2. SAME.

Such an injunction will not issue to restrain interference with certain deep-lying veins, where on the affidavits it appears doubtful whether those veins extend under the tract.

2. SAME—AFFIDAVITS.

A preliminary injunction will not be issued upon numerous affidavits by miners, engineers, and chemists that there would be great danger of explosions in the mine from the escape of gas through leaks in the casing likely to be caused by the falling of rocks or the slipping of the earth above, and from corrosion thereof by sulphur water, when these averments are contradicted by numerous affidavits equally entitled to credit; especially so in view of the fact that special precautions are to be taken in this instance to prevent leaks, and the further fact that there is much doubt as to the respective rights of the miner and the owner of the fee.

In Equity. Bill by William P. Rend against the Venture Oil Company to restrain it from drilling a well through his coal mine. On motion for preliminary injunction. Overruled.

D. T. Watson, J. S. Ferguson, and John G. MacConnell, for the motion.

D. F. Patterson, W. F. McCook, and A. M. Todd, opposed.

REED, J. The bill alleges that plaintiff, engaged in the business of mining coal, is the owner of all the coal underlying a tract of land in Allegheny county, Pa., together with a perpetual right of way, or right to use the under-ground entries for the removing of said coal, or any other coal for which said entries may be convenient, and the right to construct any shafts that might be necessary or useful for air and drainage purposes in the mining of said coal; that he is the owner of all the veins of coal under said land, including the Pittsburgh vein, the Freeport vein, and the Kittanning

vein, lying at varying depths below the surface; that the defendant, claiming to have permission from the owner of the surface, has entered upon the surface immediately over the said coal, and has erected a derrick, and threatens to drill a well in said land for the purpose of obtaining natural gas or oil, or both, and threatens to drill other wells for the same purpose in said land; that oil or gas cannot be obtained, except by drilling said wells to a depth of upwards of 2,200 feet, which will take such wells through all the veins of coal belonging to the complainant; that such wells will interfere with the removal of complainant's coal, will expose his mine to leakage of gas from said wells, and will render the mining operations conducted by complainant in said property so hazardous to his property and employes as to very greatly injure and depreciate the value of said coal property; that it will be impossible to prevent the escape of gas from said wells into said coal mines, and the presence of such gas in the mine, by reason of its inflammable and explosive nature, will occasion explosions and fires; that the coal under said property, with adjacent coal, constitutes the complainant's coal works and plant which he is now engaged in mining; that the defendant has no right to drill through complainant's coal; that such action on the part of the defendant will cause irreparable injury to the complainant. The bill prays an injunction to restrain the defendant from drilling the well which it has commenced, or any other wells, through complainant's coal. The case is now before the court on a motion for a preliminary injunction. There are certain well-settled rules regulating the granting of preliminary injunctions which must govern in passing upon this motion. They are that the complainant must show a clear legal or equitable interest or right which is to be protected; that there must be a well-grounded apprehension of immediate injury to those interests or rights, and a clear necessity must be shown of immediate protection to such interest or right, which would otherwise be seriously injured or impaired. If it appears that the preliminary injunction is not necessary to preserve interests or property *in statu quo* until final hearing, and the rights of the complainant will suffer no serious injury until that time, or that the injury threatened is of such nature that it can be remedied on final hearing, then the injunction ought not to be granted. And so if it appears that the complainant's rights are not sufficiently clear, and the considerations of respective convenience or inconvenience to parties complainant and defendant, when balanced, show that serious injury may be done to the defendant by the granting of the injunction, and no serious injury will be done to the complainant by withholding it until final hearing, then the injunction ought not to be granted. Other considerations may have at times been held as controlling in special cases, but the general rules, as I have stated, are those which have been held as governing the discretion which is to be exercised in passing upon such motions.

The affidavits presented at the argument show that the coal, at the point where defendant is drilling its well, was mined out (with the exception, perhaps, of the pillars left to support the surface during the mining operations) several years ago, and active operations in that local-

ity abandoned for the time being; that the entries have fallen in, and access is difficult, if not impossible, to that portion of the mine. Recently an entry some distance from the well has been cleaned out, the fallen rock and obstructions removed, and is now in use, as a main entry, to reach another and distant body of coal. While the deed under which complainant holds vests in him certain mining privileges still in force, although the coal may be removed, yet he is not at present exercising those privileges in the vicinity of defendant's well, and it does not appear that there is any immediate necessity for their exercise at that point. He suffers no present injury, from which he requires immediate relief, by the mere obstruction caused by the presence of defendant's casing in the space which he may be entitled to use under his deed, or by the penetration of any small body of coal which he may have left in that locality to support the surface, by defendant's well. The well, considered solely as taking up so much space, does not in any way now interfere with his mining operations, and, so far as it may have been the cause of the removal of a small quantity of coal by the operation of drilling, (if it has penetrated the coal at all,) compensation can be provided for at final hearing. What I have said has reference to the Pittsburgh vein of coal. It does not appear that either the Kittanning or Freeport vein extends under this property, that question being left in doubt by the affidavits, and hence complainant is not entitled to an injunction to restrain interference with those veins of coal.

The complainant, however, alleges that the result of the drilling of this well will be (if it is at all productive) to bring to the surface inflammable and explosive gas; that there is great danger that the falling of rock, or the sliding or creeping of the land above, both of which are said to frequently occur in coal mines after the coal is removed, may break the casing of the well, causing the gas to escape into the mine, with consequent danger of explosion and loss of life and property; also that the sulphur water which is found in this mine will eat and corrode the casing so that it will not retain the gas, which will hence escape into the mine, with the same danger to life and property; that this gas will find its way through the old workings into the present mine, although at considerable distance from the well. To support these propositions a large number of affidavits of coal miners, engineers, and chemists were read on behalf of plaintiff. Affidavits on the contrary were read on behalf of defendant, made by oil operators, some of many years' experience, and by coal miners, averring the opinion that an oil or gas well could be safely drilled and operated through a coal mine, and instances were given where wells had been drilled, some of them many years ago, and operated without accident, and, although many of such wells have been drilled through coal and coal mines,—one affidavit putting the whole number so drilled since oil was first discovered at 50,000,—yet defendant's affidavits state that there has never been an accident or disaster in a coal mine as a result of such drilling, and no instance is cited by plaintiff to sustain his theories. Defendant's affidavits also deny the effects alleged to result from sulphur water, and defendant's counsel pro-

duced at the argument a piece of casing, apparently sound, which an accompanying affidavit stated had been in direct contact with sulphur water for about five years in other wells, and was still in sound condition. Extra precautions have been prescribed in the contract for the drilling of the well in question, and a double line of casing is to be used to a depth of 25 feet below the bottom of the Pittsburgh vein of coal, the outside of the casing to be painted with a preparation said to prevent any action of sulphur water upon the iron, and the space between the two casings is to be filled up to the Pittsburgh vein with cement as an additional precaution. Under these circumstances I cannot say that there is a well-grounded apprehension of immediate injury to plaintiff's interests or property which will justify the granting of a preliminary injunction. His rights can be fully protected on final hearing, if they are found to require protection. On the other hand, while it does not appear that any immediate injury will result to plaintiff by withholding the injunction, it does appear that serious injury and inconvenience would result to the defendant by restraining its further prosecution of its work. And, finally, the relative rights and duties of the plaintiff, as owner of the coal and mining privileges and the owner of the surface and underlying portion of the land, and the defendant, as his lessee, are exceedingly difficult of definition, and ought not to be hastily determined upon a preliminary application, especially as the state courts are at present trying to define those rights as rules of property under the law of the state of Pennsylvania. The motion for a preliminary injunction must be refused; and it is so ordered.

UNITED STATES v. INGATE.¹

(Circuit Court, S. D. Alabama. July 28, 1891.)

1. ACTION BY UNITED STATES—LACHES.

When the United States voluntarily appear in a court of justice, they at the same time submit to the law, and place themselves upon an equality with other litigants; but this does not apply to such defenses as laches and the statute of limitations.

2. SIMPLE CONTRACT CREDITOR.

A simple contract creditor, or creditor at large, is one whose claim is not reduced to judgment, or secured by a lien created either by contract or law.

3. EQUITY JURISDICTION.

A court of equity interferes to aid the enforcement of a remedy at law only when there is a debt acknowledged or established by judgment, and also an interest in the debtor's property or lien thereon created by contract or law.

4. JUDGMENT IN FEDERAL COURT—EFFECT.

A judgment in one district has no force in another, except, perhaps, as evidence.

5. JUDGMENT AGAINST DEFAULTING COLLECTOR—LIABILITY OF SURETIES.

A judgment against a collector of internal revenue for a default does not bind the sureties on his bond.

6. COLLECTORS OF INTERNAL REVENUE—LIEN OF BOND.

No federal statute creates a lien on the property of a collector of internal revenue or his sureties from the execution of the bond or default thereunder.

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

7. EQUITY JURISDICTION.

An equitable right created by state statute may be enforced in the federal courts, unless it is so blended with other matters as to violate the constitutional right of a defendant in the federal courts to have determined by a jury any question cognizable at common law.

8. SAME—SETTING ASIDE FRAUDULENT CONVEYANCE.

A suit in equity under Code Ala. § 3544, by a simple contract creditor to establish a debt, set aside fraudulent conveyances, and condemn the property to payment of his debt, cannot be maintained in the federal courts, because a defendant there has the right to have any matter of debt, exceeding \$20, tried by a jury.

9. FEDERAL PRACTICE—LAW AND EQUITY.

Under the United States statutes, there is in the federal courts an entire separation of proceedings at law from those for equitable relief.

10. EQUITY JURISDICTION—DEFAULTING OFFICIALS—SUMMARY PROCEEDINGS.

While there are statutes providing for summary proceedings against defaulting federal officials, the remedies are all by action at law, and cannot be invoked on the equity side of the federal courts.

11. SAME.

Summary judgment under Rev. St. § 957, against a delinquent for public money, may be granted on motion at the return-term of an action of debt on his bond or of *assumpsit* on his accounts, but not on a bill in equity for equitable relief.

In Equity. Bill for discovery and to set aside fraudulent conveyances.

M. D. Wickersham, U. S. Dist. Atty., claimed in his argument that complainant was a contract creditor, or creditor at large, and as such "shall have an equal right, with a creditor having a lien through the aid of a court of equity, to reach property, subject to the payment of debts which have been fraudulently transferred." Code Ala. 1886, §§ 3544, 3545. *Lehman v. Meyer*, 67 Ala. 396; *Evans v. Welch*, 63 Ala. 256. The bill under consideration meets, in its form, the requirement of the statute. Fraud need not be alleged, nor the concealment of property or effects, with the intention to hinder and delay complainant or other creditors in the collection of their debts, if the same be clearly intimated by the scope and purpose of the bill. *Brown v. Bates*, 10 Ala. 438, 439; *Miller v. Lehman*, 87 Ala. 518, 6 South. Rep. 361. The supreme court of Alabama in many decisions have upheld this law, uniformly, from 1860 to the present day. *Railway Co. v. McKenzie*, 85 Ala. 550, 5 South. Rep. 322. Judicial expositions of state laws by the highest state tribunals will be respected and followed by the federal courts. They fix the rule of property, and regulate all transactions that come within its scope. *Green v. Neal's Lessee*, 6 Pet. 291. These expositions constitute the law. *Id.*; Rev. St. § 721. Complainant being a contract creditor, with or without a lien, is properly in a federal court in Alabama sitting in equity, and may seek here a discovery of property, money, or effects liable to the payment of its demand.

R. P. Deshon and *E. L. Russell*, for defendant.

TOULMIN, J. The main object of the bill in this case is a discovery and to set aside alleged fraudulent conveyances. The bill shows that some time in the year 1866 one Sheppard was appointed collector of the internal revenue in the state of Mississippi, and that he, with the defendant, Frederick Ingate, and others, as his sureties, executed his official bond prescribed by law; that some time in the year 1869 said Sheppard committed a breach of his bond, and became a defaulter to the govern-

ment in a sum at least equal to the amount of the bond, \$50,000; and that no part of said default has been paid. The bill avers that the defendant, Frederick Ingate, has no visible property to satisfy complainants' demand, yet is possessed of ample means, but that he has, from time to time, by fraudulent conveyances and transfers, so disposed of his property as to conceal the same from complainants, and to hinder, delay, and defraud them in the collection of their debt. The bill asks to have the alleged fraudulent conveyances set aside and annulled; seeks a discovery and an accounting for the income, profits, and proceeds of the property so conveyed and transferred, and to have said proceeds paid into the registry of the court to satisfy the alleged default; also a writ of injunction and the appointment of a receiver.

There is a demurrer to the bill, and many grounds of demurrer assigned, but the first two grounds and the argument thereon present the only question necessary to be decided now, and that is, whether a suit of this kind can be maintained in the courts of the United States. This question involves an answer to two other questions: (1) Whether the United States, when they become a party to a suit in the courts, and voluntarily submit their rights to judicial determination, are bound by the same principles that govern individuals,—whether, as in this case, they must come into a court of equity like other suitors seeking relief; and (2) whether the United States, as shown by the bill, are simple contract creditors or creditors at large (for so they are indifferently termed) of the defendant, Frederick Ingate. If these questions be decided in the affirmative, this cause is to be determined against the complainants on the authority of *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. Rep. 712.

It is well settled that, "when the United States voluntarily appear in a court of justice, they, at the same time, voluntarily submit to the law, and place themselves upon an equality with other litigants." *U. S. v. Beebee*, 17 Fed. Rep. 40; *U. S. v. Barker*, 12 Wheat. 559; *Mitchel v. U. S.*, 9 Pet. 743; *Brent v. U. S.*, 10 Pet. 615. "The principles which govern inquiries as to the conduct of individuals in respect to their contracts are equally applicable where the United States are a party." *U. S. v. Smith*, 94 U. S. 217. In *Brent v. Bank*, 10 Pet. 615, the court declares that there is no reason why the United States should be exempted from a fundamental rule of equity subject to which their courts administer their remedy. In 18 Fed. Rep. 278, in the case of *U. S. v. Coal, etc., Co.*, the court says:

"It is true, as a general proposition, that when the government becomes a party to a suit in its own courts, it stands upon the same footing with individuals, and must submit to the law as it is administered between man and man. But this general rule has its limitations, in that neither the defense of the statute of limitations nor that of laches can be pleaded against the United States."

These authorities, it seems to me, answer the first question we have been considering in the affirmative.

2. Are the complainants simple contract creditors or creditors at large? One who has a right, claim, or demand founded on contract, whether

contingent or absolute, is a contract creditor; and a simple contract creditor, or creditor at large, (using the terms indifferently,) is one who has not reduced his demand to judgment at law, or who has not acquired or does not possess a lien for the enforcement of such demand, (*Evans v. Welch*, 63 Ala. 256; *Lehman v. Meyer*, 67 Ala. 396; *Anderson v. Anderson*, 64 Ala. 405;) or, in other words, a simple contract creditor, or creditor at large, is one who has not established his debt by a judgment rendered, or has not an acknowledged debt with an interest in the property of the debtor, or a lien thereon created by contract, or by some distinct legal proceeding, or by law, (*Scott v. Neely*, *supra*; *Smith v. Railroad Co.*, 99 U. S. 398.)

But it is conceded by the United States attorney that complainants are contract creditors, or creditors at large. See his brief and argument. In the case of *Scott v. Neely*, *supra*, the supreme court say:

"In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment; or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property or a lien thereon created by contract or by some legal proceeding."

See, also, *Fost. Fed. Pr.* pp. 15, 18; *Welser v. Seligman*, 13 Fed. Rep. 415; *Clafin v. McDermott*, 12 Fed. Rep. 375.

It appears that there has been no judgment rendered against defendant, Frederick Ingate, to establish a debt on the demand arising out of the alleged default on Sheppard's bond. None is averred in the bill, and there is no averment of an acknowledged debt, accompanied by a right to the appropriation of the property of said defendant for its payment. There is no averment of an acknowledged or established debt with an interest in said property, or a lien thereon created by contract, or by any distinct legal proceeding. None is claimed in the bill, and none can be claimed on the averments of the bill. There is a suggestion in the bill that a judgment was rendered in the district court of the United States for the northern district of Mississippi against said Sheppard some time in June, 1873, ascertaining and determining his delinquency. But it does not appear that said Frederick Ingate was a party to said judgment, or is in any wise bound by it. Any such judgment, however, would have no force and operation here, except, perhaps, for the purposes of evidence. *Clafin v. McDermott*, 12 Fed. Rep. 375; *Welser v. Seligman*, 13 Fed. Rep. 415.

I have found no statute of the United States, and none has been called to my attention, creating a lien on the property of a collector of internal revenue and of his sureties from the execution of his official bond or from the date of any default thereon. There are statutes giving extraordinary and summary remedies for collecting any debt or claim that might arise from such default, and the courts say that necessity has forced a distinction between such claims and others, and it is for this reason that these extraordinary remedies have been provided. The contention of the

United States attorney is that, when the defendant, Ingate, signed Sheppard's bond, he did so in contemplation of the statutes providing for these extraordinary remedies, and "thus," he says, "consented to the government's employing the remedies therein provided for collecting any debt to it arising from Sheppard's default." This is true, and Ingate was liable to be proceeded against in the way pointed out by the statute. But it does not appear that any of these remedies have ever been resorted to. Certainly no such remedies are or can be pursued in this bill in equity, and no reference is made to them in the bill. Section 3638, Rev. St., provides that, notwithstanding the summary remedy authorized and provided for by statute, still the right of the United States to pursue any other remedy authorized by law for the recovery of debts or demands is reserved to them. The United States attorney in his argument, however, contends that this bill in equity is a statutory proceeding, and refers to the statutes prescribing speedy modes of procedure in such cases, particularly to sections 3625, 3633, Rev. St.; and also to section 957. Now, section 3625 provides for a distress warrant under certain circumstances to be issued by the solicitor of the treasury against a delinquent officer and his sureties, and the following sections provide for the execution of such warrants by levy, etc., and for a lien from date of levy and record thereon. The court is not advised that any such proceeding was ever had against Sheppard and defendant, Ingate, as his surety. There is no averment in the bill that any such proceeding and lien was ever had and acquired. Summary proceedings, being statutory, in derogation of the common-law mode of procedure, must conform strictly to the statute, and the record must affirmatively disclose a compliance with the requisitions of the statute. *Stamphill v. Franklin Co.*, 86 Ala. 392, 5 South. Rep. 487; *Ware v. Greene*, 37 Ala. 494; *Connolly v. Railroad Co.*, 29 Ala. 373; 7 Lawson, Rights, Rem. & Pr. § 3777.

The United States attorney, on the argument in this cause, presents to the court a motion for a summary judgment against the defendant, Frederick Ingate, and insists that it is the duty of the court to grant judgment against him upon such motion, and invokes section 957, Rev. St., to sustain him in this contention. That section, in substance, provides that, when suit is brought against any delinquent for public money, judgment may be granted at the return-term on motion. That section can have no application to a suit like that now before the court. The suit contemplated by the statute is such suit as may be properly brought against any delinquent for public money, whether it be a suit on his bond, or for a balance found due on an adjustment of his accounts with the proper officers of the treasury department. If it is a suit on the bond, it would be an action of debt, and, if a suit for a balance found due on an adjustment of his accounts, it would be an action of *assumpsit*. In either case, it would be an action at law, and could be brought only on the law side of the court. "Under the statute of the United States, an entire separation of proceedings at law from those for equitable relief is required in the federal courts." *Scott v. Neely, supra*. But it is apparent by the bill in this case that the complainants are pursuing a remedy

other than that authorized by the statutes of the United States,—a remedy afforded by the statute of the state of Alabama, which the supreme court of the United States has said can have no application in the federal courts. I do not think that there is any distinction between the case at bar and the case of *Scott v. Neely*, so far as the general principles governing the two cases are concerned; and my opinion, therefore, is that this case is controlled by the decision in that. It follows from the views expressed that this court cannot take jurisdiction of this suit, (as was said by Mr. Justice FIELD in *Scott v. Neely*,) “in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief.” The motion for judgment is denied, and the bill is dismissed, but without prejudice to an action at law for the demand claimed, and it is so ordered.

SWIEKARD v. SWIEKARD *et al.*

Circuit Court, N. D. Iowa, W. D. December 9, 1891.)

QUIETING TITLE—EVIDENCE.

Prior to 1869, two brothers, A. and B., were speculating in Iowa lands, and A., becoming indebted to his father, who lived in Ohio, conveyed one tract to him. The father paid taxes on the land, and treated it as his own until his death in 1884, when he devised it to his daughter. A few days after his death there was recorded a quitclaim deed from him and his wife to B., purporting to have been made in 1870; and shortly afterwards B. conveyed the land to strangers for a small fraction of its value. The daughter sued to quiet title, alleging that the quitclaim deed was a forgery. B. testified that before 1869 A. had repaid the debt to his father, and that shortly thereafter he had bought the land from A., who sent him the quitclaim deed by mail; also that A. thereafter disappeared, and was believed to be dead. The deed was not produced, and the mother, and the justices before whom it purported to have been acknowledged, denied that they ever signed such a deed. B. lived in Iowa, in indigent circumstances, during all the time he claimed to have owned the land, but never occupied it, or attempted to sell or derive any revenue from it, until after his father's death. *Held*, that the weight of the evidence was in favor of the daughter's right, and she was entitled to a decree quieting title.

In Equity. Bill by Emma N. Swiekard against Ezra Swiekard, J. F. Kimball, and George F. Champ to quiet title to lands. Decree for complainant.

McMillan & Kendall, for complainant.

B. W. Hight, for defendants.

SHIRAS, J. The property involved in this litigation consists of 160 acres of land, situated in Monona county, Iowa. From the evidence it appears that Mathias Swiekard, the father of complainant, died January 6, 1884, in the state of Ohio, where he had resided for many years. By the terms of his will, executed February 13, 1882, he devised to complainant the land in controversy. On the 10th day of January, 1884, there was filed for record in Monona county a quitclaim deed of the land, bearing date September 2, 1870, and purporting to be signed by Mathias Swiekard and wife, the grantee therein being Ezra Swiekard,

a son of Mathias, and half-brother of complainant. On the 1st day of February, 1884, Ezra Swiekard executed a deed of said premises to J. F. Kimball and George F. Champ, defendants herein, who purchased said land, and paid therefor, without notice of the claim made thereto by complainant. Complainant avers that the deed purporting to convey the land to Ezra Swiekard is a forgery, and that Mathias Swiekard was, at the time of his death, seised in fee of said premises, and that by the terms of his will the title thereto vested in complainant. On behalf of defendants it is claimed that in fact Mathias Swiekard never was the owner in fee of said premises, although the legal title was vested in him; that this land, with other lands, was conveyed by Elias Swiekard, a son of Mathias, to his father, as security for indebtedness due the father; that this indebtedness was subsequently paid in full; that Ezra Swiekard bought out the interest of his brother Elias in lands owned by him in Iowa and other western states; and that the quitclaim deed of the premises in controversy was made to Ezra Swiekard because he had become the owner thereof.

From this statement it will appear that the main point in dispute is as to the actual ownership of the land at the date of the death of Mathias Swiekard. If he then owned the land, the same passed by the terms of his will to complainant. If he did not own it, it did not so pass. The evidence shows that up to the date of his death Mathias Swiekard deemed the land to be his own property, as he paid the taxes thereon, and, as already stated, in his will he specifically devised the land to his daughter, the complainant. To overcome the case made for complainant, reliance is mainly placed upon the testimony of Ezra Swiekard, the grantor of defendants Kimball and Champ. The evidence shows that Elias and Ezra, sons of Mathias Swiekard, had years ago been engaged in speculating in lands in Iowa, Missouri, and Nebraska. Elias had become indebted to his father for moneys advanced, and for that and other reasons certain lands in which he was interested were conveyed to the father. It is now claimed that the indebtedness from Elias to his father was fully discharged, and that in 1869, and the years following, Ezra bought the interest of his brother Elias in all his western lands, and thus became the owner of the premises in controversy. Ezra testifies that his brother Elias has not been heard from for years, and is probably dead; that in 1869, and the years following, he bought out Elias' interest in his western lands; that Elias furnished him deeds from time to time, leaving the descriptions therein blank; that the quitclaim deed purporting to be signed by Mathias Swiekard and wife of the lands in question he received by mail from Elias. There is not adduced in evidence any written evidence of the alleged sales from Elias to Ezra, nor is the testimony thereto clear and distinct. It may well be that trades were had between Ezra and Elias during the years named, but it is not made clear or probable that the land in controversy formed part thereof. The quitclaim deed under which defendants claim is not produced, it being averred that it has been lost or mislaid. Mary Ann Swiekard, the widow of Mathias, and one of the alleged signers of said deed, testi-

fies that she never signed or executed the same; and James Watt, the justice before whom it purports to have been acknowledged, testifies that he never took the acknowledgment of the same. There is no evidence tending to show how or when this deed, if genuine, came into the possession of Elias, from whom Ezra claimed to have received it. Why a deed executed to Ezra should have been sent to Elias by the father is left unexplained. While it is true, as argued, that much weight cannot be given to the testimony of Mary Ann Swiekard and James Watts, owing to the lapse of time since the execution of the quitclaim deed, it being true that they might have executed and acknowledged the same, and have since forgotten the fact, yet it is equally true that their denial of the execution thereof, the failure to produce the alleged deed, and the absence of satisfactory evidence touching the delivery of said instrument, and the failure to explain why the same remained unrecorded for 14 years, certainly throws suspicion upon the validity thereof.

Under the circumstances, the court is compelled to give weight to the acts of the respective parties as indications of the real ownership of the property. On the one hand, we find that from the year 1859 up to his death in 1884, Mathias Swiekard paid the taxes on this land; and in 1882, when executing his will, he made a specific devise thereof to his daughter, the complainant herein. The acts of Mathias in regard to this land clearly show that he asserted the ownership thereof, and that he claimed and exercised the right of disposing of the same as his own property. Ezra Swiekard testifies that he is 54 years old, is a laborer by occupation, and has resided in Council Bluffs for 33 years. He claims to have become the owner of the land in 1870, yet it does not appear that he ever paid the taxes thereon, or that he ever occupied the land, or made any effort to sell the same, until after his father's death in 1884. Can it be possible that one, who was in straightened circumstances, should have allowed this land to have thus remained without making some disposition of it, either by sale or renting it, for so long a period, if he knew he was the absolute owner of it. During the father's life-time he remained wholly silent and inactive, although the claim now is that he was the absolute owner of the land, having the deed thereto in his own possession. Is it reasonable that during these many years there should not have been some demand made by the father in regard to the taxes paid by him, if the son held a deed to this land?

The theory of the defense is that the title to this land passed to Ezra Swiekard in 1870, yet from that date until in 1884 he did no act indicating any claim to ownership in the land, nor did he attempt to derive any benefit or profit therefrom by occupying or leasing the same. On the 6th day of January, 1884, the father died, and on the 10th day of the same month a quitclaim, purporting to be executed by Mathias and Mary Ann Swiekard 14 years before, was placed upon the record, and on the 1st day of February, 1884, Ezra Swiekard deeded the land to J. F. Kimball and George H. Champ. Ezra testifies that in fact he received \$165, and the defendants Kimball and Champ that they paid him \$335. Assuming the latter to be the sum in fact paid, it follows that Ezra

Swiekard sold the land for the sum of \$1.80 per acre, the tract being a quartersection. The defendants Kimball and Champ testify that the land was worth at the time of the sale five dollars per acre. If Ezra Swiekard was in fact the owner of this land, having a deed thereto in his possession, and he had owned it since 1870, why sell it at such a sacrifice? If he was keeping it to realize the profit from its enhanced value, why sell it for one-third its value? If he was keeping it as a protection to his old age, why sell it for a mere fraction of its value? He lived in Council Bluffs, and it would have been an easy matter for him to have offered it for sale through parties living in Monona county, and thus have realized its fair value. Had this been done, however, it might have led to inquiries as to the actual ownership, growing out of the fact that Mathias Swiekard had appeared to be the owner, and had paid the taxes thereon. His acts, including the price he received, are inconsistent with the theory that he was the owner of the land, with an unquestionable title. They are consistent with the theory that he knew he was not the owner thereof, and was therefore willing to take anything he could get without subjecting his title to special scrutiny.

Leaving out of consideration the quitclaim deed relied upon by defendants, the weight of the evidence is in support of the theory that Mathias Swiekard, at the time of his death, was the owner of the land in dispute. If Ezra Swiekard had asserted his ownership of the land and was now seeking a decree to establish his title thereto, without aid from the quitclaim, it is entirely clear that he could not recover upon the evidence adduced in this case. Therefore, in the present cause, it must be held that the evidence shows that Mathias Swiekard was the owner of the land, and the burden is upon the defendants of showing the execution and delivery of a valid deed by him. Reliance is placed upon the alleged quitclaim deed, said to have been executed in 1870, and withheld from the record until after the death of Mathias Swiekard in 1884. The original of this instrument is not produced in evidence, and no very satisfactory account of its whereabouts or loss is given. Ezra Swiekard testifies that the last time he saw it it was in the office of Kimball and Champ. The latter deny all knowledge of it. As already stated, the acts of Mathias Swiekard in his life-time are inconsistent with the execution and delivery of this alleged deed. Mary Ann Swiekard denies the execution thereof, as does also the justice before whom it purports to have been acknowledged. If the original deed had been introduced in evidence, it would have been a valuable aid in arriving at the truth; but it was not produced, and its absence, accidental though it may be, weighs against the defendants, in whose hands it would naturally be. It must therefore be held that the evidence fails to show with sufficient clearness the execution and delivery of the quitclaim deed relied upon by defendants, while it does reasonably show that at the date of the death of Mathias Swiekard he was the owner of the premises in dispute, and that the same passed by his will to the complainant herein, who is therefore entitled to a decree quieting the title in her as prayed for.

HARMON *et al.* v. STRUTHERS *et al.*

(Circuit Court, W. D. Pennsylvania. November 20, 1891.)

PATENTS FOR INVENTIONS—INFRINGEMENT—RES JUDICATA—EFFECT OF INTERLOCUTORY DECREE.

In a suit for infringement of letters patent there was a decree for plaintiffs, awarding an injunction, and for an account, and a reference to a master. The defendants quit using the device so held to infringe, substituting a different device, which was openly used by other persons, and as to which there had been no adjudication. Then, pending the reference before the master, the plaintiffs brought a new suit in the same court, against the same defendants. The answer therein not only denied infringement, but alleged that one G., and not the patentee, was the original and first inventor of the patented device, which defense was not set up in the first suit. *Held*, that the decree was interlocutory, and did not, in the second suit, preclude inquiry into the validity of the patent.

In Equity. Suit for infringement of patent. Heard upon exceptions to answer. Exceptions overruled.

W. Bakewell & Sons, for exceptions.

D. F. Patterson and *James C. Boyce*, for defendants.

ACHESON, J. This bill, which is for the infringement of letters patent for an invention, after the usual recitals and averments, recites a previous suit in equity by the plaintiffs against the defendants, in this court, for the infringement of the same patent, in which there was a decree, in the ordinary form, in favor of the plaintiffs, awarding an injunction, and for an account, and a reference to a master to take the account. 43 Fed. Rep. 437. In their answer to the present bill the defendants state that, upon the decision of the court, they abandoned the use of the device held to infringe the patent, and that they are now using a different device, which they particularly describe, and which they deny is an infringement. The answer also alleges that the patented improvement was not the invention of the patentee, but, in fact, was invented by George H. Gibbs, who put the device in public use by sales more than two years before the date of the application for the patent sued on. The plaintiffs contend that the defendants are estopped by the proceedings in the former suit from questioning the validity of the letters patent, and they seek to narrow the issue to the single question whether the device now used by the defendants infringes the patent.

Two facts are here to be noted: *First*, the other case is still pending before the master under the order of reference; *second*, the defense that George H. Gibbs was the original and first inventor of the patented device was not set up or considered in the former suit. It is to be added that it sufficiently appears to us that the particular device involved in the present suit is openly used by other manufacturers besides the defendants; and there has been no adjudication affecting the right of the public to use the same, nor has the question been raised until now. Are the defendants, then, here shut up to the single issue of infringement? It cannot be maintained that the present is a continuation of the earlier suit. It is an independent suit in form and substance. Nor

is it material that both suits are in the same court. Being distinct proceedings, no greater effect is here to be given to the former decree than if it had been made in another court. Neither is it a matter of any moment that, heretofore, for satisfactory reasons, we refused the defendants a rehearing in the first case, for the refusal did not make the decree any more conclusive than it was before. According to the language of all the authorities, to conclude the parties the former judgment or decree must have been final. Now we find, in the opinion of the supreme court in *Beebe v. Russell*, 19 How. 283, 285, a final decree thus explained:

"When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree."

Adopting this definition, Judge Nixon held, in *Chemical Works v. Hecker*, 2 Ban. & A. 351, that a decree in another circuit in a suit in equity between the same parties upon the same patent, declaring three claims void for want of novelty, but sustaining one claim, and adjudging the defendant to have infringed it, and ordering an account of the profits realized, was interlocutory merely, and did not so conclude the parties as to prevent an inquiry into the validity of the claims of the patent. It has been expressly ruled by the supreme court that a decree in a patent cause, such as the plaintiffs here rely on, is not a final decree from which an appeal will lie. *Barnard v. Gibson*, 7 How. 650; *Humiston v. Stainthorp*, 2 Wall. 106. Again: Certainly the court might open such a decree, at a subsequent term, for a rehearing, upon additional proofs; but a final decree cannot be so opened at a subsequent term, and set aside or modified. *McMicken v. Perin*, 18 How. 507; *Bronson v. Schulten*, 104 U. S. 410. Once more: In *Fourniquet v. Perkins*, 16 How. 82, the circuit court had made a decree that the plaintiffs were entitled to certain property, and referred the matter to a master, to take and report an account, but at a subsequent term after the coming in of the master's report, upon exceptions thereto, reversed its previous decree, and dismissed the bill. The supreme court held that the former decree upon the merits was interlocutory, and open to revision, and under the control of the court at the final hearing, upon the exceptions to the master's report. Applying the principle of the decisions cited to this case, we have no difficulty in holding that our decree in the other suit is interlocutory, and does not here operate as an estoppel precluding inquiry into the validity of the patent. Our conclusion is by no means inconsistent with the ruling in *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. Rep. 788, for that case merely decides that, while a decree *pro confesso* establishing the validity of a patent stands unrevoked, the defendant cannot question the validity of the patent before the master appointed to state an account, nor on appeal set up anything to impeach the decree except what appears on the face of the bill.

The exceptions to the answer are overruled.

FALK v. GAST LITHOGRAPH & ENGRAVING Co., Limited.

(Circuit Court, S. D. New York. November 30, 1891.)

1. COPYRIGHT—INFRINGEMENT—NOTICE OF COPYRIGHT—PHOTOGRAPHS.

In an action for the infringement of a copyright for a photograph, in order to sustain the defense that the copy which defendant reproduced was without the statutory notice of copyright, it is not sufficient that it was without the statutory notice when it came into defendant's possession, but it must be shown that it lacked such notice when it left plaintiff's possession.

2. SAME—PUBLICATION—DELAY.

A delay of the publication of a photograph for two months and eighteen days after the title was filed with the librarian of congress, as required by the copyright law, is not unreasonable.

3. SAME—FOR WHAT ALLOWED—PHOTOGRAPHS.

The facts that a photographer arranged the light, background, and other details for a photograph, and posed the subject so as to produce an artistic and pleasing picture, are sufficient to sustain a copyright for such photograph.

In Equity. On final hearing.

Bill for injunction by Benjamin J. Falk against the Gast Lithograph & Engraving Company, Limited. For opinion on motion for preliminary injunction, see 40 Fed. Rep. 168.

Isaac N. Falk and Rowland Cox, for complainant.

William B. Ellison and Charles C. Gill, for defendant.

COXE, J. This is an equity action to enjoin the infringement of a copyright for a photograph of Julia Marlowe. The photograph was taken by the complainant and copyrighted by him as proprietor. It is admitted that the photograph was copied by the defendant. The following are the principal defenses: *First.* The complainant failed to inscribe upon each copy of the photograph in question the notice required by law, the photograph copied by the defendant being without such notice. *Second.* The proof is insufficient of the mailing or delivery at the office of the librarian of congress of two copies of the photograph as required by sections 4956 and 4959 of the Revised Statutes. *Third.* The complainant lost his right to a copyright by unreasonably delaying the publication of the photograph. *Fourth.* The photograph in question is not the proper subject of a copyright, and the complainant has failed to show any title thereto as proprietor.

The testimony relating to the first defense should be scrutinized with unusual care, for the reason that the value of copyrights will be greatly impaired if such defenses are encouraged. It will be observed that the photograph from which the defendant copied the infringing device, the solar print which was subsequently colored by its artist and the negative of the solar print have all been lost or destroyed. The assertion that the photograph in question was without the statutory notice came from two witnesses who testified from memory only, after the lapse of a year, during which time they had examined hundreds of similar photographs. Moreover, their testimony does not agree, and the principal witness for the defendant has given two conflicting versions of the manner in which

the photograph came into his possession. In the absence of the photograph itself this testimony is too uncertain to overthrow the presumptions which follow from the established facts. The testimony for the complainant is to the effect that unusual care was taken with the photographs of Miss Marlowe for the reason that the complainant was under contract to issue none that were not copyrighted, and that none were issued from his establishment without the copyright notice. The difficulty with the defendant's testimony is that it may be true and still the complainant, in all respects, may have complied with the statute. In other words, it is not enough to show that the photograph was without the statutory notice when it entered the defendant's possession. It must appear that it was without the notice when it left the complainant's possession. There is no evidence to show this. If copied afterwards or put upon a new mount the complainant should not suffer. The case was before the court upon a motion for a preliminary injunction. 40 Fed. Rep. 168. It was there held, upon substantially the same facts, that complainant's evidence showing a compliance with the statutory requirements was not overcome by testimony that the copy from which the defendant produced the lithograph in question was without the notice of copyright. Should the court once establish the doctrine that the oral testimony of an infringer that he copied from a photograph not inscribed with the statutory notice, is sufficient to exculpate him, is it not entirely plain that the door will be opened wide for trickery and fraud, and that the value of copyrights will be destroyed? Should the court so hold it will only be necessary, in the future, for infringers to purchase photographs from which the notice has been cut or erased, or which have been transferred from a copyrighted mount to a plain one. The photograph, after having been copied, is conveniently lost or destroyed, and the owner of the copyright is left remediless when confronted with the statement of the wrong-doer that the notice was absent. The foregoing remarks are not intended to reflect in the least upon the defendant or its witnesses; they are made only to illustrate the ease with which unscrupulous men can defeat the law if aided and encouraged by such a ruling from the court.

The evidence of mailing and delivery at the office of the librarian of congress, in the absence of any proof to the contrary, shows a sufficient compliance with the statute. The testimony of the complainant's business manager that he caused to be mailed to the librarian two printed copies of the photograph in question (No. 94) is supplemented by the certificate of the librarian that "two printed copies of a photograph entitled 'Photograph No. 94 of Julia Marlowe' were delivered at his office. If further proof were needed it is found in the testimony of the witness who saw photograph No. 94 of Julia Marlowe in the office of the librarian and identified it as being similar in all respects to the photograph in question. It is true that he saw but one photograph, but it bore the librarian's mark, "No. 2," showing with reasonable certainty that "No. 1" was also there. The proof considered as a whole establishes an almost conclusive presumption that the conditions

of the statute were complied with. *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. Rep. 177. Section 4959 provides that the proprietor of a photograph shall mail to the librarian or deposit with him two printed copies thereof "within ten days after its publication." The certificate of the librarian shows that two copies of the photograph were deposited December 6, 1888. They were mailed the day previous, December 5th.

There is some testimony tending to show that a copy of photograph No. 94 was seen by Miss Marlowe as early as November 5, 1888, and that copies were sent to her on Sunday, November 25th of the same year. It is doubtful whether this testimony, in any view, is sufficient to establish a publication, but it is too vague, shadowy, and uncertain to countervail the evidence of the complainant that publication did not take place till December 5, 1888. Miss Marlowe is not sure that No. 94 was among the photographs sent her, and the other witness upon this subject, called by the defendant, is discredited. The title was filed with the librarian September 17th, and the copies were mailed to him on the day of publication, December 5, 1888,—two months and eighteen days thereafter. No authority is cited holding this to be an unreasonable delay.

The complainant testified that he arranged the pose and lighting of the photograph in question, worked up the expression and decided upon the attitude; but testimony of Miss Marlowe that he arranged the light, the background and all other details, and finally posed her, when taken in connection with the picture itself, which certainly is artistic and unusually pleasing, is sufficient to sustain the copyright within the authority of *Sarony's Case*, 111 U. S. 53, 4 Sup. Ct. Rep. 279. That the complainant was the author and proprietor of the photograph is sufficiently established. The complainant is entitled to a decree.

FISHER v. SECRET.

(Circuit Court, N. D. Illinois. November 16, 1891.)

1. ATTACHMENT—SUFFICIENCY OF AFFIDAVIT.

An affidavit in attachment which states that defendant is indebted to plaintiff "in the sum of \$24,000 damages and interest upon the covenants in the deed" annexed thereto does not sufficiently set forth "the nature and amount of the indebtedness," within the requirement of the Illinois attachment act, (1 Starr & C. St. p. 810, § 2,) when the action is commenced by *præcipe*, and no declaration has been filed, but should state the facts relied on as breaches of the covenants, and the damages sustained by each breach.

2. SAME—DEBT FRAUDULENTLY CONTRACTED.

Under section 9, authorizing an attachment when the debt sued for is fraudulently contracted, "provided the statements of the debtor, his agent or attorney, which constitute the fraud, shall be reduced to writing, and his signature attached thereto by himself, agent, or attorney," an attachment cannot issue upon affidavits showing fraudulent statements in writing by the debtor's agents, to which the debtor's signature is not attached.

3. SAME.

Nor will an attachment issue upon an affidavit averring fraudulent statements by an agent, who attached the debtor's signature thereto, when the statements are not

attached to the affidavit or the substance of them set out; since the creditor cannot be allowed to determine for himself that the statement will authorize an attachment.

At Law.

Action commenced by attachment by Olive B. Fisher against Sophia S. Secrist upon an affidavit alleging that the debt was fraudulently contracted. Heard on motion to quash the writ. Motion granted.

Eastman & Schumacher, for plaintiff.

E. A. Sherburne, for defendant.

GRESHAM, J. This is a motion to quash a writ of attachment based upon an affidavit, the material parts of which read—

"That Sophia S. Secrist, defendant herein, is indebted to this affiant, after allowing all just credits and set-offs, in the sum of twenty-four thousand dollars (\$24,000) damages and interest upon the covenants in the deed, a copy of which is hereto annexed and made a part of this affidavit. Affiant further says that said indebtedness was fraudulently contracted on the part of said Sophia S. Secrist; and, further, that certain statements were made by said Sophia S. Secrist by John M. Secrist, her agent, which constitute said fraud, and that said statements were reduced to writing, and that the signature of said Sophia S. Secrist by her said agent is attached thereto. Affiant further says that said indebtedness was fraudulently contracted on the part of said Sophia S. Secrist; and, further, that certain statements were made by said Sophia S. Secrist, by her agents R. A. Kimbel, Thomas Lomax, W. O. Crosby, and O. M. Wells, which constitute said fraud, and that said statements have been reduced to writing, and that the signatures of said agents are attached thereto."

Section 2 of an act governing proceedings in attachment (1 Starr & C. St. p. 310) reads:

"To entitle a creditor to such writ of attachment, he, or his agent or attorney, shall make and file with the clerk of such court an affidavit setting forth the nature and amount of the indebtedness, after allowing all just credits and set-offs, and any one or more of the causes mentioned in the preceding section."

The proceeding was commenced under subdivision 9 of section 1, which reads:

—"When the debt sued for is fraudulently contracted on the part of the debtor: provided, the statements of the debtor, his agent or attorney, which constitute the fraud, shall be reduced to writing, and his signature attached thereto by himself, agent, or attorney."

The deed contains the usual covenants of warranty, but there is no averment in the affidavit of a breach of all or any of them. The only description of the claim or demand is that the defendant is indebted to the plaintiff "in the sum of twenty-four thousand dollars damages and interest upon the covenants in the deed." This is not a "setting forth of the nature and amount of the indebtedness," within the meaning of the statute. The affidavit should state the facts relied on as breaches of the covenants, and the damage sustained by each breach. The action was commenced by *præcipe*, and no declaration has been filed.

There is another, and no less fatal, objection to the affidavit. The writ cannot issue under subdivision 9, unless an affidavit of the creditor, his agent or attorney, shows, otherwise than by mere averment, that the debt was contracted by means of written fraudulent representations or statements bearing the defendant's signature attached by himself, or his authorized agent or attorney. The defendant's signature is not attached to the statements made by the agents Kimbel, Lomax, Crosby, and Wells. The other alleged fraudulent statements, it is averred, were made by the defendant's agent John M. Secrist, who attached her signature to them. But a copy of them is not made part of the affidavit, nor is the substance of them embodied in it. The creditor is not permitted to determine for himself that the written statements, if there be any, are such as entitle him to the writ. The proviso of subdivision 9 was doubtless deemed necessary to protect the debtor against abuse of process in a proceeding which is summary and strictly statutory. It is true that, under the construction which the supreme court of the state has given to the preceding clauses of the same section, it is sufficient, in proceedings under them, that the affidavit follows their language. But subdivision 9 has not been construed by that court, and, in view of its clear and explicit language, I think the affidavit is defective. Motion sustained.

COULTER v. STAFFORD.

(Circuit Court, D. Washington, N. D. November 27, 1891.)

1. TAX-DEEDS—LIMITATION OF ACTIONS.

Code Wash. § 2839, providing that no suit for the recovery of lands sold for taxes shall be commenced more than three years after the recording of the tax-deed, is a complete defense to a suit brought after that time, when the recorded deed is valid upon its face; and plaintiff cannot show that deed is void by reason of irregularities in the prior proceedings.

2. STATUTES—ADOPTION FROM ANOTHER STATE—CONSTRUCTION.

A state which adopts from another state a statute which has been construed by the highest court thereof is conclusively presumed to adopt it with the construction thus placed upon it.

At Law. Action by Samuel Coulter against John A. Stafford for the recovery of land sold for taxes. Jury waived, and trial by the court. Judgment for defendant.

Tustin, Gearin & Crews, for plaintiff.

Battle & Shipley, for defendant.

HANKFORD, J. This is an action to recover real estate, situated in the city of Seattle. The plaintiff claims to be the owner in fee-simple, deraigning his title by mesne conveyances from a patentee of the United States. The defendant is in possession, having entered in the year 1886, claiming title by virtue of a tax-deed to him executed by the sheriff pursuant to a sale of the land in 1883 to H. J. Jacobs for a delinquent tax

for the year 1882. The plaintiff disputes the validity of the assessment and sale of the property for said tax, and denies that the sheriff had any authority to make the deed. The case has been, by stipulation of the parties, tried without a jury, and submitted to the court for its decision of all questions involved. On the trial objections were made to certain deeds offered in evidence by the plaintiff, and my decision of the questions so raised as to the validity of said deeds was reserved. I now overrule said objections, and give the plaintiff the full benefit of all the evidence offered in his behalf; and I hold that the plaintiff is the owner of the land, and entitled to a judgment as prayed in his complaint, unless the defendant acquired a valid title by the tax-sale and sheriff's deed, or unless the action is barred by the statute of limitations. In 1882 the land in controversy, as part of a larger tract owned by Albert Carr, was listed for taxation in the name of said Carr upon the assessment roll of King county. Said assessment roll was made in the form prescribed by statute, being ruled in columns so as to admit of descriptions of property in the most convenient and concise way. The tract referred to, of which the property in controversy formed a part, was described in the assessment roll following the owner's name thus:

N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ | 20 | 25 | 4 | 2.50 | 31

The figures in columns indicate, as shown by explanatory head-lines, section No. "20," township No. "25," range No. "4," number of acres in the tract, "2.50," and road-district No. "31." This description is accurate so far as it goes. Objection is made to it, however, on the ground that it is incomplete, in this: that it does not specify township 25 north and range 4 east of the Willamette meridian; and this supposed imperfection in the description is the basis of the only point made against the regularity and validity of the assessment and sale of the property. In connection with this objection it is proper to note, as it is a matter of common knowledge, that King county is wholly north of the parallel and east of the meridian, which are the initials of the government surveys of all the land therein.

One objection to the tax-deed is on the ground that the original certificate of sale issued to Jacobs was not produced to prove the assignment thereof to the defendant. The fact of the assignment was testified to on the trial by both parties to it, Mr. Jacobs and the defendant. The law in force at the time of the sale secured to the delinquent tax-payer a right to redeem his land at any time within a period of three years from the date of the sale, and provided that, in case of his failure to redeem within that time, the holder of the certificate of sale should be entitled to have a deed executed by the sheriff of the county, which should have the effect to convey to him absolutely the title to the property. This land was not redeemed, and on the 14th day of July, 1886, which was more than three years after the sale, a deed was made by the sheriff to defendant, purporting to be a tax-deed pursuant to the above-mentioned sale to Mr. Jacobs. Before the right of the holder of the certificate to have a deed had matured by lapse of the time allowed for redemption, section 2934 of the Code, which contains the provisions of law confer-

ring upon the sheriff all the authority which he had to execute the deed, was amended by the addition of a proviso requiring the holder of the certificate to serve a notice upon the person in whose name the land was assessed, personally, or by publication, if he be not found within the county, not less than 60 days prior to the expiration of the time for redemption, and to make proof of the giving of such notice in a prescribed manner before he should be entitled to receive a deed. This amendatory act is general in its terms, making no exceptions of cases in which the redemption period was about to expire. It repeals all conflicting statutes, and contains no saving clauses. The act was approved February 3, 1886, and went into effect the same day. The 6th day of May, 1886, was the last day of the three years allowed for redemption of this property from the tax-sale. The time intervening between the approval of said act and the 6th of May was only 91 days. This time was not sufficient, considering the usual delay in publication of the laws after their passage, to afford a reasonable opportunity for compliance with the exactions of the new law. Although it was, for the reason just given, impracticable to comply with the requirements of this statute, the plaintiff now insists that, without compliance, no right to a deed could mature, because the law so declares in plain and mandatory language. The defendant, arguing to the contrary, maintains that, if the act be construed literally, it would deprive him of all rights under his contract of purchase, and therefore impair the obligation of a contract, and therefore render said act unconstitutional and void.

The defendant also relies upon the statute of limitations as a bar to this action. Section 2939 of the Code provides that "any suit or proceeding for the recovery of lands sold for taxes, except in cases where the taxes have been paid or the land redeemed, as provided by law, shall be commenced within three years from the time of recording the tax-deed of sale, and not thereafter, except by the purchaser at the tax-sale." The defendant's deed was recorded more than three years before this suit was commenced. The land was sold for a tax, which has not been paid, and it has not been redeemed. If the deed is held to be valid, there can be no question but what the case is fully within the statute, and barred by it. The only argument in behalf of the plaintiff on this point is that the deed is void, and entirely impotent to serve either as a conveyance of the title, or as a starter to set time running, and bring the case within the protection of the statute. If the bar exists only in cases where valid tax-deeds have been recorded, then it must be necessary, in order to determine whether a case is barred or not, to try it on its merits. To so hold is equivalent to holding that the statute is not a bar in any case, for, if the deed conforms to the requirements of the law in all respects, it will convey the title, and a defendant claiming under such a deed must prevail by reason of having a perfect title,—that is to say, win the case on its merits; and, if the tax-deed be invalid by reason of non-observance of any essential provisions of the law, the plaintiff cannot be defeated within any period of time. Such doctrine is contrary to the manifest design of this species of legislation. The purpose of a

statute of limitations is to put an end to strife, by cutting off the right to dispute the validity of proceedings to divest the owner of his title after the lapse of a definite period of time. The decisions of the supreme court of the United States so maintain. In the opinion of that court, written by Mr. Justice GRIER, in the case of *Pillow v. Roberts*, 13 How. 477, this language is used:

"Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and of course adversely to all the world. * * * In order to entitle the defendant to set up the bar of this statute, after five years' adverse possession, he had only to show that he, and those under whom he claimed, held under a deed from a collector of the revenue of lands sold for the non-payment of taxes. He was not bound to show that all the requisitions of the law had been complied with in order to make the deed a valid and indefeasible conveyance of the title. If the court should require such proof before a defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute before he could be entitled to it. Such a construction would annul the act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax-title."

In the case of *Wright v. Mattison*, 18 How. 50, the court in its opinion quotes and approves the above extract from the opinion in *Pillow v. Roberts*.

Section 2939 of the Code, so far as it affects this case, is in words and effect the same as a statute of Wisconsin, (the only important difference being that the last seven words of section 2939 are not found in the Wisconsin act,) and was judicially construed by the highest court of that state, and by the supreme court of the United States, many years before its adoption here. In the case of *Leffingwell v. Warren*, 2 Black, 599, the supreme court cites a line of decisions by the supreme court of Wisconsin, holding that the grantee in a tax-deed is not required to establish the validity of his deed in order to maintain a plea of the statute in bar of an action to recover the land. In the opinion of the court Mr. Justice SWAYNE says:

"In *Sprecker v. Wakeley*, 11 Wis. 432, the subject came again under consideration. The court reaffirmed the principles of the former decision. In answer to the objection that it should be shown the land had been regularly sold, and that the officer who executed the deed had authority to give it, they say: 'But if this is a correct view of the statute, we fail to perceive any object in passing it; for, when the public authorities have proceeded strictly according to law in listing the lands, assessing the tax, making demand for the same at the proper time and place, advertising for non-payment of tax, etc., and have observed all the requirements of the statutes up to the execution of the deed, surely the tax-deed in that case must convey a good title, or our revenue laws are illusory, and the power of the government to raise means by taxation upon the property of its citizens necessary for its own support and action is entirely impotent and vain. But we think a party cannot be required to show that his tax-deed has been regularly obtained before he can claim the protection of this statute, since such a construction renders

the law unnecessary and useless.' * * * The lapse of the time limited by such statutes not only barred the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder. 'It tolls the entry of the person having the right, and consequently, though the very right be in the defendant, yet he cannot justify his ejecting the plaintiff.' Bull. N. P. 103; *Stocker v. Berny*, 1 Ld. Raym. 741; *Taylor v. Horde*, 1 Burrows, 60; *Barwick v. Thompson*, 7 Term R. 492; *Beckford v. Wade*, 17 Ves. 87; *Moore v. Luce*, 29 Pa. St. 260; *Thompson v. Green*, 4 Ohio St. 233; *Newcombe v. Leavitt*, 22 Ala. 631; *Wynn v. Lee*, 5 Ga. 217; *Chiles v. Jones*, 4 Dana, 483."

These decisions are controlling, because this court cannot disregard a rule established by the solemn judgments of the highest court of the nation; and for the further reason that, in adopting a statute of Wisconsin after it had been construed by the decisions of the highest court of that state, it must be conclusively presumed that the legislature intended to adopt the decisions expounding it as well as the letter of the law. The grounds of the objection to it do not appear on the face of the defendant's tax-deed. Therefore this case is to be distinguished from the case of *Moore v. Brown*, 11 How. 414, in which it was held, by a majority of the justices of the supreme court, that a statute of Illinois, of a peculiar pattern, providing that actions to recover real estate, of which any person may be possessed by actual residence thereon, having a title deducible of record from the state or the United States, or any officer authorized to sell the same for non-payment of taxes or upon execution, shall be brought within seven years next after possession being taken, was not meant to give protection to a person in possession under a deed void upon the face of it. Another case cited by counsel for the plaintiff is *Shyfield v. Barnum*, (Iowa,) 32 N. W. Rep. 270. That was a suit to redeem land from a sale for taxes. The purchaser had obtained a deed without having complied with a statute similar to ours prescribing a notice to be given as a prerequisite to a right to have a deed, and the statute of limitations of that state was pleaded as a defense. The court held that, as the required notice was not given, the officer who executed the deed was without authority to do so; that, notwithstanding such lack of authority, the deed was not void; that it operated to transfer the title to the property, but not to cut off the right of redemption, and while that right continued the statute of limitations could not begin to run. If I could concur in that decision, and follow it in this case, I would be bound to render judgment against the plaintiff on the ground that an action at law to recover real property is not maintainable in a circuit court of the United States against the owner of the legal title, and leave him to apply to a court of chancery for such relief as he might obtain there by a bill to redeem. *Shyfield v. Healy*, 32 Fed. Rep. 2, was also a suit in equity to redeem, and therefore not in point in this case. I am unable to find in any of the authorities cited by counsel for the plaintiff support for his contention. It is my opinion that this case is barred by the statute of limitations of this state, above quoted. On that ground there must be a judgment for the defendant, and it is unnecessary for me to express an opinion upon the other questions which have been argued.

DANFORTH *et al.* v. NATIONAL STATE BANK OF ELIZABETH.

(Circuit Court of Appeals, Third Circuit. November 18, 1891.)

1. NATIONAL BANKS—WHAT IS DISCOUNTING—USURY.

The purchase of accepted drafts by a national bank from the holder without his indorsement at a greater reduction than lawful interest on their face value is a discounting of those drafts, within the meaning of Rev. St. U. S. § 5197, which prohibits such bank from taking interest on any loan or discount made by it at a greater rate than is allowed by the laws of the state where it is situated.

2. SAME—FORFEITURE OF INTEREST—WHO MAY DEFEND.

The acceptor of the drafts so purchased may defend against the recovery of interest thereon by the bank, under section 5198, which provides that the taking of an unlawful rate of interest shall be deemed a forfeiture of the entire interest which the "bill or other evidence of debt carries with it;" for this provision destroys the interest-bearing power of the instrument.

3. SAME—PAYMENT—APPLICATION.

Where the acceptor of the drafts makes a payment to the bank without any direction as to its application, it cannot be applied to the forfeited interest, but must be credited on the face value of the drafts.

Error to the Circuit Court of the United States for the District of New Jersey.

Action by the National State Bank of Elizabeth against Waldo Danforth and Seth B. Ryder. The court directed a verdict for the plaintiff for the whole amount of its claim, and from the judgment thereon defendants bring error. Judgment reversed.

A. S. Brown and James H. English, for plaintiffs in error.

R. V. Lindabury, for defendant in error.

Before *ACHESON, BUTLER, and WALES, JJ.*

ACHESON, J. This action was brought by the National State Bank of Elizabeth, a national bank located in the state of New Jersey, against Waldo Danforth and Seth B. Ryder, executors of the last will of Edward G. Brown, deceased, to recover the amount of certain drafts and interest thereon. The material facts disclosed by the record are these: Brainard Bros. drew nine drafts, payable to the order of themselves, upon Edward G. Brown, who accepted the same. Afterwards, and before the maturity of the drafts, Brainard Bros. indorsed, and placed them in the hands of James W. Raynor, a broker in commercial paper, for sale, and the plaintiff bank bought the drafts from Raynor at a discount, at the rate of 15 per centum per annum for the length of time they had to run, paying to Raynor the face amount of the drafts, less the said discount. The bank did not know that Raynor was acting for Brainard Bros., or that the latter then owned the drafts. The legal rate of interest in the state of New Jersey was 6 per centum per annum. On April 5, 1889, Ryder, one of the executors of Brown, paid to the bank \$2,500. Shortly before, the cashier of the bank had made a demand on Ryder for the interest on the drafts. Ryder consulted his counsel, who advised him not to pay the interest, but to make a check for even \$2,500, which was something more than the interest would be, and give it to the bank. This Ryder did, handing the check to the cashier without saying any-

thing. He testified that his intention was to make a general payment. The cashier, without the consent or knowledge of Ryder, credited the \$2,500 on account of interest. The defendants resisted the recovery of anything more than the amount of money advanced by the bank on the drafts, less the payment of \$2,500, claiming that all interest was forfeited under the following provisions of the national banking law, (sections 5197, 5198, Rev. St.):

"Sec. 5197. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more; except that where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state, territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

"Sec. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: provided such action is commenced within two years from the time the usurious transaction occurred."

The court below overruled the defense, assigning as reasons for so doing the following:

"*First.* That the transaction was not usurious, there being a difference between discount and purchase.

"*Second.* That the payment made by Ryder upon the indebtedness was either a distinct payment upon interest, or, if a payment generally, must be by law credited upon the interest account in this transaction.

"*Third.* That, if the transaction was usurious as to Brainard Bros., the drawers of the drafts, that does not relieve the defendants from liability to pay the full amount."

—And by direction of the court the jury rendered a verdict for the plaintiff for the whole amount of its claim, namely, the sum of \$13,654.44, and judgment therefor was entered.

We are now to determine whether these rulings were correct. Undoubtedly, the suggested distinction between discount and purchase has been judicially recognized as existing under state usury laws, and it has been held that, without infraction of those laws, a promissory note or draft, valid in its inception, and originally free from usury, may be purchased from the holder at any agreed price, without regard to the

rate of interest fixed by law. But such decisions are not applicable here. *Bank v. Johnson*, 104 U. S. 271. It was there held that, so far as loans and discounts are concerned, "the sole particular in which national banks are placed on an equality with natural persons is as to the rate of interest, and not as to the character of contracts they are authorized to make." In that case a national bank, located in the state of New York, acquired from the payee certain promissory notes, business paper, and valid for the full amount in his hands, at a deduction exceeding the lawful rate of interest, and the notes were transferred to the bank by the indorsement of the payee, imposing upon him the ordinary liability of an indorser. By the law of the state of New York it was not usurious or unlawful for natural persons thus to acquire business paper, the transfer being treated as a sale. But the supreme court of the United States adjudged that the transaction was a discount by the bank, and was within the prohibition and penalty of sections 5197 and 5198 of the Revised Statutes. Now the only distinction between that case and the case in hand is that here the bill-broker who negotiated with the bank, and who was the ostensible owner of the drafts, transferred them to the bank by mere delivery, without his own indorsement. Does this circumstance so distinguish the two cases as to justify the conclusion of the court below that the transaction in question was not a discount, within the meaning of the sections above quoted?

In *Fleckner v. Bank*, 8 Wheat. 338, 350, the supreme court of the United States, speaking by Judge STORY, said:

"Nothing can be clearer than that by the language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank."

—And it was added that, if the transaction there was a purchase, it was "a purchase by way of discount." It will be perceived that the above definition of discount embraces as well a transaction where money is advanced upon paper transferred to a bank without the indorsement of the previous holder, as the case of a strict loan thereon, where the relation of debtor and creditor is created. Mr. Justice MATTHEWS, in *Bank v. Johnson*, *supra*, tersely defined "discount" as "the difference between the price and the amount of the debt, the evidence of which is transferred." In *Tracy v. Talmage*, 18 Barb. 456, 462, the court said: "Now to 'discount' includes to buy; for discounting, in most cases, is but another term for 'buying at a discount;'" and this proposition the court of appeals of New York cited with approval in *Bank v. Savery*, 82 N. Y. 291, 302. In *Bank v. Baker*, 15 Ohio St. 68, 85, the court declared:

"It is also undeniably clear that the term 'discount,' when used in a general sense, is equally applicable to either business or accommodation paper, and is appropriately applied either to loans or sales by way of discount, when a sum is counted off or taken from the face or amount of the paper, at the time the money is advanced upon it, whether that sum is taken for interest upon a loan, or as the price agreed upon a sale."

In *Pape v. Bank*, 20 Kan. 440, 451, the court said: "And the term 'discounting' includes purchase, as well as loan." It is worthy of observation that the opinion of the supreme court of Kansas in that case was delivered by Judge BREWER, now an associate justice of the supreme court of the United States. In *Bank v. Sherburne*, 14 Ill. App. 566, the court expressed the opinion that "a purchase may be made by way of discount equally as well as a loan may be made by way of discount." This question was before the court of appeals of the state of New York in *Bank v. Savery*, *supra*, where the facts were substantially the same as they are here. There a negotiable promissory note, duly indorsed, was delivered by the holder to a firm of brokers, to whom he was indebted, with directions to sell the note, and apply the proceeds on that indebtedness. They accordingly sold and delivered the note to the bank, without their own indorsement upon it, at a greater rate of reduction than lawful interest. The court of appeals held that this was a discount within the meaning of the state act, which authorizes associations organized under it "to carry on the business of banking by discounting bills, notes, and other evidences of debt."

Upon the score, then, of judicial authority, the conclusion is well warranted that, in the business of banking, "discount," in the ordinary acceptance of the term, includes what is called "purchase." We find nothing in the national banking law to suggest that congress used the word in any other than its usual commercial sense, or intended to make the distinction between discount and purchase insisted on by the defendant in error. But, upon the face of the statute, there are, we think, decisive indications to the contrary. All the powers national banks have to deal in negotiable paper and other evidences of debt are conferred by section 5136 of the Revised Statutes. The grant of power is this:

"To exercise * * * all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; * * * by buying and selling exchange, coin, and bullion; by loaning money on personal security."

Now, clearly, no authority is hereby given to national banks to acquire notes, drafts, etc., otherwise than by way of discount. The term "negotiating," as here used, does not enlarge the power of acquisition, but concerns the disposal by a bank of the notes, etc., it may have acquired, and authorizes the transfer thereof by the bank. 1 Morse, Banks, § 73, p. 156. If, then, there is any essential difference between discount and purchase, it is plain that a national bank cannot lawfully take title to paper by purchase, for, where there is no grant of power to these banking associations to do an act, a prohibition against the exercise of the power is implied. *First Nat. Bank v. National Exchange Bank*, 92 U. S. 122. Then observe the power of "discounting" promissory notes, drafts, etc., is conferred by the same paragraph which authorizes "buying" exchange, coin, and bullion. The statute thus evinces great care and nice discrimination in the use of words. Again, turning to the concluding clause of section 5197, we find it there declared that—

"The purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

The obvious deduction is that but for this saving clause the described purchase would have come within the previous limitation as to the rate of interest on loans and discounts. Then, too, as Judge MATTHEWS pointed out in *Bank v. Johnson, supra*, "here the purchase, discount, and sale of bills of exchange are classed as one, and subject to the same rule and rate of discount." Page 278.

It is incredible that, while the statute carefully restricts the rate of interest upon loans and discounts, it was intended that national banks should have the right to buy commercial paper at any agreed price, without respect to the usury laws. This, in effect, would be to relieve these institutions from all limitation on the right to charge interest whenever the transfer takes on the form of a purchase, and is so denominated.

We are then constrained to differ with the court below as to the nature of this transaction, and to hold that the bank acquired the drafts sued on by discount, or by purchase by way of discount, which substantially are one and the same thing.

But it is contended that, even if the transaction between Brainard Bros. or their broker, Raynor, and the bank was usurious, the forfeiture prescribed by the statute is not an available defense to the executors of Brown, the acceptor of the drafts; and so the court below held. But this view, in our judgment, is against the words of the statute, and defeats the legislative intention. The language of the act is plain:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon."

The forfeiture here denounced attaches to the instrument itself, and the consequence inheres in it. As it carries no interest, how can any interest thereon be recoverable? The clause operates directly upon the bank, and affects its power. The statutory franchise to recover interest is lost by the commission of the illegal act. Being without right to demand interest, the offending bank cannot recover interest from any one. The right to defend is not made a personal one; and herein, it will be perceived, there is a marked difference between this provision of the law and the one immediately succeeding, which gives a particular remedy to the person by whom the excessive interest has been paid. We are therefore of the opinion that the plaintiffs in error may defend under the forfeiture clause of the act.

We are aware that this conclusion is at variance with the ruling of the supreme court of Ohio in *Smith v. Bank*, 26 Ohio St. 141, and of the supreme court of New Jersey in *Bank v. Littell*, 47 N. J. Law, 233; but we are in accord with the decision of the supreme court of Pennsylvania in *Guthrie v. Reid*, 107 Pa. St. 251. There, the objection being made

that the maker of a note discounted by a national bank (the equitable plaintiff) for the payee at a usurious rate of interest could not defend because the illegal interest had been paid by the payee, the court declared: "The answer to this is that the bank, by its act, has destroyed the interest-bearing power of the note, and can recover no interest upon it from anybody."

We are brought now to the consideration of the question how far a valid defense exists to the claim in suit. It was settled by the case of *Barnet v. Bank*, 98 U. S. 555, that, where unlawful interest has been paid to a national bank, it cannot be used by way of set-off or payment in a suit by the bank on the bill, note, or draft. This principle is applicable here, so far as relates to the usurious interest taken by the defendant in error in its transaction with Raynor. It is true the illegal interest was not here paid to the bank in money, but it was paid in what was the equivalent. Raynor was the apparent owner of drafts good in his hands for their face amount as against all the parties to the paper, and which, indeed, in the hands of Brainard Bros., themselves, were thus good as against the acceptor. Therefore, the transfer of the drafts to the bank operated as a payment of the amount charged for discount. This point was expressly so ruled by the court of appeals of New York in *Nash v. Bank*, 68 N. Y. 396, which was an action to recover penalties under a state act identical, as regards the taking of interest, with the national banking law. The same ruling was also made by the court of errors and appeals of New Jersey in *Bank v. Carpenter*, 52 N. J. Law, 165, 19 Atl. Rep. 181, which was a suit for a penalty under section 5198, Rev. St. To the extent of the face amount of the drafts, then, the bank had an enforceable claim.

But we are clear that no interest upon the drafts after their maturity was recoverable. The statutory forfeiture is not of part of the interest, but all of it. "The entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon," is comprehensive language. It would be difficult to employ broader terms. The legislative intent, we think, was utterly to destroy the interest-bearing capacity of the instrument. The interdiction of a recovery of interest by the transgressing bank is salutary, and full effect should be given to it. These views have prevailed in the courts. In *Bank v. Stauffer*, 1 Fed. Rep. 187, (Cir. Ct. W. D. Pa.,) a national bank upon the discount of a note had charged and received more than the legal rate of interest between the date and maturity of the note, and the question there, as here, was whether this subjected the bank to a forfeiture of the interest which otherwise would have accrued upon the note after its maturity. Judge McKENNAN held that it did, and that nothing could be recovered but the face amount of the note. The same point arose in *Bank v. Childs*, 133 Mass. 248, and the supreme court of Massachusetts ruled that, while illegal interest paid to the bank upon the discount of a note could not be set-off in a suit brought on it, yet the bank was entitled to recover only the face of the note, without interest. So, too, in *Alves v. Bank*, 3 Browne, Nat. Bankr. Cas. 452, the court of ap-

peals of Kentucky decided that by receiving a greater rate of interest than was lawful the bank forfeited all interest accruing by law upon the discounted note after its maturity. This was also adjudged by the supreme court of Pennsylvania in *Guthrie v. Reid*, *supra*. The court there said:

"It is settled law that where a national bank takes, receives, or charges more than the legal rate of interest in the discount of a note, the interest-bearing power of the note is destroyed; and, when once so destroyed, it remains so. The taint of usury clings to it until paid. It is a dead note thereafter, so far as interest is concerned."

It only remains for us to consider the question of the application of the payment of \$2,500. We have carefully examined the evidence, and are of the opinion that it was not sufficient to warrant a finding that the payment was made specifically on account of interest. The burden of showing this was upon the bank, especially in view of the circumstances of the case. No interest was legally demandable. Besides, Ryder was acting in a representative capacity, and he had no right to appropriate the funds of the estate of the decedent, Brown, to forfeited interest. Certainly, he made no express application of the money to interest, and such an application by him is not to be lightly inferred, but should be satisfactorily proved. The cashier of the bank himself testified that when Ryder handed him the check "he did not say it was for interest," but "went right away without saying anything." Under the evidence, it must be regarded as having been a general payment; and, if it was that, then clearly it was not competent for the bank to apply it to forfeited interest,—to a claim which had no legal existence. *Adams v. Mahnken*, 41 N. J. Eq. 332, 7 Atl. Rep. 435, (N. J. Err. & App.); *Greene v. Tyler*, 39 Pa. St. 361. The law will appropriate the payment to the principal of the drafts.

Under the evidence, the jury should have been instructed to render a verdict for the plaintiff below for the face amount of the drafts, less the payment of \$2,500, without interest.

The judgment is reversed, and the case is remanded to the circuit court, with a direction to award a new trial.

NATIONAL BANK OF COMMERCE v. TOWN OF GRANADA.

(Circuit Court, D. Colorado. December 9, 1891.)

1. MUNICIPAL BONDS—VALIDITY—FAILURE TO PUBLISH ORDINANCE.

Under Laws Colo. 1887, p. 445, § 1, providing that all municipal ordinances of a general or permanent nature shall be published in the manner there prescribed, and that they shall not take effect until five days after such publication, a failure to publish an ordinance authorizing the issuance of municipal bonds renders the bonds invalid.

2. SAME—INNOCENT PURCHASER—NOTICE.

A recital on the face of the bonds that they were issued under an ordinance of the municipality does not render them valid in the hands of an innocent purchaser for value, since such a purchaser is chargeable with notice of the statutory provisions under which the bonds were issued.

At Law. Action by the National Bank of Commerce against the town of Granada, Colo., upon interest coupons of municipal bonds. Tried by the court without a jury. Judgment for defendant. For former reports, see 41 Fed. Rep. 87, and 44 Fed. Rep. 262.

S. L. Carpenter, for plaintiff.

Alvin Marsh and *J. B. Belford*, for defendant.

PARKER, J. This is an action of debt to recover on interest coupons attached to funding bonds issued by the defendant in 1887. The bonds are payable at the National Park Bank, New York, 15 years after date, or after 5 years, at the option of the city; interest at 8 per cent., evidenced by coupons attached, similar to those upon which this suit was brought. A jury was waived. The cause was submitted to the court upon an agreed statement of facts. It is my conclusion that under the laws of Colorado there must have been an ordinance of the town of Granada to authorize the issuance of the bonds, the coupons of which are the basis of the suit in this case. The statute of the state, as found in section 1, Sess. Laws 1887, p. 445, is as follows:

"All ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose, and be authenticated by the signature of the presiding officer of the council or board of trustees and the clerk; and all by-laws of a general or permanent nature, and those imposing any fine, penalty, or forfeiture, shall be published in some newspaper published within the limits of the corporation, or, if there be none such, then in some newspaper of general circulation in the municipal corporation; and it shall be deemed a sufficient defense to any suit or prosecution for such fine, penalty, or forfeiture to show that no such publication was made: provided, however, that if there is no newspaper published within or which has no general circulation within the limits of the corporation, then, and in that case, upon a resolution being passed by such council or board of trustees to that effect, such by-laws and ordinances may be published by posting copies thereof in the public places to be designated by the board of trustees, within the limits of the corporation; and such by-laws and ordinances shall not take effect and be in force until the expiration of five days after they have been so published or posted. But the book of ordinances herein provided for shall be taken and considered in all courts of this state as *prima facie* evidence that such ordinances have been published as provided by law."

By the terms of this section of the statute law of the state, when the same is given a reasonable construction, all by-laws of a general or permanent nature must be published as required by the above-named section. This ordinance of the town of Granada passed by its council, purporting to authorize the issue of the bonds to which the coupons in suit were attached, is of a general or permanent nature, and all by-laws or ordinances of a general or permanent nature do not take effect and be in force until the expiration of five days after they have been published or posted. It appears from the agreed statement of facts in this case that there was never any publication of the ordinance in a newspaper, or in any manner or form whatever. The statute requiring the publication of the ordinance is mandatory, and the ordinance, without the requisite publication, is a nullity, and consequently of no force or validity. There is, then, no authority for the issue of the bonds, to which the coupons in suit belong.

The recital in the bond that it was issued under an ordinance of the city of Granada passed by the council of said city will not make the bonds valid in the hands of plaintiff as an innocent holder, if it, under the law, was bound to take notice of the legal authority of the town of Granada to issue the bond. The legal authority of the officers of the town to do this must be found in some ordinance authorizing them to so act. The recitation on the face of the bond that it was issued under an ordinance referred the purchaser to the law requiring the publication of the ordinance. The ordinance conferred no legal authority upon the town officers to execute and issue the bonds until the expiration of five days after it had been published. The corporation of Granada must have had legislative authority to issue the bonds issued by it. Although the plaintiff is a holder for value and before maturity, it must, at its peril, take notice of the existence and terms of the law by which it is claimed the power to issue such bonds is conferred. The holder of a municipal bond is chargeable with notice of the statutory provisions under which it was issued: *Bank v. City of St. Joseph*, 31 Fed. Rep. 218; *Anthony v. Jasper Co.*, 101 U. S. 698; *Ogden v. Daviess Co.*, 102 U. S. 634; *Bank v. Porter Tp.*, 110 U. S. 608, 4 Sup. Ct. Rep. 254; *McClure v. Township of Oxford*, 94 U. S. 429. The last-named case I regard as especially relevant to the present one. In that case the statute under which the bonds were issued was referred to on the face of the bonds, and, although passed and approved at a certain date, was not by its terms to go into effect until after its publication in the *Kansas Weekly Commonwealth*. Chief Justice WAITE said in that case that—

“Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and all its requirements. Every man is chargeable with notice of that which the law requires him to know, and of that which, after having been put upon inquiry, he might have ascertained by the exercise of reasonable diligence.”

And further:

“A municipality must have legislative authority to subscribe to the capital stock of a bridge company before its officers can bind the body politic to the

payment of bonds purporting to be issued on that account. Municipal officers cannot rightfully dispense with any of the essential forms of proceeding which the legislature has prescribed for the purpose of investing them with power to act in the matter of such a subscription. If they do, the bonds they issue will be invalid in the hands of all that cannot claim protection as *bona fide* holders."

In *Ogden v. Daviess Co.*, the supreme court of the United States said:

"We have always held that every holder of a municipal bond is chargeable with notice of the provisions of the law by which the issue of his bond was authorized. If there was no law for the issue, there can be no valid bond."

In *Anthony v. Jasper Co.*, the supreme court said:

"Dealers in municipal bonds are charged with notice of the laws of the state granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the *bona fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power, no legal liability can be created."

In *Bank v. Porter Tp.*, 110 U. S. 608, 4 Sup. Ct. Rep. 254, the supreme court declared:

"The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation, issuing bonds in the aid of the construction of a railroad, was not permitted against a *bona fide* holder to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action in issuing the bonds, but equally as authentic and final evidence of their existence, for the information and action of all others dealing with them in respect to it."

The agreed facts in this case show, in effect, there was no law authorizing the issue of the bonds to which the coupons in suit belong. The plaintiff was bound to take notice of that fact. It cannot, therefore, under the law, be entitled to recover. Judgment should therefore go for the defendant, and it is ordered that judgment be entered accordingly.

In re CHICHESTER.

(Circuit Court, W. D. Texas. November 19, 1891.)

CUSTOMS DUTIES—BOARD OF GENERAL APPRAISERS—JURISDICTION.

The jurisdiction conferred on the board of general appraisers by Act Cong. June 10, 1890, relating to the collection of revenue, to review the decision of the collector as to the rate and amount of duties on imported merchandise, extends only to merchandise lawfully entered and regularly invoiced and appraised; and they have no jurisdiction, in the case of goods seized and libeled for forfeiture in the federal courts, to review the collector's determination of duty to be paid thereon, as required by Rev. St. § 938, in order to secure delivery of such goods to the claimant.

At Law.

On appeal from the decision of the board of general appraisers.

On January 13, 1891, the collector of customs for the collection district of Saluria seized at Eagle Pass, in the state of Texas, certain five car-loads of lead and silver ores, consigned to E. H. Chichester, as forfeited to the United States, by reason of certain alleged attempted false and fraudulent entries of said ores as imported goods. Thereafter, on the 31st of January following, the district attorney for the western district of Texas libeled the said ores in the district court for the western district of Texas, claiming their condemnation and forfeiture to the use of the United States by reason of alleged attempted false entry and invoices, to-wit:

"*First.* He did attempt to make, and did make, a false and fraudulent entry of said imported goods, wares, and merchandise under a certain false invoice, then and there omitting and failing to comply with the instructions of the secretary of the treasury of the United States of America of date July 17, 1889, in this, to-wit: He failed to make a declaration that the said imported goods, wares, and merchandise embraced no mixture of ores or concentrates from different mines, and thereby was guilty of a willful act of omission, by means whereof the United States shall be deprived of the lawful duties then and there accruing upon the imported goods, wares, and merchandise aforesaid, and portions thereof; and all this he, the said E. H. Chichester, illegally did, with the intent to defraud the revenue of the United States of America. *Second.* He, the said E. H. Chichester, did then and there make, and attempt to make, a false and fraudulent entry of the imported goods, wares, and merchandise aforesaid, having first willfully and intentionally commingled the aforesaid ores, the same then and there being taken from different mines, so that said ores so commingled would assay in such a manner as to avoid the force and effect of the laws of the United States in such cases made and provided for the collection of her duties, in this, to-wit: Had said entry been received as a just and proper entry by the said collector of customs, then the United States would have been deprived of the lawful duties on said aforesaid ores, and a portion thereof, embraced and referred to in said invoice."

Warrant being issued, and the said car-loads of lead and silver ores being taken into the possession of the marshal, Chichester, consignee, applied to the court for leave to bond the said ores under section 938 of the Revised Statutes of the United States, and, as a prerequisite to such bonding, applied to the collector of customs of the district to pay the duties on the said ores in like manner as if the same had been legally

entered. The collector exacted as duties upon the said ores the sum of \$2,427.60, which was paid by the claimant, for which receipt was given as follows:

"CUSTOM-HOUSE, EAGLE PASS, TEXAS.

"COLLECTOR'S OFFICE, February 21, 1891.

"Received of E. H. Chichester the sum of twenty-four hundred twenty-seven and 60-100 dollars, (\$2,427.60,) being duties on 99,200 pounds of lead ore, at one and one-half cents per pound, and on 64,640 pounds of lead contained, according to assay at port of entry, in 149,500 pounds of ore, at 1½ cents per pound on the lead in said ore as aforesaid; said ores being same described in that certain cause numbered 57 on the docket of the U. S. district court for the western district of Texas at San Antonio, and styled The United States vs. 448,700 pounds of silver and lead ore, and libeled January 31, 1891. Of the above sum the amount of \$972.19 is paid under protest, as excessive.

[Signed] "F. A. VAUGHAN, Collector Customs District of Saluria, Texas.

"By C. W. HARTUP, Special Deputy."

Presenting the above receipt to the court, accompanied with an agreement by the district attorney as to the appraised value of the ores in question, consignee, Chichester, obtained from the court an order for the delivery of the property on bond pending the suit. The record further shows that at the time the consignee paid the duties on the said ores, as shown by the above receipt, he filed a protest with the collector, claiming that the sum of \$877.92 was in excess of the amount of duties to which the United States was entitled according to law. He afterwards filed a more extensive and elaborate protest, in which he "asks that said excessive duties, so collected and paid under protest in order to replevy said ore, be repaid, and further asks that this protest be submitted to the board of general appraisers." Upon these protests the case was submitted to the board of general appraisers, which board, on the 14th of April, 1891, rendered the following decision:

"This importation of silver and lead ore was seized by the collector on the ground that the shippers and consignees were attempting to defraud the revenue by bringing in ores from several mines, so mixed as to give the ores a high content of silver, and to make the importation dutiable only on the lead contained, instead of on its gross weight as lead ore. The collector states that the case was reported to the United States district attorney, who filed a libel against the ore on January 31, 1891, and that the suit is now pending in the United States district court for the western district of Texas. The collector further reports that the appellant, having sought to replevy by giving bond and paying me the duties thereon, did, on the 21st day of February, 1891, pay to me, —, the duties on said ore as assessed by me according to weights and assay at this port.' The collector holds, in conclusion, 'that the board of general appraisers has no jurisdiction to hear and determine the appeal, but that the question involved must be determined according to the decision of the United States district court.' It appears that duty to the amount of \$2,427.60 was assessed upon the ore. This sum was paid by the importer under protest, as he claimed that of the amount \$877.92 was unlawfully exacted, improper samples having been taken in determining the classification of the ore. As section 14 of the act of June 10, 1890, gives jurisdiction to the board in cases where the importer has duly expressed his dissatisfaction with the amount and rates of duties assessed, we see no reason why we should be excluded from a consideration of the appeal now before

us, because the question of the forfeiture of the merchandise is in controversy before a United States court. The question, for our consideration, under this protest, is the legality of the collector's method of assessing duty on two car-loads of ore, weighing 99,200 pounds. He selected samples from a portion of the ore containing a very low silver content, claiming that the portions of the car-loads rich in silver had been mixed for the purpose of defrauding the revenue. In accordance with the assay of the samples thus taken, duty was assessed upon the 99,200 pounds, at $1\frac{1}{2}$ cents a pound, as a lead ore. The collector states that, if the ore was dutiable in its mixed state, the appellant would be entitled to recover. Lead and silver ores are thus provided for in paragraph 199, Act Oct. 1, 1890: 'Lead and lead dross, one and one-half cents a pound: provided, that silver ore, and all other ores containing lead, shall pay a duty of one and one-half cents a pound on the lead contained therein.' There is nothing in this provision of the tariff, or in any other that we know of, to warrant a discrimination against the importation of mixed ores. In paragraph 383 penalties are prescribed for the importation of mixed wool, and in section 11 the importation of obscene articles, etc., is prohibited. But there is no such limitation or prohibition in regard to ores of any kind, and no such discrimination can be lawfully made, except after further legislation by congress. The protest of the importer is sustained as to the amount of \$871.98, which we find from the report of the collector to have been unlawfully exacted."

To review the questions of law and fact involved in this decision, the secretary of the treasury has applied to this court under section 15 of the customs act of June 10, 1890, upon the following assignment of errors:

"(1) The said board erred in taking jurisdiction of said protest when the merchandise referred to therein was then libeled as forfeited to the United States for being entered in fraud of the revenue laws of the United States. (2) The board of general appraisers erred in holding that an importer can mix lead ores with silver ores so as to give the ore a high content of silver, and after so doing import the whole amount of mixed ores as silver ore. (3) The board of general appraisers erred in holding that there is nothing in paragraph 199, Act Oct. 1, 1890, (Tariff Act,) or in any other act, warranting a discrimination against the importation of mixed ores. (4) The board of general appraisers erred in holding, in effect, that the acts of the consignee, as stated in the libel filed in cause No. 57, district court, western district of Texas, San Antonio division, and the proof of the government thereon, did not operate as a fraud on the revenue of the United States. (5) The board of general appraisers erred in holding that the collector had exacted \$871.98 in duties in excess of the amount legally due on said merchandise."

A. J. Evans, U. S. Atty., and *Henry Terrell*, Asst. U. S. Atty., for appellant.

Jas. M. Goggin and *John H. James*, for claimant.

PARDEE, J. The facts of this case show that precisely the same questions were at issue and passed upon by the board of general appraisers as are involved in the suit for forfeiture then and now pending in the district court for this district. In the district court the questions involved, as presented by the libel, are (1) whether the consignee was required to make the declaration that the said imported goods embraced no mixture of ores or concentrates from different mines; and (2) whether

ores of different mines can be lawfully commingled by the importer for the purpose of giving the mixture created a high content of silver, and thus make the importation dutiable on the lead contained instead of on its gross weight as lead ore, thereby avoiding the force and effect of the laws of the United States, and reducing the revenue of the United States. The question before the board of general appraisers was apparently as to the amount of duties exigible on certain aggregates of mixed ores, but the real question necessarily decided was whether or not the importer had the right to so mix ores from different mines as to give the ore a high content of silver, and thus make the importation dutiable only on the lead contained, instead of on its gross weight as lead ore. The anomaly is thus presented of the board of general appraisers taking jurisdiction in a cause pending in a court of the United States for a forfeiture of goods, and deciding, as it were, finally the issues involved; for, in the language of the statute under which the jurisdiction is claimed, "their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein. And the record shall be transmitted to the proper collector, or person acting as such, who shall liquidate the entry accordingly, except," etc. The question of jurisdiction thus becomes exceedingly important, for, if maintained, the jurisdiction of the courts in suits for forfeiture is clearly affected, if not decidedly curtailed. The board of general appraisers was established by act of congress approved June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues." 26 St. at Large, p. 131. The first eleven sections of the act provide the mode and manner of entering imported goods for the payment and collection of revenue duties thereon; for the entry, the invoice, the declaration, and the ascertainment of value. The twelfth section of the act provides for the appointment of nine general appraisers:

"They shall be employed at such ports, and within such territorial limits, as the secretary of the treasury may from time to time prescribe, and are hereby authorized to exercise the powers and duties devolved upon them by this act, and to exercise, under the general jurisdiction of the secretary of the treasury, such other supervision over appraisements and classifications, for duty, of imported merchandise, as may be needful to secure lawful and uniform appraisements and classifications at the several ports. Three of the general appraisers shall be on duty as a board of general appraisers daily at the port of New York, during the business hours prescribed by the secretary of the treasury. * * *

The thirteenth section provides for the revision of the reports of assistant appraisers as to value; the report of the appraisers as to value; the reappraisement by a general appraiser, if called for; and, in case of dissatisfaction by the importer or by the government, for an appeal to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the secretary of the treasury, which shall be on duty at that port or any other port; and the decision of the board of general appraisers is made final and conclusive as to the dutiable value of such merchandise against all parties interested therein.

The dutiable value having been ascertained as provided in section 13, section 14 provides for the ascertainment of the amount of duties chargeable, as follows:

"That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character, (except duties on tonnage,) shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within ten days after, 'but not before,' such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and, if the merchandise is entered for consumption, shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment, the collector shall transmit the invoice, and all the papers and exhibits connected therewith, to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers, who may be designated by the secretary of the treasury for such duty at that port, or at any other port; which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except," etc.

An examination of the foregoing provisions of the act shows clearly that the invoice or the verified statement, in form of invoice, and the consular declaration prescribed and required by the act, presuppose an original lawful entry. The declaration required of the owner, agent, importer, consignee, or manufacturer, in terms, is based upon both entry and invoice. The appraisalment provided for presupposes an entry and invoice, and the assignment of the dutiable charges is based upon and presupposes an entry, invoice, and appraisal. In short, all the duties of customs officers prescribed in these sections, and, for that matter, in the whole act, relate to dealings with imported merchandise, in the regular course of passing the same through the custom-house. It therefore seems clear that the decision of the collector as to the rate and the amount of duties upon imported merchandise provided for in the fourteenth section, and which decision is made under certain circumstances reviewable by the board of general appraisers, is a decision as to the rate and amount of duties on imported merchandise lawfully entered, regularly invoiced, and regularly appraised; and that a decision of the collector as to the rate and amount of duties on goods seized for forfeiture, and as if said goods had been legally entered, but in fact not entered, not invoiced, and not appraised, is not such a decision as is contemplated in said fourteenth section. This view as to the proper construction of the fourteenth section is strengthened by the language of the section itself, wherein it is provided "that the decision of the board shall be final and conclusive upon all persons interested, and the record shall be transmitted to the proper collector, or person acting as such, who shall liquidate the entry accord-

ingly. * * * And when section 14 is considered in connection with sections 934 and 938 of the Revised Statutes, both of which are undoubtedly in full force, there is no ground left for giving the board of general appraisers any jurisdiction in cases where goods are seized and libeled for forfeiture in the courts of the United States. Section 934 provides "that all property taken or detained by any officer or other person under authority of any revenue law of the United States shall be ir-repleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." Section 938 provides for delivery to claimants, by rule or order of court, goods seized under customs laws, on complying with the rules therein contained as to appraisement of the goods, payment of estimated duties, and execution of delivery bond, all under the direction of the court. The requirement therein of payment of duties, "in like manner as if the same had been legally entered," means no more and no less than that the claimant shall, as a condition precedent to obtaining the goods, pay the duties as claimed by the United States, to be summarily estimated and determined by the collector on the theory of a lawful entry of the goods, taking it for granted that such lawful entry could have been made. In the case of seized goods, and particularly in case of goods liable for forfeiture, sections 934 and 938 leave nothing for customs officers to decide or control in the regular line of the duties imposed upon them as such officers. For the foregoing reasons this court holds that on the protest and appeal of claimant, Chichester, in the matter of protest and payment of estimated duties on certain lead and silver ores libeled for forfeiture in the district court for the western district of Texas, the board of general appraisers was without jurisdiction, and the proceedings and decision therein should be reversed and vacated. This decision will leave the questions raised in the suit for forfeiture to be passed upon in due course by a court of competent jurisdiction. In case it shall be held that no ground of forfeiture existed, and there shall be judgment in favor of the claimant canceling his bond, he will not be remediless with regard to any claim he may have for the payment of more duties on the ores in question than were exigible under the law, as he can apparently obtain relief under section 24 of the act of June 10, 1890.

MAXEY, J., concurred.

In re SALOMON et al.

(Circuit Court, S. D. New York. October 13, 1891.)

1. CUSTOMS DUTIES—CLASSIFICATION—CONSTRUCTION OF STATUTE—COMMERCIAL DESIGNATION.

Where it appears that a word used in the tariff law had at the time of the passage of the tariff act a special and technical trade meaning, but the language of the section or paragraph in which the word is used in the act shows clearly that such technical meaning could not have been the one which congress placed upon the word, such technical trade meaning cannot be adopted by the court in construing the statute.

2. SAME—CORDOVAN LEATHER.

Cordovan leather cut during the process of dressing into a shape suitable for re-cutting into shoe-vamps was, under the tariff act of March 3, 1883, properly dutiable as "dressed upper leather," under the provision therefor in Schedule N, par. 461, at 20 per cent. *ad valorem*, and not as a "manufacture or article of leather," under paragraph 463 of the same schedule, at 30 per cent. *ad valorem*.

At Law.

Application under section 15 of the act of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenue," (26 U. S. St. at Large, 131,) by Salomon and Phillips, importers, for a review of the decision of the United States general appraisers, affirming the decision of the collector of the port of New York, as to the rate and amount of duty assessable upon certain merchandise imported by them per steamship Wieland, August 23, 1890. The merchandise in question consisted of certain pieces of Cordovan leather. The leather was made by tanning, dressing, and currying skin or hide taken from the back part or hips of the horse. The leather was designed to be made into shoe-vamps. The board of general appraisers had held that the goods in question were in fact vamps in the condition in which they were imported, but the undisputed testimony taken by the court showed that a further process of cutting and shaping was necessary to transform them into the articles commercially called "vamps," and that the shape in which they had been imported was one given to them in the process of dressing. The goods in question had been classified by the collector as "manufactures of leather," and assessed for duty at 30 per cent. *ad valorem*, under paragraph 463, Schedule N, Act March 3, 1883. They were claimed by the importers to be dutiable at 20 per cent. *ad valorem* as "dressed upper leather," under paragraph 461 of the same act and schedule. A number of witnesses called on behalf of the collector testified that the term "upper leather" had in the leather trade a special, technical meaning, and was confined to waxed cowhide. These witnesses, as well as witnesses called on behalf of the importers, stated that in a general sense all leather used for the upper part of a shoe was called "upper leather."

Curie, Smith & Mackie, (W. Wickham Smith, of counsel,) for importers.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for collector.

LACOMBE, Circuit Judge, (*orally*.) The articles imported here seem, from the testimony, to be within the meaning of the phrase "dressed upper leather," as used in the tariff act of 1883, par. 461. It appears that there are two commercial meanings given to that phrase, one of which applies generally to the different kinds of leather which are used for making the upper part of a shoe, in contradistinction to the leather which is used for the sole or under part; the other, a very restricted, technical meaning, is confined to waxed cowhide. It is apparent that congress did not use the term "dressed upper leather" with this restricted meaning, because the phraseology of the section (omitting the adjectives) is: "Calf-skins * * * and dressed upper leather of all other kinds." Therefore, inasmuch as congress considered that calf-skins were a variety of dressed upper leather, it evidently did not have in mind the peculiar and restricted meaning of that term referring only to waxed cowhides, but intended to cover all varieties of upper leather as known to the trade; and this importation, according to the testimony, is one of the kinds of dressed upper leather which the trade knows. The board of appraisers seems to have been misinformed as to what these articles are. The testimony now taken shows pretty conclusively that they are not "shoe-vamps,"—that is, "pieces cut from dressed upper leather for the forepart of a shoe, ready for making up." An additional process of cutting is required to transform these articles into the shoe-vamp of trade and commerce. It is true that the articles are not in the shape in which the horse-hide was before it was subjected to the process of tanning and dressing, but it appears that the shape which they now have was given to them in the process of dressing. In other words, they were cut into this shape before they became dressed upper leather at all, and we have not a case where dressed upper leather has been, as the board of appraisers say, "by the labor of the cutter, a skilled artisan, converted from mere upper leather into vamps designed for a specific purpose." I am therefore of the opinion that they are not covered by paragraph 463 as manufactures of leather, but are to be classified under paragraph 461 as dressed upper leather. The decision of the collector and of the board of appraisers is reversed; the articles should be classified under paragraph 461.

BATTERSON *et al.* v. MAGONE, Collector.

(Circuit Court, S. D. New York. November 18, 1891.)

CUSTOMS DUTIES—CLASSIFICATION—MEXICAN ONYX.

So-called "Mexican Onyx" not being a chalcedony or onyx proper, as defined in mineralogy, but being a carbonate of lime, containing a small proportion of carbonate of magnesia and ferrous oxides, and having the other characteristics of marble in respect of texture, hardness, and capacity for being worked and polished, is "marble," within the provision of paragraph 467, Tariff Ind. (New,) Schedule N, Tariff Act, March 3, 1883.

At Law.

This action was brought by the plaintiffs against the defendant, collector of the port of New York, to recover the amount of an alleged overpayment of duties on certain merchandise imported by the plaintiffs into the port of New York in the month of April, 1889, which was invoiced to the plaintiffs from Vera Cruz as "196 blocks marble," and was classified for duty by the defendant collector as "marble in blocks," at 65 cents per cubic foot, under Tariff Ind. (New,) paragraph 467 of Schedule N of the tariff act of March 3, 1883. Against this classification the plaintiffs duly protested, claiming, first, that the merchandise was duty free, as a "crude mineral, not advanced in value or condition by refining, grinding, or manufacture," under the free list of said tariff act, paragraph Tariff Ind. (New) 638; or by "similitude in material, quality, and uses to agates unmanufactured," under said free list paragraph, Tariff Ind. (New) 596; or, if not, then at one dollar per ton, as "unmanufactured or undressed stones, building or monumental stone, not marble," under paragraph Tariff Ind. (New) 487 of said Schedule N of said tariff act, either directly or by similitude in material, quality, and uses. The plaintiffs duly appealed to the secretary of the treasury from the decision of the collector, and the secretary affirmed the decision of the defendant collector, and this action was thereupon brought within the time limited by law to recover the alleged overpayment of duties. On the trial the plaintiffs did not offer any proof that the material in question was an onyx or chalcedony belonging to the quartz group, as understood in mineralogy. They also abandoned their claim that it assimilated to agate unmanufactured; and rested their contention entirely upon the ground that the material imported by them had been known from the time of its introduction into this country, and at the time of the passage of the tariff act of March 3, 1883, as "Mexican Onyx;" that it was never known in the trade as marble, or as one of the marbles, but that the term "marble," as used in trade at that time, excluded this article as imported by them. To sustain this contention plaintiffs introduced a number of witnesses from the marble trade, who dealt in this article at the time of the passage of the tariff act. They also endeavored to prove by the testimony of one witness that the material was extracted from mines in Mexico, and was consequently, if not a monumental or building stone, a crude mineral, within the ordinary meaning of that term. Plaintiffs also offered testimony showing that the material in question

was used to some extent in buildings for columns and interior decorations, and also had been used in some instances in the interior of mortuary vaults in cemeteries. On behalf of the defendant collector the testimony of an expert chemist was introduced, who had made an analysis of the material imported by the plaintiffs, with the result that this so-called "Mexican Onyx" was shown to contain:

Carbonate of lime,	-	-	-	-	-	-	-	95.56%
Carbonate of magnesia,	-	-	-	-	-	-	-	2.32
Anhydrous sulphate of lime,	-	-	-	-	-	-	-	0.13
Ferrous and ferric oxides,	-	-	-	-	-	-	-	1.85
Residue,	-	-	-	-	-	-	-	0.14
								<hr/>
								100.00%

—Also that this material had a crystalline structure, composed of rhombohedral crystals, and scientifically belonged to the group of calcites known as "marble." The testimony of this witness also showed that ordinary marbles contained from 78 per cent. to 99 per cent. and upwards of carbonate of lime, and that the carbonate of magnesia in marbles ran from 20 per cent. down to 1 per cent.; and that like impurities were found in marbles as had been shown by the analysis to exist in this Mexican onyx. Trade testimony was also given on behalf of the defendant, showing that this material was extracted from mountain quarries in Mexico; was used in the manufacture of mantel-pieces, vases, pedestals, table tops, columns, etc., and also for wainscoting and other mural decorations; that it was sawed, polished, cut, and turned like other marbles; that it could never, by reason of its characteristics of texture and composition, be used in places exposed to the weather; that it was never used in the structure proper of buildings or of vaults, and was only employed for decorative purposes, and could never be used for monuments, tomb-stones, or shafts, where exposed to the weather. It was also shown that this material came in blocks, in the same manner as in the case of other varieties of marble, excepting that the blocks of Mexican onyx averaged somewhat smaller than the blocks of the other fine foreign marbles. The principal trade witness for the defendant testified that, although this material was generally known in the wholesale trade as "Mexican Onyx," yet that in the trade that dealt in it (which was only to a limited extent in the year 1883 and prior to that date) it was known and recognized as "Mexican Onyx Marble" or "Onyx Marble." Testimony that it was also known as "Marbre Onyx" in France, and as "Onyx Marble" in the Spanish language in Mexico, from whence the material came, was excluded by the court as incompetent evidence of trade designation. At the close of the testimony motions were made on behalf of the plaintiffs and of the defendant, respectively, for a direction of verdict by the court, which motions were denied.

Hartley & Coleman, for plaintiffs.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (*charging jury*.) You will not be troubled with any determination of the question as to similitude or similarity. Those provisions in the tariff laws refer only to articles which have not been enumerated in some way or other in the tariff. As I find this article enumerated,—certainly in one place, if not in more, in the tariff,—the particular paragraph referring to similitude does not apply. This is an article which evidently has come to this country quite recently; but it was known here prior to 1883, and therefore we would naturally expect that in some way or other congress was aware of its existence, and by some terminology or other in the statute did provide for it. Referring to the tariff, we find a provision in paragraph 638, in the free list, enumerating “crude minerals, not advanced in value or condition” beyond a certain stage. I charge you that this is a crude mineral, as described therein; and, if there were nothing else in the tariff but that provision, we would have the case determined. It seems, however, unreasonable to suppose that congress would have provided for an article such as this, coming to this country in considerable quantities, and entering largely into trade, by so brief and general a description; and, looking further to the tariff, we find two paragraphs, which it is contended on one side or the other may properly be applicable to this article. One of these is paragraph 487, which provides for a rate of one dollar per ton on “stones, unmanufactured or undressed, freestone, granite, sandstone, and all building or monumental stone, except marble.”

The first question for you to determine in regard to this article is whether it is or is not properly building or monumental stone other than marble, within the meaning of that paragraph. As to the meaning of those two words “building” stone and “monumental” stone, I charge you that a building stone is one which enters structurally into the composition of a building, not something added as pure ornament to a structure complete without it. I further charge you that a monumental stone is one which is a structural component of a monument, and not something which is added as mere ornament to a completed monument. With those definitions of the two words “building” stone and “monumental” stone in your minds, you will apply what you have heard from the evidence here as to the uses to which this stone is put when it is availed of in the process of building, or in the process of erecting monuments; and you will determine whether or not it is building stone or monumental stone on the evidence which has been given to you. But should you reach the conclusion that it is building stone or monumental stone, there then remains the other question,—as to whether it is or is not marble; for the very paragraph which lays a duty on building and monumental stone excepts marble from its operation. That brings you, then, to the final question in the case,—whether it is or is not marble. The word “marble,” as it is used in common speech, is undoubtedly broad enough to cover this article here; and we have learned that its composition, material, and appearance are such that it would be properly classified under the ordinary use of the word “marble” in the English language, as given to us by the dictionaries.

It is contended, however, that in trade and commerce there is a different meaning given to the word "marble"—or, rather, that there was a different meaning so given to the word "marble" in 1883—from that which is in use in common speech. You will understand, of course, that all these tariff acts are passed in regulation of commerce, and that the usages of commerce and the nomenclature of merchants and wholesale dealers in the various articles named in the tariff are taken into consideration by congress when framing tariff laws when using the language in which they express themselves. Of course it is not enough for a party who claims that his article is not within the ordinary meaning of the terms of common speech to show that it always has in trade some special name that it is called by, unless he goes further, and shows that in that same trade the general term, which otherwise would cover it, is used exclusively for articles other than the one as to which he claims the special designation. For instance, as an illustration, (which I have used quite frequently, but perhaps you will understand it better from an illustration than from a mere statement in words,) wheat is a "grain;" and therefore, if a tariff act provided a certain duty for grain, then wheat of all kinds and sorts would pay that duty. Now, no amount of evidence that certain seeds were always bought and sold as "winter wheat," and never were called anything else in trade, would take them out of the general designation of grains, unless the trade testimony went further, and showed that the commerce of this country understood the word "grain" as referring exclusively to cereals other than wheat. And so here, in order to establish the proposition that the articles imported here are not marbles, it is not sufficient for the plaintiff to show that they are always bought and sold as onyx, or as Mexican onyx; he must go further, and satisfy you from testimony, and by a fair preponderance of proof, that the trade in this country in 1883 dealt in that article as something different from marble; and that the various kinds and varieties of marble which it knew, dealt in, and recognized as marble, did not include this particular article. In other words, when the committees of congress were drawing this bill, and the members of congress were voting upon it, if they, at that time, had been fully informed as to trade knowledge on this whole subject, would they have considered that by the use of the word "marble" they did or did not include this Mexican onyx? If congress, in 1883, thus enlightened by the trade knowledge of those who dealt in marbles and in Mexican onyx, would have understood that "marble" included "Mexican onyx," then you must find that this importation is marble. If, however, congress would have understood at that time that when it used the word "marble," although it might include many varieties of limestone, carbonates, calcites, etc., it still did not include this article then known and dealt in here, you must find that the article imported in this case is not marble.

The jury rendered a verdict for the defendant.

CLAY v. ERHARDT.

(Circuit Court, S. D. New York. November 19, 1891.)

1. CUSTOMS DUTIES—CONSTRUCTION OF STATUTES.

Construction of a statute should not be resorted to when the statute bears its meaning plainly on its face, but should be reserved for a statute expressed in doubtful language.

2. SAME—DANDELION ROOT.

Dandelion root, imported while the tariff act of March 3, 1883, (22 U. S. St. 488,) was in force, which was not edible, and was in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, and which was not used or intended to be used as coffee or as a substitute therefor, but was used for medicine, and in medicinal preparation, was not dutiable under the provision for "acorns and dandelion root, raw or prepared, and all other articles used or intended to be used as coffee or as substitutes therefor," contained in paragraph 290 of the aforesaid tariff act, but was free of duty, under the provision for "drugs, * * * roots, * * * any of the foregoing of which are not edible, and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture," contained in paragraph 636 of the same act.

At Law. Action against the collector of customs at New York to recover duties paid. Verdict directed for plaintiff.

During the years 1889 and 1890 the plaintiff imported from Germany into the port of New York certain dandelion root. This dandelion root was classified for duty as "dandelion root, raw, used as a substitute for coffee," under the provision for "acorns, and dandelion root, raw or prepared, and all other articles used or intended to be used as coffee, or as substitutes therefor, not specially enumerated or provided for in this act," contained in Schedule G of the tariff act of March 3, 1883, (22 U. S. St. 488; Tariff Ind., New, par. 290,) and duty was exacted thereon at the rate of two cents per pound by the defendant as collector of customs at that port. Against this classification and this exaction the plaintiff duly protested, claiming that this dandelion root was free of duty as a root not edible, and in a crude state, etc., under the provision for "drugs, * * * roots, * * * any of the foregoing of which are not edible, and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially enumerated or provided for in this act," contained in the free list of section 2503 of the same act. Tariff Ind. (New,) par. 636. The plaintiff also duly made appeals to the secretary of the treasury, and, within 90 days after adverse decisions were rendered thereon by him, he brought this suit to recover all the duties exacted on this dandelion root. Upon the trial it appeared that the article in suit was the root of the dandelion plant; that it was then known in trade and commerce of this country, as was, at and prior to the passage of the tariff act of March 3, 1883, all root of the same plant, as "dandelion root;" that it was not edible, and was in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture; that it was not used or intended to be used as coffee, or as a substitute therefor, but was used for medicine, or in medicinal preparations; that root of the same kind was never used for coffee, or as a substitute therefor, but was

always used for the same purposes as the root in suit was used for; that at and prior to the passage of the aforesaid tariff act there was imported a root of a certain other and different plant, that was of an entirely different nature, and was then generally known in trade and commerce of this country as "chickory root," but was sometimes called "dandelion root" or "American dandelion root;" that this root was then used, and has ever since been used, as an adulterant of coffee; and that the two above-mentioned roots were the only articles ever known in trade and commerce of this country as "dandelion root." Both sides having rested, the defendant's counsel moved the court for a direction of a verdict in favor of the defendant, and the plaintiff's counsel moved for a direction of a verdict in favor of the plaintiff.

Comstock & Brown, for plaintiff.

Edward Mitchell, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (*orally*.) Of course it is perfectly possible to make almost anything out of a tariff act, by construction, without violating recognized rules for the interpretation of statutes, but construction should be reserved for doubtful language. When we have a provision in a tariff act which seems to be unambiguous, I think it unsafe and unwise to seek in it for something different from the meaning it plainly bears on its face. The particular importation in suit was not used or intended to be used as coffee, or as a substitute therefor; and, according to the witnesses, both for plaintiff and defendant, articles of the same kind were never so used. But there was, at and prior to the passage of the tariff act of March 3, 1883, and there is now, imported into this country a certain other article, as the testimony of these witnesses shows, which was used as an adulterant of coffee, and which, though generally known as "chickory root," was then, and is now, referred to in trade and commerce as "dandelion root." Of this fact congress, conversant as it is with trade and commercial usage, was perfectly well aware. In its experience of the past it had seen more or less successful attempts made by importers (by evidence of commercial designation) to take other articles similarly circumstanced out of the provisions intended for them, and thereby subject them to no duty, or to a less rate of duty than that specified in such provisions. To guard against any possibility that chicory root should not pay the rate of duty that ought, in its opinion, to be imposed on articles used or intended to be used as coffee, or as substitutes therefor, it enacted the express provision for "chicory root," contained in paragraph 288 of the aforesaid act, and then enacted a further provision for "dandelion root used or intended to be used as coffee, or as substitutes therefor," contained in paragraph 290 thereof, and in each of these paragraphs imposed thereon a duty of two cents per pound. The importation in suit appears to be plainly not covered by paragraph 290 of the tariff act of March 3, 1883, but is within the provision of paragraph 636 thereof, as claimed by the plaintiff in his protests. I therefore deny the motion of the defendant for a direction of a verdict in his favor, and direct the jury to find a verdict for the plaintiff.

ANDERSON v. GERMAIN *et al.*

(Circuit Court, W. D. Pennsylvania. November 18, 1891.)

1. PATENTS FOR INVENTIONS—JURISDICTION.

Where a manufacturer has his factory and place of residence and business in one district, and also sells by an agent resident in another district, manufactured articles claimed to infringe, he does not become an inhabitant of the district in which the articles are sold by the agent, and suit for infringement of letters patent cannot be brought against him in that district, by service on the agent.

2. SAME—PRELIMINARY INJUNCTION.

Where an inventor and others have manufactured and sold articles prior to the grant of design letters patent therefor, and the only proof of infringement, since the grant of the patents, relates to a single sale, made shortly after the grant of the patents, but prior to the establishment of their validity, and prior to notice of the patents, the articles not being marked patented, a preliminary injunction should be denied.

In Equity. Motion for a preliminary injunction.

Germain is a manufacturer of wooden mantels, having his factory, residence, and place of business in the state of Michigan. Monroe, who is an inhabitant of the western district of Pennsylvania, acts as the agent for the sale of the Germain mantels in this district. Complainant has filed his bill against Germain and Monroe jointly for alleged infringement of design letters patent by the sale of such mantels; service of the writ being made on Monroe personally, and also as the agent of Germain. Motion being made for a preliminary injunction to restrain the alleged infringement, counsel for Monroe, without entering an appearance for Germain, contend that under the act of congress of 1888, c. 866, § 1, Germain not being an inhabitant of the western district of Pennsylvania, this court has no jurisdiction in this suit as against him. They also contend that a preliminary injunction should be denied, because both complainant and respondents commenced the sale of the mantels alleged to have the designs claimed in the patents prior to the grant of the patents; because complainant, after the grant of the patents, failed to mark the mantels patented; because there is proof of but a single infringing sale of 35 mantels by Monroe, which sale was made shortly after the grant of the patents; and because it does not appear that Monroe at the time of this sale had knowledge of the patents.

W. L. Pierce, for complainant, cited the following authorities on motion to strike off service:

Riddle v. Railroad Co., 39 Fed. Rep. 290; *Hayden v. Androscoggin Mills*, 1 Fed. Rep. 96; 2 Pars. Cont. (Ed. 1873,) p. 580, note *x*; Act Assem. Pa. April 21, 1858, (1 Purd. Dig. p. 58, § 9;) *Kieley v. McGlynn*, 21 Wall. 520; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495; *Estes v. Belford*, 22 Fed. Rep. 276; *Zambrino v. Railroad Co.*, 38 Fed. Rep. 455.

Marcellus Bailey and *W. Bakewell & Sons*, for Monroe.

REED, J. After a careful examination of the authorities cited by complainant's counsel, I am still of the opinion that the bill cannot be maintained against Germain by service of a subpoena upon his agent in

this state. To hold that Germain became an inhabitant of this state, because he has a regular agent here for the sale of his goods, would be an extension of the meaning of the act of 1888 far beyond any reported case that I can find, and I think contrary to the spirit of the act. As to the defendant Monroe, my judgment is that, upon all the affidavits and facts presented at the hearing, a preliminary injunction ought not now to issue. The only clear evidence of infringement is contained in Mr. Monroe's affidavit, in which he admits the sale of 35 mantels of the various designs covered by complainant's patents. These were sold in August, 1890, very shortly after the patents were granted, and before their validity had been established. He swears that at that time he had no knowledge of the existence of the patents, and it was shown that sales had been made for several months, by both complainant and the defendants, before the granting of the patents, so that it is reasonable to believe that he did not know of the patents. He denies that he has taken any orders for or sold any mantels of these designs since he received notice from the complainants of his ownership of the patents. No evidence has been furnished by the complainant to disprove these statements, and the case rests upon the sale of the 35 mantels, which, under all the circumstances, would not warrant the granting of the preliminary injunction. The complainant may at any time hereafter, however, renew his motion, if he should discover evidence of further infringement. The motion must be for the present refused; and it is so ordered.

ZINSSER *et al.* v. KRUEGER.

(Circuit Court of Appeals, Third Circuit. November 18, 1891.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—AERATING BEER.

Reissued letters patent No. 9,129, issued March 23, 1880, to William Zinsser and August Zinsser, as assignees of F. C. Musgiller and Robert W. Schedler, for an improved method of charging beer and other liquids with bicarbonate of soda or other alkali, by mixing the same with a proper cement and compressing it into lumps which will at once sink to the bottom of the vessel, and thus give off the acid gradually to the whole body of liquid above them, are void because of anticipation by various English and French patents for aerating different liquids with gas producing salts compressed into lumps.

2. SAME—APPLICATION OF OLD PROCESS TO NEW PURPOSE.

The fact that the anticipating processes were used in treating water or neutral liquids, while the patent was for treating beer and similar liquids, is immaterial, as this was merely applying an old process to a new, but analogous, subject.

45 Fed. Rep. 572, affirmed.

In Equity.

Suit by William Zinsser and August Zinsser against Gottfried Krueger for infringement of patent. Decree declaring the patent void because of anticipation and dismissing the bill. 45 Fed. Rep. 572. Plaintiffs appeal. Affirmed.

A. v. Breisen, for appellants.

Joseph M. Deuel, for appellee.
Before *ACHESON* and *WALES, JJ.*

WALES, J. This is a suit in equity, brought in the circuit court of the United States for the district of New Jersey, by William Zinsser and August Zinsser against Gottfried Krueger, for the infringement of reissued letters patent No. 9,129, dated March 23, 1880, and granted to complainants, as assignees of F. C. Musgiller and Robert W. Schedler; "for a new and useful improvement in treating beer and other liquids." The specification and claims are as follows:

"The invention consists in treating beer and other liquids of a similar nature with lumps of bicarbonate of soda or of other alkali, said lumps being compacted by means of a suitable cement, so that they are heavy enough to at once drop through the liquid to be treated upon the bottom of the vessel containing the liquid. The carbonic acid evolved from said lumps is thus compelled to permeate the entire column of liquid above it, and at the same time to give up the requisite quantity of alkaline matter. Together with the lumps of bicarbonates of alkali may be used lumps of tartaric or other suitable acid, compacted in the same manner as the lumps of bicarbonate of alkali, so that the amount of carbonic acid evolved from the latter can be easily controlled. It is a common practice with brewers and others to use bicarbonate of soda, either alone or together with tartaric acid, in the manufacture of beer, sparkling wines, and other effervescent liquids, for the purpose of increasing the life of such liquids. The mode of applying such article or articles by brewers, for instance, is to apply about one ounce of the bicarbonate of soda to each quarter barrel with a table-spoon, the bicarbonate being in the form of a powder. The powder, on being thrown into a barrel of beer, will at first float on the surface of the liquid, and immediately evolve carbonic acid, a large portion of which is lost, together with the beer which is thrown out by the action of the acid before the barrel can be closed with a bung. Besides this, the operation of filling barrels is carried on in a great hurry, and a large quantity of the bicarbonate of soda handled with a spoon is spilled over the barrel and wasted. Like effects occur in the use of tartaric acid in crystals when applied together with powdered bicarbonate of soda. These disadvantages we have obviated by preparing the bicarbonate of soda or of other alkali and the acid in solid lumps, of such weight that the lumps at once drop through the liquid upon the bottom of the vessel, and give off the carbonic acid to the entire column of liquid, and not only, as heretofore, to the upper stratum. These lumps we produce by mixing powdered bicarbonate of alkali with a suitable cement, such as a solution of dextrine, and then compressing the same in molds of suitable size and shape. Lumps of acid are made in like manner. The advantages of using the bicarbonate of alkali, either alone or in connection with acid in this shape, is perceptible at once. The lumps, being in a compact form, when dropped into a barrel filled with beer, ale, or other liquid, will at once sink to the bottom, and the carbonic acid evolved from them is forced to stay in the liquid. The barrel can be easily closed with a bung, without losing a particle of carbonic acid or of beer, and the said lumps can be introduced into the barrel without any waste. Besides this, the weight or size of our lumps is so gauged that each barrel will receive the exact quantity of bicarbonate of alkali and of acid required; and that the liquid in a number of barrels, after having been treated with the bicarbonate of alkali, with or without acid, will be of uniform quality.

"What we claim as new, and desire to secure by letters patent, is the process of charging beer and other liquids of a similar nature with carbonic acid,

by dropping into and through the liquid lumps of bicarbonate of soda or other alkali, thereby causing the acid discharged from the lumps to pass through the entire column of liquid, substantially as specified."

The bill alleges infringement, and states that the validity of the patent has been already sustained by a decree of the circuit court for the district of New Jersey in a former suit by these same complainants against Alois Kremer, (39 Fed. Rep. 111.) The answer denies novelty of invention, and claims that, since the former suit and decree against Kremer, new evidence has been discovered which proves that the invention described in the foregoing specification had been anticipated by English and French inventors. After hearing the proofs and arguments of counsel, the bill was dismissed, on the ground of priority of invention, (45 Fed. Rep. 572,) and the complainants have appealed to this court.

The use of bicarbonate of soda in the treatment of beer was not new at the date of the application for the original patent, on October 20, 1875. Before that time the bicarbonate had been used by brewers in the form of a powder, and the only novel feature of its use, described in the specification, is the conversion of the powder into lumps, which are introduced into the barrel through the bung-hole. The effect produced in the beer is the same whether the alkali is used in a powdered or in a compressed form, nor will the taste of the beer indicate which form has been adopted in treating any particular barrel. As explained by Mr. Griffin, a chemical expert and a witness for the defendant, the patented process begins with the dropping of lumps into the liquid. When the lump is dropped and the vessel closed the process is ended. The result is the evolution of gas, which is dissolved by the liquid. So, also, powder is dropped from a spoon, and the result is identical. The only difference is that the solution of the powder and the consequent evolution of gas in the latter case are more rapid, so that it is desirable to close the vessel at once, if all the gas is to be confined. "Solids dissolve more slowly than powders. That is all there is to it." The object of the patentees was to retard the solution of the alkali, thereby preventing a too sudden effervescence, and so retain the gas and the beer in the barrel without any loss of either. The defendant has used the bicarbonate of soda in lumps, or in a compact form, in the treatment of beer; and the only question now to be considered is whether this mode of using the alkali was original with the complainants, or their assignors, in view of the state of the art at and before the date of their patent. And on this point the evidence appears to be conclusive. English patent No. 568, dated March 1, 1860, granted to William Bush, describes a method of granulating the components of Seidlitz mixtures, by which bicarbonate of soda and tartaric acid were formed into artificial granules or lumps, for the purpose of solution in water, evolving carbonic acid gas. The advantage of such granulation in retarding the solution of the salts, and the consequent slow evolution of gas, is mentioned and described in Dinger Polytechnic Journal, (volume 170, p. 314,) published in 1863, in which the writer says that the objection of a too rapid effervescence of the salts may be overcome by converting the powder into lumps, taking the form of coarse-grained

powder. English letters patent No. 910, dated November 29, 1852, were granted Barse & Gage for "improvements in apparatus for manufacturing soda-water and other aerated liquids, and likewise in the preparation of substances employed therein." Barse & Gage converted the acid and bicarbonate powders into "a paste by a mucilage of gum," which is then compressed into cylinders of different shapes, so as to distinguish the acid from the alkali. The cylinders were graduated by weight, "in proportion to the quantity of gas to be produced," and in size depending upon the diameter of the holes through which they were to be dropped. The advantages are specified by "the solid appearance in the shape of a pencil given to the salts which are to produce the gas, and which in other apparatus are used in a powder."

The complainants' specification shows their mode of preparing the lumps, as follows:

"These lumps we produce by mixing powdered bicarbonate of alkali with a suitable cement, such as a solution of dextrine, and then compressing the same in moulds of suitable size and shape. The lumps of acid are made in like manner."

English letters No. 1,609, dated June 26, 1863, issued to William Clark for "improvements in apparatus for aerating liquids," under the head of "gaseous lemonades," describe a process of charging lemonade with carbonic acid gas by the use of pastilles, lozenges, or drops, composed of bicarbonate of soda, citric or tartaric acids, and sugar, in various proportions. French letters No. 595,527, dated July 23, 1863, issued to Le Pedriel, describe the patentee's mode of granulating the salts employed for making gaseous waters. English letters patent No. 3,160, dated October 24, 1872, were granted to William Cooper for "improvements in preparing and making up medicated and other effervescing mixtures," and show a method of making an effervescent mixture from a carbonate of a suitable alkali with an acid salt, and adding sugar, the whole being then compressed in suitable dies to form solid lozenges. French letters No. 58,807, dated May 28, 1863, were granted to Defourmentel and Pore for making gaseous waters. The invention in that patent consists in the creation of a solid body composed of bicarbonate of soda and melted sulphate of alumina, the latter being an economical substitute for tartaric acid. This solid body, placed in one of the gasogenous apparatus, then in general use, evolves, under the action of water, the carbonic acid necessary for producing gaseous water. This solid body is made in the form of a cartridge, and a single cartridge is sufficient for charging the apparatus described. One or two other patents are exhibited in the defendant's evidence to prove the state of the art prior to the date of the patent now in suit, but those referred to above will suffice for the purpose; and these show that the complainants' assignors, although they may have been ignorant of the prior patents, were in fact not the first and original inventors of a mode of converting the bicarbonate of soda, either with or without an acid, into a solid lump or cartridge, for convenient handling in dropping the same into barrels or other vessels. It may be true that they were the first to successfully apply the mode of

using the alkali by introducing it into a barrel of beer in the manner described in their specification, but it is quite certain that the same form of use was previously known and had been adopted in charging neutral liquids. It must be observed that none of the exhibits above referred to were before the court in the *Kremer Case*.

To avoid the effect of this proof, the complainants' counsel insisted that "the defendant seeks to invalidate a process which serves to neutralize an acidulated liquid, such as beer, by showing it to be old to acidulate and medicate neutral liquids, such as water." This distinction does not affect the question of priority of invention in the present case. The treatment of beer by bicarbonate of soda, used in the form of a powder, was well known; and the issue here is whether the conversion of the powder, by compression, into lumps, granules, or cartridges of suitable size and weight, was new. The proof is clear that it was not. The complainants do nothing more than apply the lumps or cartridges to beer instead of to water, and thus adopt an old form or method of applying the alkali, without any novelty in the mode of its application; and this, it has been frequently decided, will not sustain a patent, even if the new form of result has not been before contemplated. *Pennsylvania R. Co. v. Locomotive, etc., Truck Co.*, 110 U. S. 490, 4 Sup. Ct. Rep. 220. There is no error in the decree of the circuit court, and it is therefore affirmed.

**PACIFIC CONTRACTING CO. v. SOUTHERN CALIFORNIA BITUMINOUS PAV.
Co. et al.**

(Circuit Court, N. D. California. November 16, 1891.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—INVENTION—ASPHALT PAVING.

Letters patent No. 819,125, issued June 2, 1885, to Judson Rice, Andrew Stelger, and Isaac L. Thurber, covers a "process of working asphaltum," by taking it in its native state, and softening it by the aid of hot water, steam, or superheated steam, and applying it to the use intended while in a plastic state, and then pressing it with a heavy heated iron or roller, until the surface is smooth and compact. *Held*, that this was a patentable invention, consisting in the application of an old process to a new and useful purpose.

2. SAME—PAVING AND ROOFING COMPOUND.

Letters patent No. 342,852, issued June 1, 1886, to Austin Walrath, covers a "paving, roofing, and building compound" made by heating bituminous sand-rock (found near Santa Cruz, Cal.) by means of steam until it is in a semi-liquid state, spreading it over the surface to be paved or roofed, and then rolling it or smoothing it with heated irons until it becomes firm and hard. *Held* a patentable invention, as it applies known processes to new and useful purposes.

In Equity. Bill by the Pacific Contracting Company against the Southern California Bituminous Paving Company and others, for infringement of patents. Decree for an accounting.

Garber, Boalt & Bishop and *M. A. Wheaton*, for complainant.

Langhorne & Miller, for respondents.

MORROW, J. Bill for the infringement of two letters patent,—one numbered 319,125, granted to Judson Rice, Andrew Steiger, and Isaac L. Thurber, on June 2, 1885, entitled "Process of working and using asphaltum;" and the other numbered 342,852, granted to Austin Walrath on June 1, 1886, entitled "Paving, roofing, and building compound." Both patents are owned by the complainant, and it is alleged that the defendants have infringed both of them. The process described in the first patent is as follows:

"To carry out our invention we take the asphaltum in its native state, and soften it, or dissolve it, by the aid of hot water, steam, or superheated steam, and, when dissolved or in a plastic state, to apply it to the uses for which it is intended. We then press it with a heavy iron or rollers, heated for that purpose, but not to a temperature that would burn the material, which gives it a smooth surface, and renders it compact and solid. When the asphaltum is dissolved or softened by our process, clean sand may be added, if desired, to give it the proper consistency; but without the addition of sand or other ingredient we can also use asphaltum by our process for making floor-tiling, by placing the material in molds, and subjecting it to pressure, which gives it a firm, solid form, with a smooth surface, which is susceptible of a fine polish. In our process of working asphaltum we use an ordinary steam-boiler for supplying the hot water, steam, or superheated steam, and a close or open vessel, stirring by hand or by machinery."

The process described in the second patent is as follows:

"To manufacture my paying, roofing, and building compound, I take this bituminous sand-rock, [previously described as a natural product which had been recently discovered near Santa Cruz, California,] and heat it, by means of steam, in a suitable vessel, which may be either open or closed. When sufficiently softened by the steam it will be in a semi-liquid condition, so that it can be spread, by suitable raking implements, in a thin course or layer over the surface to be paved or roofed. I then roll and smooth it down with heated irons until it has become firm, and until the water which it has taken up from the steam and the volatile part of the oil have evaporated, which will leave a firm, hard, but elastic surface, that will wear a great length of time. For building purposes, and for one class of paving, I convert the bituminous sand-rock into bricks or blocks of the desired size. In this case I treat the sand-rock with steam, as above specified, and, in addition, I add some earthy or mineral substance, such as sulphate or carbonate of lime, so as to give it density and body, and then I subject it to pressure in molds, thus forming blocks or bricks, which can be used for paving or building purposes."

The defense is that both of these patents are void for want of invention. It is claimed that the processes they describe are old, as applied to other substances; that from time immemorial substances have been softened by hot water and by the action of steam; and in support of this claim reference is made to familiar culinary operations, such as the boiling of potatoes and other vegetables, and the reduction of animal matter to grease. It is also claimed that all species of asphaltum had been disintegrated by heat applied in various forms, though not in the form of steam or boiling water alone, and the bituminous rock was a mechanical mixture, and could be disintegrated by heat, the heat acting simply to loosen the mechanical bond between the atoms. It does not appear, however, that these simple operations suggested the application of hot

water or steam to the reduction of asphaltum or bituminous rock to a consistency suitable for paving purposes, prior to the invention of the processes described in these two patents, nor does it appear that the application was one that would naturally suggest itself to a person giving the subject consideration. The fact was that the presence of water in the bituminous material during the process of reduction was deemed to be an obstacle to its successful treatment; and the care was at first to expel all the moisture, as its retention was considered dangerous to the work and destructive to the resisting quality of the final product. The uses of water and steam as described in these patents are therefore inventions in the application of processes to new and useful results. As both of these patents have heretofore been sustained by this court, it will not be necessary to add anything further than a reference to the decision of Judge SAWYER in the cases of *Walrath v. Paving Co.* and *Rock Co. v. Walrath*, 41 Fed. Rep. 883. Decree for complainant, and for an accounting.

PETTIBONE *et al.* v. STANFORD.

(Circuit Court, N. D. Illinois. November 9, 1891.)

1. PATENTS FOR INVENTIONS—EXTENT OF CLAIM—PRIOR STATE OF ART—INFRINGEMENT.

Claim 8 of letters patent No. 245,634, issued August 16, 1881, to Thomas J. Jenne and Charles S. Harmon, for an improvement in lifting-jacks, describes the combination, among other things, of "the standard, A, provided with the arms, *v*, * * * collar, C, having the trunnions, *o*, working in journals at the tops of the arms, *v*." Held that, in view of the prior state of the art, the claim is limited to the specific elements named, and is not infringed by a jack having a collar integral with the standard, and incapable of any movement.

2. SAME—EXTENT OF CLAIMS.

Claims cannot be enlarged by construction.

In Equity. Suit by Pettibone, Mulliken & Co. against Arthur L. Stanford for infringement of patent. Bill dismissed.

Dyrenforth & Dyrenforth, for complainants.

Geo. Payson and *L. L. Bond*, for defendant.

GRESHAM, J. This suit is brought by the complainants, as assignees of letters patent No. 245,634, granted to Thomas J. Jenne and Charles S. Harmon, August 16, 1881, for a new and useful improvement of a lifting-jack, covered by a patent previously issued to Jenne. The third and only claim which it is charged the defendant infringes reads:

"(3) The combination of the standard A, provided with the arms *v*, having the cross-plate *h*, collar C, having the trunnions *o*, working in journals at the tops of the arms *v*, lifting-bar B, passing through the collar C, lever D, working upon the trunnions *o* as a fulcrum, friction collars or pawls E and E' upon the bar B, and clevis F, connecting the short arm of the lever D with the pawl E, substantially as described."

This jack is designed for lifting heavy weights, and especially for railway use. As illustrated in the drawings, and described in the specification, it comprises an iron standard bifurcated near the upper end, its two arms standing apart to accommodate between them gripping pawls, which embrace and bite a lifting bar. The front face of the standard is provided with two longitudinal flanges extending from the base-plate, which is integral with the standard, to the two expanding arms, which flanges serve as guides for the lifting-bar. This bar has a foot at its lower end, and is screw-threaded at its upper end to receive a nut. The jack is operated under a load or object resting on the head or top of the lifting-bar, as well as on the foot or projection at its lower end. The upper friction pawl is connected with the lever by means of a clevis, and the application of force to this pawl on one side causes it to bite and raise the bar. When the lever is raised to a sufficient height, this pawl strikes the upper edge of a plate which is connected with the arms of the standard at the rear of the bar, and is thus left free to take another grip. The lower pawl dogs the lifting-bar at any desired elevation, and prevents it from dropping back. For this purpose the pawl rests on one side upon a part of the standard where it begins to bifurcate. This pawl is in close proximity to a plate above it, so that, when the bar is raised, the pawl is brought into contact with the plate, and forced to release its bite on the bar without rising with it. To facilitate dropping the bar, the lower pawl is provided with a lip, which can be operated by the foot or hand to cause it to release its hold:

"C is a collar, through which the bar passes at the upper end of the standard, and which is provided with trunnions *o* resting in journals in the top of the upright arms *v*. These trunnions also form the fulcrum of the lever D. The caps *n* of the journals are fitted to the arms *v* by means of dovetailed projections *m*, which fit into recesses of corresponding form in the upper ends of the arms *v*. The caps are placed in position by forcing the projections laterally into the recesses from the outside, where they are obviously held firmly in position against any upward pressure. This method of securing the caps is preferable to fastening them with bolts, both because it enables the cap to resist a greater upward strain, and because it is more readily applied."

The specification further says:

"We prefer to flatten a part of the lower face of each trunnion *o* where it enters the journals, as shown in Fig. 7, to prevent it from turning under a severe strain."

The lifting-bar and the load are raised by operating the lever, the short end or socket of which is made in two parts, in order that the lever may be fulcrumed on the trunnions of the collar. The specification and drawings show a separate collar, with projecting trunnions on opposite sides resting in recesses, called "journals," in the top ends of the two arms. This collar is not integral with the standard, and the trunnions are confined in their bearings or journals as above described. The elements of claim 3, except "collar, C, having trunnions, *o*, working in journals at the tops of the arms, *v*," are found in the prior art in substantially the same arrangement, and operating in the same way. If

there is anything in the jack covered by the third claim which distinguishes it from the prior art, it is this collar, with its trunnions confined in the journals, and serving as a fulcrum for the lever.

The defendant's lifting-bar is guided in the standard as the bar is guided in the complainant's jack, and other jacks found in the prior art; but the upper guide of the defendant's bar is a slot or opening in the head of the standard which is formed by bringing the two arms or branches together, thus making the guide integral with the standard, and not separate and distinct from it. The two forks or prongs of the defendant's lever embrace the top or head of the standard, and are fulcrumed on the protruding ends of a pin which passes through the head. This pin is slightly in front of the lifting-bar, and directly over the load, and the center of the base. It is urged that this is a mere mechanical modification of the complainants' jack, and in no sense a departure from the invention covered by the third claim. It is not denied that the other claims of the patent are for a specific construction of the combined elements, but it is urged that the claim in controversy is not thus limited, for the reason that it is for a general combination of parts. In view of the language of the claim, and the specification and the state of the art, the patent is a narrow one. The claim embraces a collar of particular construction, namely, "collar, C, having the trunnions, o, working in journals at the tops of the arms, v." This language clearly excludes the idea of an absolutely rigid union between the collar and the standard. Trunnions working in journals cannot mean trunnions rigidly united to the journals. The patentees doubtless thought that, in order to make their jack operative, the collar and trunnions should be so confined in their bearings as to have some play; and the ingenuity of no expert can make it appear that a collar with trunnions working in journals means a collar integral with the standard, and incapable of any movement. The complainants' expert, in effect, eliminates from the claim words which are not at all ambiguous, but have a clear and distinct application, and imports into it language which is unwarranted by the specification. He even goes so far as to say that the statement that the trunnions work in their bearings is a mistake. The specification and drawings show just how the collar and trunnions, which may be easily removed, are held in place, not rigidly, but "firmly against any upward pressure." Jenne and Harmon were mere improvers, and the thing claimed is limited to the particular elements of the combination. A jack which does not contain a collar at the top capable of some movement in its bearings does not infringe the claim in controversy, and we have seen that the collar or upper guide of the defendant's jack is integral with the standard, and incapable of any play or movement whatever. The language of the claim is explicit and clear, and the court is not at liberty to enlarge it beyond its plain scope; nor can the complainants be allowed to show by experts that the invention is broader than the terms of the claim. The bill is dismissed for want of equity.

HAMMOND BUCKLE CO. v. HATHAWAY *et al.*¹

(Circuit Court, D. Connecticut. December 1, 1891.)

1. PATENTS FOR INVENTION—PATENTABILITY—CLASPS AND BUCKLES.

Letters patent No. 251,246, granted December 20, 1881, to Theodore E. King and Joseph Hammond, Jr., are for an improvement in glove-fasteners, shoe-buckles, and similar articles, which consist of a tongue-plate, a tongue or lever pivoted to the tongue-plate, and a slotted catch-plate, with which the tongue can be engaged, and by which the two parts of the buckle are drawn together and securely fastened. The improvement consisted in dispensing with the spring element usually found in pre-existing devices, which operated on the tongue, and held it in an open or closed position. *Held*, that this patent is void, for letters patent granted November 9, 1880, to Charles F. Littlejohn, were for the same device as applied to carriage boot-flaps; and it involved no invention to apply it to wearing apparel.

2. SAME—EXTENT OF CLAIM—PRIOR STATE OF ART.

In letters patent No. 301,884, granted July 15, 1884, to the same persons, for an improvement in similar buckles, the tongue-plate was a single piece of metal, doubled upon itself, and forked at its rear end next the catch-plate. The tongue swung in this bifurcation, its pivot being located underneath the tongue-plate. Indentations in the under-fold of the tongue-plate partially embraced the ends of the pivot-pin, which was held between the two folds. The object of this construction was to cause the tongue-plate, or a portion of it, to extend rearward of the tongue, forming there a bearing surface for the catch-plate. The first claim was: "In combination, the catch-plate, the tongue pivoted directly to the tongue-plate, and the tongue-plate extending rearward of the pivot and in contact with the catch-plate when the parts are engaged." *Held* that, as the claim was merely for an improved clasp, which had many predecessors, it must be so limited that the tongue should be not only pivoted directly to the tongue-plate, but below its face, and between its bifurcated ends.

3. SAME—INFRINGEMENT—BUCKLES.

This patent is infringed by a buckle which is composed of two plates riveted together, the lower being provided with projections in which the pivots of the tongue turn, and which fit into openings in the upper plate when the two lie together; and the upper and spring-plate being bifurcated, and extending on both sides of the tongue rearward, to afford a bearing surface for the catch-plate, though the lower plate has no such extension.

In Equity. On final hearing.

George W. Hey, for plaintiff.

Frederick P. Fish, for defendants.

SHIPMAN, J. This is a bill in equity, based upon the alleged infringement of three letters patent,—No. 251,246, dated December 20, 1881, for a glove-fastener; No. 301,884, dated July 15, 1884, for a shoe-clasp, each of said patents having been issued to Theodore E. King and Joseph C. Hammond, Jr.; and No. 341,422, dated May 4, 1886. The complainant submitted to a dismissal of its bill so far as the third patent is concerned.

No. 251,246 is for an improvement in glove-fasteners, shoe-buckles, and similar articles, which consist of a tongue-plate, a tongue or lever pivoted to the tongue-plate, and a slotted catch-plate, with which the tongue can be engaged, and by which the two parts of the buckle are drawn together and securely fastened. The improvement consisted in dispensing with the spring element, which usually was found in pre-existing devices, and which was generally caused by some kind of a spring-plate, which operated upon the tongue, and held it in open or closed position, like the spring that acts on the blade of a pocket-knife,

¹Rehearing denied, 48 Fed. Rep. 834.

and substituting therefor a hook or tongue of peculiar curvature. The patent also spoke of a stop to prevent the tongue from swinging too far back, but there is no patentable novelty in that part of the alleged improvement, for, as it was said by the patent-office examiner in the correspondence relative to the grant of this patent, "with this kind of hook it is believed to be impossible to hinge the two parts without having the edge act as a stop." In order that the description contained in the specification and the claim of the patent may be understood it is necessary to define the meaning of the terms which are used. The hook, C, is the tongue; the curve, C¹, is the arched part of the tongue, which extends outwardly over the pivot; the loop, C², is the bend or bight of the tongue; the plate, A, is the catch-plate; and the plate, B, is the tongue-plate, having an opening, B¹, whose outer edge serves as a stop. The specification says:

"C is the hook, which is hinged to the inner edge of B, and passes through an opening in A when the two edges are secured together. The hinged hook or tongue, C, has a curved back, C¹, which increases slightly in distance from the hinge as it reaches the loop, C², so that the point at which the plate, A, rests when the clasp is shut is the most distant from the center of any part of the loop, C². This point, or deepest part of the loop, also lies in such a direction that when strain is brought upon the fastener it tends to draw the outer end, which rests upon the plate, B, close down upon the plate with a slight pressure. * * * The opening, B¹, in the plate, B, through which the hinge passes, is made of such a width that when the hook is turned upward, as shown in Fig. 3, the part, C², strikes against the edge, B², and acts as a stop to prevent the hook from turning too far back."

The claim is as follows:

"The combination of the hook, C, having the curve, C¹, and the loop, C², with the plate, A, having the opening, A¹, and the plate, B, having the opening, B¹, substantially as described."

A hook or tongue of this peculiar shape, and used for precisely the same purposes, viz., having drawn two opposing edges together, to hold them together, and to remain in closed position by the strain of the other part of the buckle, was well known before the invention of the patentees. It is found in the Charles F. Littlejohn patent of November 9, 1880, for a carriage boot-flap hook. The entire hook is thus described: Above the folded boot-flap there was a standing strap and a free strap below. A metal loop was attached to the standing strap, and a metal hook, with a loop at one end, was attached to the free strap by this loop. The loop was bent inward, and the end turned downward, so as to form a bearing surface substantially in line or slightly forward of the straight line of the strap. The bend of the loop portion was in rear of the point where the free strap was attached. To engage the free strap with the standing strap the hook was turned up, and its free end passed through the loop upon the standing strap, and was then turned down to bring its end against the free strap. The specification says:

"This brings the line of pull or strain at the bend and in rear of the point where the free strap is attached, so that the strain tends to force and hold the end or suitable bearing surface down and against the free strap."

The Littlejohn hook had substantially the same shape and mode of operation as the hook of No. 251,246. There was no novelty in the mode by which the old tongue was applied to the glove-fastener or the shoe-buckle, and there was no patentability in taking it out of its place in a carriage and substituting it for another tongue in the same general kind of a fastener upon wearing apparel.

In order to ascertain the character and validity of No. 301,884 it is necessary to know the state of the art at the date of the invention. Very many patents have been issued of late years for arctic buckles, some of them for minute advances in the art, so that the territory open to invention seems to have been fully explored and occupied. In this case the defendants were of opinion that the state of the art with reference to the improvement contained in No. 301,884 was shown at the date of the invention, with substantial clearness, by patents No. 191,758 and No. 215,824, which were also issued to Hammond & King. The tongue in patent No. 191,758 was hinged to an upper spring-plate, which plate was secured at its outer or front end to a lower plate, which was the tongue-plate, and which was attached to the shoe. The clasp of patent No. 215,824 had a spring-plate curved to fit the under side of the tongue-plate, and lying close to it, and held in place by the ends of the tongue-plate. The tongue passed up through a hole in the tongue-plate, had a projection on each side, which rested in raised projections at the sides of the tongue-plate, so as to form a hinge upon which the tongue turned. A projection acted downwardly upon the spring-plate, so that the pressure of the spring held the tongue open or shut. The catch-plate had also curved projections, which fitted upon the projections of the tongue-plate. The idea was that when the two parts of the clasp were together, the projections joined, and prevented the two parts from being drawn asunder longitudinally. The buckle of No. 301,884, so far as the first three claims are concerned, is described as follows: The tongue-plate was a single piece of metal, doubled upon itself, and was forked at its rear end,—i. e., the end next the catch-plate. The tongue swung in this bifurcation, the pivot of the tongue being located underneath the tongue-plate. Indentations in the under-fold of the tongue-plate partially embraced the ends of the pivot-pin, which was held between the two folds. The specification says:

"It will be observed that this construction of the tongue-plate causes the tongue-plate, or a portion of it, to extend rearward of the tongue, forming there a bearing surface for the catch-plate, the result of which is, in use, that the whole structure is caused to move together when movement of the catch-plate is had, which unity of motion in the parts of the shoe-clasp preserves the two flaps of the shoe in a better relation to each other than in the case where the catch-plate can be tilted downward independently of the tongue."

When the tongue pivots are formed solely underneath the tongue-plate, the face of the plate may be made smooth. A cross-bar or projection on the tongue-plate back of the tongue made a stop which limited the backward play of the tongue. The first three claims, which are the only ones said to have been infringed, are as follows:

"(1) In combination, the catch-plate, the tongue pivoted directly to the tongue-plate, and the tongue-plate, extending rearward of the pivot, and in contact with the catch-plate when the parts are engaged, all substantially as described. (2) In combination, the catch-plate, the tongue pivoted directly to the tongue-plate, and the tongue-plate having a smooth surface from a point in the rear of the pivot to a point in front of the pivot, all substantially as described. (3) In combination, in a clasp, a tongue-plate, bearing a tongue pivoted directly to the tongue-plate and between its bifurcated ends by a pivot arranged below the surface of the plate, an inwardly projecting bar or lug, arranged adjacent to the tongue, and forming a stop whereby the backward play of the tongue is limited, and a catch-plate, all substantially as described."

The improvement consisted in having the body of the tongue plate extended on both sides of the tongue beyond the pivot, so as to form a bifurcation at the inner end of the plate in which the tongue plays, these extensions being for the purpose of forming supports upon which the catch-plate is drawn as the tongue is closed, and which prevent the catch-plate from changing its position. The pull of the tongue and the catch-plate upon each other is more efficient when the pivot is below the fold of the tongue-plate. It is plain that this buckle is a different thing, in the way in which and the means by which the catch-plate is made to be an efficient member of the buckle, from the preceding patents which have been described. The difference consists in the efficient support of the catch-plate, and this is accomplished by the bifurcated extensions of the tongue-plate which project rearwardly beyond the pivots. The question of importance is whether this improvement has the element of patentable invention. I do not think that the mere elongation of the tongue-plate would have been patentable, but I am of opinion that the way in which the lengthening was accomplished and the support was given to the catch-plate, viz., by the bifurcated extensions of the body of the tongue-plate on both sides of the tongue beyond the pivot, in which extensions the tongue plays, and upon which the catch-plate is supported in position, did show patentable invention. There was no invention in the production of smoothness of surface upon the face of the tongue-plate. If smoothness was desirable, it was easily attained by forming the sockets for the tongue-pivots solely in the lower fold of the plate. Neither was there any patentability in the stop. It was a familiar device. It had no new or different function, and there was no inventive skill in the means employed to put it into or to adapt it to the new tongue-plate. The first claim was made as broad as the patent-office would permit, and was intended to cover any tongue-plate to which the tongue was directly pivoted, and which extended rearward of the pivot, and came in contact with the catch-plate. This claim, being merely for an improved clasp, and one which had many predecessors, must be limited by construction to the invention as it was made, and therefore the details are important. It should be so limited that the tongue should be not only pivoted directly to the tongue-plate, but below its face, and between its bifurcated ends. The second claim was for the catch-plate and the tongue pivoted directly to the tongue-plate having a smooth surface. This combination, as an entirety, was not patentable. It was intended to be for the elements of the first claim,

plus a smooth tongue-plate; but inventive skill is required in a combination as well as an entirely new device, and there was no skill in so arranging the pivots of the tongue that the surface of the tongue-plate should be smooth. The third claim is for the elements of the first claim and the stop. A combination of devices, new or old, in order to be patentable, must produce some new effect or result, as the product of the combination. A stop was a familiar part of the tongue-plate. This stop was like its predecessors, and no skill was required to add it to the plate, and, when added, it produced its old, independent result. It was not a part of the improvement; it operated in its old way, and contributed no new result. This claim is not patentable. The two buckles which have been made by the defendant, and which are known in the case as "Defendant's Weld Buckle A," and "Defendant's Weld Buckle B," infringe the first claim of No. 301,884. Buckle C is not claimed to infringe this patent. There is more uncertainty in regard to the infringement by defendant's weld buckle D. It is composed of two plates, riveted together. The lower plate is provided with projections at its inner end, in which the laterally projecting pivots of the tongue turn; and the upper plate is provided with openings, which receive the top portion of the projections when the two plates lie together. It is the reverse of the method by which the tongue and tongue-plate of No. 215,824 are pivoted together. The upper and spring plate is bifurcated, and extends on both sides of the tongue rearward to afford a bearing surface for the catch-plate, but the lower plate has no such extension beyond the tongue-pivot to afford such a bearing. The buckle as a whole differs materially in appearance from the buckle of the patent. The projection at the end of the lower plate, in which the pivots turn, and the openings in the upper plate, which receive the top portion of the projections, are, in appearance, quite unlike the double leaves of the patented buckle, between which the pivot-pin is held. The extension of one side of the double plate is a departure from the form of the patented buckle. But, with some hesitation, I think that the essential and described elements of the first claim are present in buckle D, notwithstanding the differences in details of construction. Let there be a decree dismissing the bill as to patents Nos. 251,246 and 341,422, and for an injunction against the infringement of the first claim of No. 301,884. and for an accounting.

ESSEX BUTTON CO. v. PAUL *et al.*

(Circuit Court, D. New Jersey. December 1, 1891.)

1. PATENTS FOR INVENTIONS—PRIOR STATE OF ART—CUFF-BUTTONS.

Letters patent No. 319,997, issued June 16, 1885, to George D. Paul and Cyrus E. Vreeland, covered an improvement in cuff-buttons, whereby they are provided with a separable shoe, "consisting of a spring-metal ring, formed with a flaring opening, *a*, through which the post or shank is passed, and with a yielding central portion, curved outwardly, forming a seat, *c*, in which the post or shank rests," and "adapted to be secured to the shank between its outer end and the fabric through which the shank is inserted." *Held* that, in view of the prior state of the art, and of the fact that broader claims were originally made and rejected, the patent must be restricted to the specific device described, and is not infringed by letters patent No. 382,342, issued May 8, 1888, to Egbert Alsdorf and George D. Paul.

2. SAME—ASSIGNMENT—ESTOPPEL.

The fact that the inventor and patentee of an improvement in an article sells and assigns the patent to a third person does not, in the absence of misrepresentations as to the scope of the patent, estop him from obtaining a patent for another and different improvement thereon.

In Equity. Suit by the Essex Button Company against George D. Paul and others for infringement of patent. Bill dismissed.

Alfred A. Van Hovenberg, for complainant.

E. L. Sherman, for defendants.

Before *ACHESON* and *GREEN*, JJ.

ACHESON, J. This suit is upon letters patent No. 319,997, dated June 16, 1885, granted to George D. Paul, the inventor, and to his assignee of one-half, Cyrus E. Vreeland, for an improvement in buttons; the invention consisting (the specification states) "in certain features of construction," the object being to provide a device adapted to be applied to a cuff-button, to prevent it from coming through the button-hole and becoming lost. The patent has a single claim, which is as follows:

"A button, constructed with a rigid post or shank, having an enlarged flat end, and provided with a separable shoe, consisting of a spring-metal ring, formed with a flaring opening, *a*, through which the post or shank is passed, and with a yielding central portion, curved outwardly, forming a seat, *c*, in which the post or shank rests, the said shoe adapted to be secured to the shank between its outer end and the fabric through which the shank is inserted, substantially as set forth."

By virtue of assignments from Vreeland to one Van Hovenberg and from the latter and said Paul, the plaintiff, on January 17, 1885, became the sole owner of the said invention and the letters patent therefor. Subsequently, upon the application of Cyrus E. Vreeland, the inventor, filed January 14, 1888, letters patent No. 382,342, dated May 8, 1888, were issued to Egbert Alsdorf and George D. Paul, as assignees of Vreeland, for improvements in button fasteners. The alleged infringing buttons are made under and in accordance with this latter patent. The bill of complaint proceeds upon the assumption that the Paul invention, for which the patent in suit was granted, consisted in "the formation and construction of a removable spring-back washer or shoe, with a central perforation of such a relative diameter as to be used in connection with

a button having a rigid post or shank, with an enlarged flat end, thereby admitting of the easy application of a button to any kind of goods, and admitting of its removal at pleasure." But so broad a scope must be denied to the patent by reason both of the prior state of the art and the proceedings in the patent-office. The evidence is conclusive that prior to the Paul invention buttons had been patented in the United States having all the general features just mentioned. In truth, Paul was a mere improver of an old and well-known type of buttons, his improvement introducing no new principle of operation, but consisting altogether of certain specific forms of construction. Moreover, the file-wrapper shows that his application as originally framed was for broader claims, which, being rejected, were replaced by the restricted claim finally allowed. It is manifest upon the face of this claim that it relates to mere features of peculiar construction, and the prior state of the art was such that the claim must receive a very narrow interpretation. Conceding that the patent may be sustained for the precise device described, yet the claim cannot be extended by construction so as to cover distinct devices having other forms, although designed for the same general purpose. Now, such is the character of the defendants' button fastener, which undoubtedly varies as much from the plaintiff's device as it did from earlier devices in the art. The position taken by the plaintiff, that the question of infringement is to be determined by the supposed construction which the second section of the answer puts upon the patent in suit, is quite untenable. Therefore we need not stop to consider whether or not the views of the plaintiff's expert based upon that theory are correct. The two devices are not colorably, but substantially, different. We need only specify one point of distinction, which is fundamental, namely, the defendants' device has no "yielding central portion, curved outwardly, forming a seat, c, in which the post or shank rests." There are other distinctive features. But it is not necessary to prolong the discussion. We are well satisfied that infringement has not been shown.

Nothing appears to create an estoppel as against any of the defendants. It is not shown that either Paul or Vreeland ever made any misrepresentation to the plaintiff as to the scope of the patent in suit, and certainly they were not precluded, by a simple assignment of the patent, from applying for and obtaining letters patent for another and different improvement, subsequently made, in the same class of button fasteners. Let a decree be drawn dismissing the bill, with costs.

GREEN, J., concurs.

THE ST. LOUIS.

HITCHCOCK v. THE ST. LOUIS.

ST. LOUIS, I. M. & S. RY. CO. v. SAME.

(District Court, D. Kentucky. November 16, 1891.)

1. ADMIRALTY JURISDICTION—RAILROAD FERRY-BOATS.

Rev. St. U. S. § 5258, authorizing railroads to carry over its "road, boats, bridges, and ferries" all passengers, freight, etc., "on their way from any state to another state, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination," does not make a steam ferry-boat owned by an interstate railway company, and used exclusively in carrying its trains across the Mississippi river between two states, a part of the railway, in such sense as to exclude admiralty jurisdiction over it, and the same may be libeled for wages.

2. SEAMEN—ATTACHMENT OF WAGES.

Under Rev. St. U. S. § 4612, declaring that the word "ship" shall be taken to comprehend "every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this title are applicable," and that persons engaged in the navigation thereof shall be considered as "seamen," a person serving on board such ferry-boat is entitled to the benefit of section 4536, declaring that no wages due any "seaman or apprentice" shall be subject to "attachment or arrestment."

3. SAME—FAILURE TO CLAIM EXEMPTION.

But when such wages have been paid over for a debt justly due, under attachment proceedings in which the seaman, though properly served, failed to claim exemption under the statute, a court of admiralty will not decree a second payment to the seaman himself.

4. SAME—COSTS.

When, however, the seaman's admiralty proceeding was begun before a United States commissioner prior to the judgment of the justice, and the railroad company had actual notice thereof before that time, it was the latter's duty to call the justice's attention to that proceeding, and because of its failure to do so it will be charged with the costs thereof.

In Admiralty. Libel by J. J. Hitchcock against the steamer St. Louis, owned by the St. Louis, Iron Mountain & Southern Railway Company, for wages. Decree for libellant for costs only.

James Campbell, Jr., for libellant.

Quigley & Quigley, for claimant.

BARR, J. This is a libel *in rem* for the wages claimed by the libellant, and the questions raised by the claimant, the St. Louis, Iron Mountain & Southern Railway Company, are: (1) Has a court of admiralty jurisdiction of the subject? (2) If it has jurisdiction, is not the payment of the wages due libellant by the claimant defendant, by and under an order of a state court under a proceeding of garnishment, a bar to a recovery in this court?

The steamer St. Louis is owned and used by the claimant defendant for the purpose of transporting its trains across the Mississippi river. It is really a steam ferry-boat, with iron rails so adjusted as to permit the trains of the defendant to be run over and upon it, and thus be transported across the Mississippi river by the steamer. This boat is registered, has a large tonnage, and has the capacity of transporting

freight and passengers other than those in or on a train of cars; but it is not thus used, nor was it at the time the wages were earned by the libellant. The defendant insists that this ferry-boat was a part of the line of its railroad, under section 5258 of the Revised Statutes, and therefore not subject to the jurisdiction of an admiralty court. That section authorizes "railroads to carry upon and over its road, boats, bridges, and ferries all passengers," etc., "mails, freights, and property, on their way from any state to another state, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination." But we do not think it has any bearing upon the question of the jurisdiction of the courts of admiralty. It was passed by congress under the commercial clause of the constitution, and authorizes continuous lines of railroads from one state to another state, and thus secures interstate commerce against obstacles, even if attempted by state action; and was not intended to deprive courts of admiralty of any jurisdiction which they otherwise had. The question of jurisdiction is to be considered without regard to this section of the statutes. The Mississippi river is within the jurisdiction of courts of admiralty; and as the St. Louis is a large boat, propelled by steam across that river from one state to another, it would seem there can be no doubt this case is within admiralty jurisdiction. It may be, in cases like the one at bar, there is no especial need for the lien of seamen for their wages, and that commerce between the states does not need the aid of liens in favor of the crew of steamers running over or across the public navigable waters from one state to another; but this need is not the test of the admiralty jurisdiction, or of maritime liens. A recent author, Mr. Henry, states the matter thus:

"But later cases seem to extend the scope of admiralty jurisdiction to all classes of vessels used in commerce or navigation, without regard to the necessity for such liens arising in order to enable them to conduct the voyage." Henry, Adm. p. 91.

It has been decided that the crew of an ordinary ferry-boat running across a river, and within the same state, have a maritime lien. *Murray v. Ferry-Boat*, 2 Fed. Rep. 86. See, also, *The Cheeseman v. Two Ferry-Boats*, 2 Bond, 363; *The Gate City*, 5 Biss. 200. In the case of *The Volunteer*, 1 Brown, Adm. 159, it was held that an admiralty court had jurisdiction in a collision between two tug-boats which were employed in harbor service in the same harbor, and within the body of the same county, but as links of transportation in interstate commerce.

The answer of the defendant sets out the attachment of the wages claimed by the libellant by process of garnishment, and a judgment thereon by J. P. POLLOCK, a justice of the peace in and for the state of Kentucky, and a subsequent payment thereof by the defendant. The sums thus paid are pleaded by defendant as a bar to any recovery by libellant in this suit, as they cover the whole amount of his wages. It appears from the record of the proceedings in the justice's court the libellant was before the court by actual service of the summons, but that neither he nor the defendant set up the character of libellant's claim, and

claimed an exemption from the attachment because of the nature of the wages due. The libelant now insists that his wages are not subject to an attachment from a court of law, and that the justice of the peace was without jurisdiction to render the judgment he did, and his counsel calls the attention of the court to the 4536th section of the Revised Statutes. That section declares that "no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages, or of any attachment, incumbrance, or arrestment thereon." This language is similar to that used in the English statutes of 17 & 18 Vict., and is taken from the act of congress passed June 7, 1872, which is entitled "An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States to superintend the shipping and discharging of seamen engaged in merchant ships belonging to the United States, and for the protection of seamen," and is placed in the Revised Statutes under the head of "Merchant Seamen." Many of the provisions of the act of June 7, 1872, do not apply to vessels navigating the western rivers; but section 61, which is the same as section 4536, Rev. St., is under the head of "Protection of Seamen;" and section 65 of said act provides "that, to avoid doubt in the construction of this act, any person having the command of any ship belonging to any citizen of the United States shall, within the meaning and for the purposes of this act, be deemed and taken to be 'masters of such ship,' and that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board of the same shall be deemed and taken to be a 'seaman,' within the meaning and purposes of this act; and that the term 'ship' shall be taken and understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this law may be applicable." This section is re-enacted in Rev. St. § 4612.

The court in *Ross v. Bourne*, 14 Fed. Rep. 859, in considering section 61 of the act of 1872, says: "This provision is general in its terms, and is applicable to all wages earned by seamen, whatever the nature of the voyage." I conclude the present case is within its provisions, and that libelant's wages could not be attached by the process of garnishment issued from a common-law court. Whether these wages could have been thus subjected, in the absence of a prohibitory statute, is a most interesting question, which has been most ably and learnedly discussed by Justice GRAY, then chief justice of Massachusetts supreme court, on the one side, and by Judge BENEDICT on the other. See *Eddy v. O'Hara*, 132 Mass. 56, and *McCarty v. The City of New Bedford*, 4 Fed. Rep. 818. But this court need not express an opinion on this mooted question, as we think the statute covers the case.

It seems from the record filed of the proceedings before the justice of the peace that libelant was before him by actual service of the summons, and these wages have been in fact paid by the defendant, and applied to the payment of libelant's debts. These debts of his are presumably

just debts, and I do not find that he made any question before the justice as to the right of attachment and the application of his wages to the payment of his debts. He should have made the question before the justice, and, if decided against him, appealed the case to a higher court. He did not do this, but allowed the defendant to pay the wages due him under the order of the state court, and apply the money to the payment of his presumably just debts. It would be inequitable, under such circumstances, to require defendant to pay these wages a second time. *The City of New Bedford*, 20 Fed. Rep. 57.

It appears from the record that proceedings were commenced before the commissioner of this court on the 30th of January, 1891, and that the defendant had actual notice of this proceeding before the judgment was rendered by the justice of the peace on the 5th of February. It was the duty of the defendant, under the circumstances, as well as the libellant, to bring to the attention of the state court—justice of the peace—the fact of the proceeding in admiralty. I shall not, therefore, give libellant judgment for the wages which have already been paid by defendant, and applied to libellant's just debts, but will give libellant a judgment for the costs of the admiralty proceedings; and it is so ordered.

THE UNIONIST.

MYERS *et al.* v. THE UNIONIST.

(District Court, E. D. Virginia. November 30, 1891.)

1. CHARTER-PARTY—CONSTRUCTION—NOTICE OF READINESS FOR CARGO.

A charter-party provided that it was to go into effect the morning after notice of readiness to receive cargo, such notice to be given before 12 o'clock of the preceding day; that 14 lay-days should be allowed, "Sundays and holidays excepted;" and that the charterers might cancel the contract if the vessel was not ready on or before Christmas day. *Held* that, although this latter provision seemed to make Christmas day available for the purpose of giving notice, yet as the provision for notice of readiness was evidently intended to enable the charterers to get the cargo together and engage laborers for loading, a notice given on that day was inoperative, and the lay-days did not commence until the second day thereafter.

2. SAME—GUARANTY OF INSURANCE—DECK CARGO—CATTLE.

A printed charter-party gave the charterers a right to put on board a full cargo of cotton, or any lawful merchandise, using all spaces where cargo was usually carried, and the owners guaranteed first-class insurance. On the margin of the instrument was written a clause giving the charterers a right to ship cattle on the deck. *Held*, that the charterers could not recover freight for cattle which they would have shipped, but did not because insurance was not obtainable; it appearing that insurance was refused for reasons not calling in question the vessel's seaworthiness, and that shippers did not usually construe the guaranty of insurance as covering deck cargo, especially cattle, unless expressly so provided.

In Admiralty. Libel by Myers & Co. against the steamer Unionist upon a charter-party.

The facts fully appear in the following statement by HUGHES, J.:

The conceded facts of this case are as follows: On the 12th day of September, 1889, the owners of this steamer, through their agents, Messrs. Simpson, Spence & Young, of New York, chartered the steamer to the libelants, Myers & Co., of Norfolk. The charter, or a copy thereof, is annexed to the libel. In the charter the steamer was designated as "trading," and it was provided that she should take on "a full and complete cargo of cotton ^{and} or other lawful merchandise," at Norfolk, Newport News, or West Point, and carry the same to Liverpool or Bremen. The charter in its printed body provided also as follows:

"The entire carrying capacity of the vessel, including cross-bunkers, space under bridge-deck, *lazarette*, deck-houses, and other spaces where steamer has usually carried cargo, or would carry if loaded on rates, shall be placed at disposal of charterers, exclusive of any space which may be needed for the crew, cabin stores, and coal for the voyage; and owners guaranty not to occupy more space for coals below than was occupied on previous voyages from United States to Europe when steamer was loaded with cotton for their benefit, and no goods or merchandise whatever shall be received on board, otherwise than from charterers or their agents, without their consent in writing. * * * If the steamer be not sooner dispatched, fourteen running days, Sundays and holidays excepted, shall be allowed the charterers for loading, such days not to commence before 20th November, unless with charterers' consent. * * * In case the steamer is longer detained by the charterers or their agents, demurrage shall be paid by them at the rate of sixpence per net register ton per day for every like day detained, and it shall in all cases be settled with the captain before the steamer leaves the port of loading, and no claim shall be valid if made after that time; or, if steamer is sooner dispatched, she shall pay the charterers or their agents dispatch money at the rate of ten pounds per day for each and every day so saved. * * * It is agreed that this charter shall not commence until the morning after the steamer is ready to receive cargo at the place of loading, all her holds being cleared and passed for grain, and customary notice thereof is given to the charterers or their agents, and such notice must be given before twelve o'clock on the day the steamer is ready; and if, upon arrival, the steamer is ready for cargo, then lay-days shall commence the morning after the entry is made at the custom-house. Should the steamer not be ready in all respects for cargo at her first loading port for entering on this charter on or before 25th December, 1889, the charterers may cancel the charter. * * * First-class insurance is hereby guaranteed by owners of the steamer."

Upon the margin of the policy this clause appeared in writing:

"Charterers to have the option of shipping cattle on deck, cost of fittings to be paid by them, necessary food and attendance on cattle to be provided by shippers; steamer to supply requisite fresh water," etc.

The Unionist was a steel steamer, built in 1888. She was a small steamer, being only 1,403 tons, but she was of the first class. After completing her "trading" engagements, she arrived in Hampton Roads in the afternoon of December 23d, and, under telegraphic orders from the libelants, came that same day to Norfolk. Early in the morning of December 24th the master reported the ship ready to receive cargo, and about noon of the same day announced that she had entered at the custom-house, and that her lay-days would commence on the morning of the 26th. At 8 P. M. of that day the libelants returned the notice,

saying that they did not "consider the Unionist ready for entering on her charter." Immediately the master asked the libelants to state their reasons, and announced that the vessel was ready to take in cargo at all hatches, and that she had been entered at the custom-house. He added, ship's ballast would all be out by morning. In the morning of December 25th, at 9 A. M., the master reported that the ship was free of ballast, and all holds cleared, and that the vessel was ready to receive any description of cargo, and that lay-days would commence on December 26th. On December 26th the master again wrote the libelants, asking for instructions as to loading berth, and later in the day again wrote them on the same subject. The libelants then asked for some delay to consider the subject, and finally, on December 27th, indicated a loading berth for the steamer, to which the Unionist at once proceeded.

Sharp & Hughes, for libelants.

Butler, Stillman & Hubbard, for respondents.

HUGHES, J., (*after stating the facts.*) The first claim of charterers is of £10 sterling per day for two days alleged to have been saved from the 14 allowed them by the charter for loading, which days were to commence on the morning after the steamer's readiness to receive cargo. The notice of readiness was given on the 25th December, a general holiday; and the contention of libelants is that, this being *dies non*, the legal day of readiness was the 26th December; that the loading days did not commence until the 27th; that hence they had, excluding Sundays and holidays, until the evening of the 13th January for the loading; and that, inasmuch as this was completed on the evening of the 11th January, they are entitled to dispatch money for two days. The respondent contends that, although the charter provides that loading need not be done on holidays, yet it contains no provision that notices may not be given on holidays.

He contends, further, that inasmuch as the charter provides that, "should the steamer not be ready for cargo on or before the 25th December, 1889, the charterers may cancel the charter," this instrument itself made the 25th December an operative day for the purpose of the notice. There is undoubtedly some force in this latter contention; but it must be considered that the object of giving charterers one day to begin the loading of the vessel after notice of readiness is received is to afford them time to get their cargo together, and to engage laborers to do the work of loading. Respondent's contention becomes inadmissible in the present case. Of all days in the year, Christmas is the one in which a charterer would be most unable to make preparation for loading a ship on the day following. The reason of the rule giving a day for preparation applies, therefore, more imperatively in the present than in other cases, and I think the libelants are entitled to two days of dispatch money.

The other claim of libelants is for £273. 15s. as an amount that would have accrued to them as freight on a hundred head of cattle which the charter gave them an option to ship, but which they were unable to

ship, because of their inability to obtain the first-class insurance on cattle which they claim was guaranteed to them by a clause of the charter. The charter-party itself is in form a printed sheet, gotten up and used by the charterers in their business in Norfolk. This printed formula contemplates and provides for only such cargo as is carried in the spaces of the ship where she "has usually carried cargo," and this printed sheet embraces a clause in print providing that "first-class insurance is guaranteed by owners of the steamer." Cattle cannot be shipped in the "spaces where the steamer has usually carried cargo." They can be put nowhere except on deck, on which sheds of wood have to be constructed for their comfort and safety. On a margin of the copy of the printed formula which became the contract between charterers and ship-owners in this case, there was written with pen and ink a clause giving charterers the option of shipping cattle on deck, under conditions which need not be recited. It is proved that several insurance companies in the United States and Canada were applied to for policies on cattle to be shipped by charterers on this ship on this voyage in the depth of winter, and that all of them refused for reasons which did not bring in question the seaworthiness of the steamer or allege any distrust of her on any ground. The testimony also shows that shippers and experts in such matters do not regard the usual guaranty of first-class insurance embodied in charter-parties as including deck cargo, especially cattle, unless express language is employed to that effect. It is evident to me from the proofs in this case, and the circumstances under which this contract was made, that the minds of the parties to it did not meet in respect to insurance of a deck cargo of cattle, and that it would be inequitable and unreasonable for the court to hold the ship-owners responsible for the failure of the charterers to obtain first-class insurance upon a deck-load of cattle for a voyage across the Atlantic ocean in mid-winter. I will sign a decree allowing two days of dispatch money to libelants, and rejecting their claim of compensation for the loss of freight on cattle which they had the option of shipping.

THE PILOT.

UNITED STATES v. THE PILOT.

(District Court, D. Washington, N. D. October 30, 1891.)

FOREIGN WATERS—TOWAGE—FOREIGN TUG-BOATS.

The boundary between the United States and Great Britain in the Strait of Juan de Fuca is fixed by treaty on a line following the middle of the strait, the northern part of the strait being British water, the southern, American; but by the same treaty the entire strait is free and open to both countries for purposes of navigation. *Held*, that no part of the strait is "foreign waters," within Rev. St. U. S. § 4370, which excepts, from the penalty therein denounced against foreign tug-boats towing United States vessels between domestic ports, cases where the towing is in whole or in part on foreign waters.

In Admiralty. On libel to enforce a penalty.

P. H. Winston, U. S. Atty.

Burke, Shepard & Woods, for claimant.

HANFORD, J. This is a case of seizure to enforce a penalty imposed by section 4370, Rev. St. U. S. The facts are as follows: The Pilot is a British steam-tug, engaged in the business of towing upon the Strait of Juan de Fuca and other waters of this state and British Columbia. The bark Valley Forge is an American enrolled vessel of 1,286 tons burden, engaged in coastwise trade; and, being bound on a voyage from San Francisco to Port Angeles, entered the strait without assistance, and was beating against a headwind towards her port and destination. The Pilot found her on the north side of the strait, and within three miles of the shore of Vancouver island, near Port San Juan, where she had sailed upon her port tack, and towed her across the strait to Port Angeles, pursuant to a contract made with her master at the time to tow the Valley Forge first to Port Angeles; thence to Departure bay, in British Columbia, to load; and thence to sea. The Valley Forge remained at Port Angeles while her master went to the custom-house at Port Townsend for the purpose of exchanging her certificate of enrollment for a register, to entitle her to clear for a foreign port, and she was afterwards towed from Port Angeles to Departure bay by a British tug, under the contract made with the master of the Pilot. Section 4370, Rev. St., is the same as the twenty-first section of the act of July 18, 1866, entitled "An act to prevent smuggling, and for other purposes." 14 St. at Large, 183, as amended by the act of 1867, found on page 410 of the same volume. It reads as follows:

"Sec. 4370. All steam tug-boats, not of the United States, found employed in towing documented vessels of the United States plying from one port or place in the same to another, shall be liable to a penalty of fifty cents per ton on the measurement of every such vessel so towed by them respectively, which sum may be recovered by way of libel or suit. This section shall not apply to any case where the towing in whole or in part is within or upon foreign waters."

Originally the section contained no exceptions. The last clause was added by the amendatory act. The exact question now presented for decision is this: Does the mere fact that a vessel, in making a passage of the strait, crosses the international boundary line, legalize a towage service which would be a violation of section 4370 if performed wholly on the American side? This strait is an arm of the sea, wholly within the jurisdiction of the United States and Great Britain, as part of the territory of the two countries, and is not, like the open ocean, a free highway for the ships of all nations. By treaty stipulations the boundary between the two countries is upon a line following the middle of the strait, and all that part of it north of the middle is British water, and all south of the line is American water. But by the treaty the entire strait is free and open to both countries for purposes of navigation, so that the vessels of each are free to sail anywhere in the strait, upon either side of the line. It is my opinion that, while this treaty remains, no part of the strait can be regarded as foreign waters to either American or British vessels, (*The Apollon*, 9 Wheat. 362;) and further, that the term "foreign waters," as used in section 4370, means water under the exclusive dominion of a foreign government for all purposes. My conclusion is that foreign tugs are not privileged to tow American vessels bound from one American port to another on either side of the strait, and that a penalty has been incurred by the tug Pilot as charged in the libel in this case.

THE AGUAN.¹

HONDURAS & C. A. S. S. Co. v. \$9,500 IN SILVER SPECIE.

(District Court, S. D. New York. November 19, 1891.)

1. SALVAGE—MASTER AS SALVOR.

In disaster the ship-master is agent of the cargo as well as of the ship, and he is but fulfilling his legal duty in providing for the safety of such of the cargo as can be saved, and is not entitled to salvage compensation therefor.

2. SAME—SEAMEN AS SALVORS.

Seamen who assist in saving cargo after the ship is wrecked, and the voyage broken up and the crew discharged, are entitled to extra compensation.

3. SAME—STATEMENT—STRANDING.

A steam-ship ran aground on a well-known shoal, in clear weather, at sea, and became a total loss. The passengers and 81 of the crew were discharged, and sent by a small steamer to the port of destination. The master retained seven of the crew to guard \$9,500 specie on board the vessel, and subsequently removed it from her to a small island, from which they finally brought it in a small boat to a place of safety. The work was not dangerous or arduous. Held that, apart from his presumptive negligence in stranding the vessel, the master was not entitled to salvage, but that compensation of \$1,000 should be paid to the seven sailors.

In Admiralty. Suit to recover salvage.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

Wheeler, Cortis & Godkin, for libelants.

Butler, Stillman & Hubbard and *Mr. Mynderse*, for claimants.

BROWN, J. At about 3 o'clock in the morning of March 26, 1891, the steamer *Aguan*, on a voyage from New York to Greytown, Central America, stranded on the outer shoals of Roncador island, about 6 miles from that island, and 300 miles from Greytown. The island of Roncador has no inhabitants except fishermen, who have huts there for a part of the year. Forty passengers, with provisions and baggage, were landed at Roncador on the same day, and the chief officer, with 4 men, was dispatched in a boat to Corn island, some 200 miles distant, for the small steamer *Presidente Carazo*, belonging to one of the passengers on board, which arrived on the 31st day of March, and took the passengers and 31 of the crew, and the baggage, to Greytown. All hope of saving the *Aguan* had been abandoned, and, as the owner of the small steamer refused to take more than the passengers, crew, and baggage, the master, with 7 of the crew, which in all numbered 39, remained for the purpose of guarding the specie on board until the *Carazo*, which promised to return at once after landing the passengers at Greytown, should come back, and take them and the specie thither. On the 4th of April, the *Carazo* not having yet returned, and the weather becoming somewhat threatening, and the steamer seeming likely to break up soon, the specie, which was in 3 casks, and weighed about 800 pounds, was removed to the island, about 6 miles distant, with the assistance of a fishing boat and schooner. On the 7th of April, nothing being heard from the *Carazo*, the master and the remaining 7 of the crew started for Greytown in a small two-masted sail-boat, taken from the ship, carrying the specie with them. They arrived at Greytown on the 8th, put the specie on the libellant's steamer *Hindoo*, a sister ship, notified the consignee at Greytown, and asked one-third the amount as salvage compensation. This being refused, the specie was brought to New York, and the present libel filed by the owners of the *Hindoo* and *Aguan*, and by the master and seamen who remained by the ship.

Without considering the question of the presumptive negligence of the master in running his vessel upon a well-known shoal in fine weather, the master is not entitled to salvage compensation, for the reason that the proofs do not show any such extraordinary circumstances, or any such service outside of the line of his duty, as to entitle him to a salvage reward. In disaster the master is the agent and representative of the cargo, as well as of the ship, as respects all matters connected with its safety and preservation, so far as preservation is possible. In cases of stranding, it is his duty to provide for the safety of such of the cargo as can be saved. In arranging for the return of the *Presidente Carazo* from Greytown to take the specie which she had refused to take upon her first trip, the master was only fulfilling his legal duty. The arrangement was a simple and proper one, upon which he had a right to rely. It did not apparently involve any danger, and but small inconvenience. Why the *Carazo* did not return, we are not told. The agent of the libel-

ant company, who went to Greytown in her, and who verified the libel in this case, if he knew the reason, has not disclosed it. But that is not, perhaps, material. Though her failure to come back entailed much additional care and labor, it did not change the master's duty as respects the specie.

As respects the seamen, the case is somewhat different. All hope of saving the ship or of continuing the voyage had been abandoned before the Carazo sailed away. The engagement of the sailors for the ship and the voyage was broken up. Thirty-one of the crew were sent to Greytown, evidently discharged, and the seven who remained should be treated, I think, not as seamen remaining on wages, but as any other persons would be treated who were secured by the master for the purpose of guarding and preserving so much of the cargo as was practicable, after the abandonment of the ship, until the Carazo returned. That seamen after their discharge may be allowed compensation as salvors, where the voyage is broken up, has been repeatedly adjudicated. 3 Kent, Comm. (12th Ed.) 196; *The Blaireau*, 2 Cranch, 240, 269; *The Umattilla*, 29 Fed. Rep. 259; *The Mary Hale*, Marv. Wreck & Salv. 161; *The Holder Borden*, 1 Spr. 144; *The Warrior*, Lush. 476. The old sea laws, while emphasizing the duty of the seamen to stick by the ship, and to save as much as possible of ship or cargo by all reasonable exertions, provide also for extra compensation to seamen over and above their wages, though not discharged, when they have performed this duty. Article 3 of the Rolle of Oleran says: "The master shall allow them a reasonable consideration to carry them home." The ordinance of Philip II. of Spain gave them wages "and a reward out of the goods saved." The laws of the Hanse Towns (article 44) says: "The master ought to reward and satisfy them." The marine ordinance of Louis XIV. (book 3, tit. 4, art. 9) says: "Whatever way they be hired, they shall be over and above paid for the time they are employed in saving the wreck and goods." 2 Valrog. Code Com. § 501; 3 Desjard. Droit Mar. § 716; and see *Reed v. Hussey*, Blatchf. & H. 525, 543. That the seamen who remained should receive some extra compensation under circumstances like the present seems to me not only equitable, and authorized by the maritime law, but sustained by sound policy, as an incentive to faithful conduct. I do not find, however, that the actual service was arduous, and the sum of \$1,000 will, I think, be a fair and liberal compensation, for which a decree may be entered. with costs.

THE EXPRESS.¹MAYOR, ETC., OF CITY OF NEW YORK *v.* THE EXPRESS.

(District Court, S. D. New York. November 9, 1891.)

1. COLLISION—VESSEL AT PIER—FOG—SIGNALS.

A vessel moored for the night, according to her custom, along-side a well-known dock, and not projecting beyond the wharf into the channel, and run into by a steamer passing in the fog, is not in fault because she had no lights set, and sounded no signals.

2. SAME—NAVIGATION IN FOG—NARROW CHANNEL—SOUNDINGS.

The Express, going east, met a thick fog at night at Little Hell Gate, and continued her navigation in a narrow and winding channel, without using the lead, until she ran into the F. E., tied up, as usual, at a well-known pier on North Brothers' island. A fog-bell on the island, near the course of the Express, was rung frequently. *Held*, that the E. was solely to blame for the collision, it being her duty to use the lead.

In Admiralty. Suit to recover damages caused by collision.

Wm. H. Clark, Corp. Counsel, and *James M. Ward*, for libellant.

Carpenter & Mosher, for claimant.

BROWN, J. The libellant's steam-boat Franklin Edson, which for the past two years has been used in the service of the health department, under the provisions of law for the transportation of persons having contagious diseases, was in the habit of tying up at night on the southerly side of the pier extending from the northerly side of North Brothers island about 275 feet into the water towards the Port Morris shore. A sufficient depth of water had been obtained there by dredging, and towards evening on the 16th of February, 1891, the Edson returned to her usual mooring place along the southerly side of the dock, at about 5 o'clock P. M., and was there made fast, with her head towards the shore, and her stern a few feet inside of the outer end of the pier. At a little past 7 o'clock the steam propeller Express, loaded with 19 freight cars, and with a float attached to her port side loaded with 12 other freight cars, while making her way to the eastward on one of her regular trips from New York to Wilson's Point, near Norwalk, Conn., in a dense fog, ran up against the pier just ahead of where the Edson lay, and carried her float upon and into the Edson, causing the latter great damage, to recover which the above libel was filed. The Express was accustomed to make daily trips to Wilson's Point, leaving New York usually at about 6 o'clock P. M. When she started upon this trip the weather was smoky, but without indications of thick fog. On arriving near the mouth of Little Hell Gate, she ran suddenly into a bank of fog so thick that the spindle light on the Sunken Meadow could not be seen. She thereupon hauled a little to the southward, to avoid the shoals there, and afterwards, on hearing the bell and getting a glimmer of the light from North Brothers island, for a moment, nearly ahead,

¹Reported by Edward G. Benedict, Esq., of the New York bar.

she changed her course, so as to bring the light about two points on her starboard bow. She continued on that course slowly, and, as her pilot supposed, towards the main ship channel between the North Brothers island and the Port Morris shore, till the Edson was seen looming through the dense fog only 100 or 150 feet distant, — too late to enable the Express, by the immediate backing of her engines, to prevent collision.

There is no evidence on the part of the libelant disputing the evidence of the claimant that from the time the fog was encountered there was no suitable place either to anchor or to moor short of Port Morris, and I therefore assume that to be the fact. The evidence also shows that the engines and twin screws of the Express were worked slowly, under one bell only, with frequent stops; that the tide was ebb, and that the usual course of the Express against the ebb-tide was by the Port Morris channel, and not between the Two Brothers. The master states that he would have gone into the Port Morris dock if he had made it, but that he was not specially endeavoring to make the Port Morris shore. No lead was thrown by the Express, and no one was at the time of collision on board the Edson, nor were any signals given from her. The Express was sounding her fog-whistle, as required by law, at short intervals. The respondent contends that under such circumstances no blame is attributable to the Express, and that the Edson was in fault for not having persons on board to answer the fog-whistle of vessels approaching in the fog in a channel where navigation is difficult.

I cannot sustain the defense of inevitable accident, nor absolve the Express from blame. The master was familiar with the winding channel, the projecting pier, the habit of the Edson to moor along-side the pier at night, the course of the tides, and the position of the light and bell on North Brothers island. He was not in fact proposing to come to anchor or to moor as soon as possible, but to pursue his navigation through the fog. In choosing this alternative, he took the risk of injuring other vessels properly moored at the docks. I have little doubt that he ran upon this dock because he did not intend to make the Port Morris shore. In thick fog, where from any cause there is doubt as to one's position, the obligation to use the lead when practicable is well settled, (*The Montana*, 17 Fed. Rep. 377; *The City of Para*, 44 Fed. Rep. 689;) and, as the evidence showed, is often acted on in going around the North Brothers. It is urged that the use of the lead would have been impracticable, owing to the great depth of water, except so near the pier as to be of no use. But the course of the Express in reaching the point where she came up against the dock contradicts, as it seems to me, this contention. The master says that he did not change his helm after getting the North Brothers light two points on his starboard bow, so that the Express, in order to come up to the dock at nearly a right angle, as she did, must, for some time before, have been in the shoal water off the western side of the island, so that the lead, if used, would have apprised her of her position in ample time to have avoided this accident. It is not improbable that the master mistook the distance of the bell and light, and supposed the use of the lead unnecessary. The evidence of Joyce leaves

no doubt that the bell was rung very often, and was perfectly audible. I am not satisfied with the meager recognition of the bell that appears in the testimony in behalf of the *Express*. If not heard or noticed more than appears, there was neglect in attending to it.

I do not think the *Edson* is within the line of cases that require a light or fog-signals. In all the cases cited by the claimant, the anchored vessel held in fault for the lack of signals in a fog has not been a vessel moored at a dock at her usual place, but one lying at anchor in or near a fair way, where vessels were likely to pass, and were to be expected. It is impossible to say that any vessel, in navigating on either side of North Brothers, was to be expected to run up against the dock where the *Edson* lay. The *Edson* was not off the end of the dock, but on its side, and wholly within its exterior line, in a place where sufficient depth of water for her had been obtained only by means of dredging out the shoal bottom. As the *Edson* had no reason to expect any vessel there, she was under no more obligation to give signals to other vessels, or to keep persons on board of her for their benefit, than was the owner of the dock for the purpose of protecting his wharf.

Decree for the libellant, with order of reference to compute the damages.

THE COLUMBIA.¹

BOYER *et al.* v. THE COLUMBIA.

(District Court, S. D. New York. November 10, 1891.)

COLLISION—VESSEL AT PIER—WIND—INEVITABLE ACCIDENT—INATTENTION.

The steam elevator C., having a large surface exposed to the wind, in attempting to moor along-side certain barges at Twenty-Fourth street and North river, struck and sunk one of them. The elevator claimed that the collision was an inevitable accident, due to a sudden gust of wind. The evidence showed that the wind was strong on the New York side; that the elevator left the less exposed side of the river and crossed, at Hoboken, where the wind in the lee was light, with the wind nearly astern, to the more exposed side, where the barges lay, and where especial care in a strong wind was necessary. *Held* that, though inevitable accident may arise from sudden gusts of wind, the evidence showed that this collision arose from lack of sufficient caution, and inattention of the pilot, and that the C. was liable.

In Admiralty. Suit to recover damages caused by collision.

Carpenter & Mosher, for libelants.

Platt & Bowers, for claimant.

BROWN, J. In the afternoon of April 23, 1891, the libelants' scow barge *Nestor*, with about 450 tons of fine sugar on board, was lying in the slip between Twenty-Third and Twenty-Fourth streets, North river, moored along-side of two lighters, which were next outside of, and moored to, the steamer *Ethopia*, which lay on the southerly side of the

¹Reported by Edward G. Benedict, Esq., of the New York bar.

Twenty-Fourth street pier. The stern of the lighter was a few feet inside of the outer end of the pier, and she was waiting to have her cargo discharged upon the steam-ship. While thus moored, she was run into and sunk, not far from half past 2 P. M.; by the steam elevator Columbia, as she came into the slip for the purpose of discharging the cargoes of the lighters into the steamer. The elevator had come from Hoboken, crossing the river in the ebb-tide till quite near the pier off Twentieth street, when she headed directly up river for the slip. The claimant contends that the damage is to be ascribed to inevitable accident, on the ground that the elevator, though handled with all proper care, was struck by a sudden gust of wind after she had stopped off Twenty-Third street, and was thereby carried against the libelants' barge, despite all efforts to prevent it. No doubt cases may arise of inevitable accident produced by gusts of wind, (*The Lady Pike*, 2 Biss. 144;) but to admit of that defense it must appear that the danger was not to be apprehended, or, if it was liable to arise, that a proper watch was kept beforehand, and seasonable precaution taken against such a liability, and that reasonable skill was used when danger arose. *Union St. Co. v. New York*, 24 How. 313; *The Morning Light*, 2 Wall. 550; *The Mabey*, 14 Wall. 204. The facts in the present case fall short of these requirements.

There is no little conflict in the evidence as regards the force of the wind on the easterly side of the river at the time of the Columbia's approach and before. All of the Columbia's witnesses say that when the elevator left Hoboken the wind was light,—not more than three or four miles an hour. Nearly all of them speak of a gust of wind that struck the elevator at or near Twenty-Third street, and testify that the wind increased rapidly after the accident. Several of her witnesses, however, state that from the time they reached mid-river the wind was perceptibly increasing; several estimate the wind at 9 or 10 miles an hour when they reached Twentieth street; and one or two leave it doubtful whether at Twenty-Third street there was any sudden gust, or more than a gradual increase of the wind's force. The libelants' witnesses all deny that at the pier at Twenty-Fourth street there was any sudden gust of wind of any importance at the time of the accident. They assert that the breeze was pretty steady all the afternoon, increasing somewhat towards 4 o'clock. Several of these witnesses mention circumstances of their employment tending to corroborate their testimony; while the record of the weather bureau shows that upon the top of the Equitable building, about two miles from the place of the accident, the wind was from the south-west, and that between 12 and 1 o'clock P. M. it blew at the rate of about 12 miles per hour; and from 1 to 4 steady at about the rate of 19 miles per hour, diminishing at 4:30, when it changed to the north-west. The wind being from the south-west, which is about three points off the Hoboken shore, and the Columbia being in the lee of the buildings there, the wind would naturally be less felt at the start; while at the bend of the river at Twenty-Fourth street, on the New York side, with nothing below as a shelter, a south-west wind is felt in its greatest force. The need of special caution at that place is well understood.

The Columbia in crossing from Hoboken to Twentieth street would moreover have a south-west wind almost directly astern, and her pilot, who was in a closed pilot-house, and did not come out till just before the accident, naturally failed to observe its increasing force as he got out into the river. These proofs leave no doubt in my mind that when the Columbia approached her destination at Twenty-Fourth street the wind was much stronger than her officers in their testimony admit; and that on the east side of the river it was not less than 12 or 15 miles an hour, and that, being astern, its force was not appreciated by the pilot until the engines were stopped, and he came out on deck, shortly before reaching the slip. The Columbia, although one of the best and most powerful of the floating elevators in the harbor, had also a greater surface exposed to the wind, having a square-sided tower about 60 feet high and 25 feet across, a great surface which made her unmanagable in a high wind, and required special prudence in handling her in a fresh breeze. Her pilot stated that in a wind blowing at the rate of 10 miles an hour, or upwards, he should not have deemed it prudent to attempt to make a mooring near the scows, but should have gone first to the outer end of the pier. As I have no doubt that the wind on the New York side of the river was much above that rate, it follows that the attempt to make a landing inside the slip, near the boats, was imprudent and unjustifiable. It arose, I have no doubt, from the facts above stated, that the wind was much less at Hoboken, and because its force on the New York side was not appreciated, in the absence of any watch or precaution in regard to it, until it became necessary to stop to withstand its force. The sudden apparent increase in the wind when the pilot came out on deck would then doubtless seem like a sudden gust. I am not satisfied that there was any such change as might not have been foreseen and guarded against had proper and seasonable attention been given to it.

Decree for libelants, with costs.

THE INTREPID.¹

NASSAU FERRY CO. v. THE INTREPID.

(District Court, S. D. New York. November 11, 1891.)

1. COLLISION—STEAM-VESSELS CROSSING—KNOWLEDGE BY ONE OF SAGGING COURSE OF THE OTHER—DUTY TO REVERSE.

The tug I., with two heavy floats along-side, was proceeding at night, at full speed, against the ebb-tide, up the East river. Her floats extended 100 feet ahead of her. They had no bow-lights, such as similar boats mostly carry, but carried vertical lights 218 feet aft, near their sterns. When the tow was about off South Fifth street, Brooklyn, the ferry-boat J. started from her slip on the Brooklyn side of the river, at full speed, and with her helm a-port, as was her custom on the ebb. When half out of the slip, the green light of the tug came in view, and the pilot of the

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

ferry-boat gave one whistle, and put her helm hard a-port. The tug also gave one whistle, slowed her engines, and in 20 seconds stopped them, and 20 seconds afterwards reversed; but her port float collided with the ferry-boat. The position of the ferry-boat and her course were known to the tug. The ferry-boat was not so well able to judge of the position or distance of the tow. Held, that the tug, having the ferry-boat on her starboard hand, and having exchanged one whistle with her, was bound to keep out of the way, and, knowing the sagging course of the ferry-boat in the ebb-tide, should have reversed at once on giving one whistle, and was in fault for the collision; that the ferry-boat did all that was required of her, and was not liable.

2. SAME—EAST RIVER—IMPRUDENT NAVIGATION.

It is imprudent navigation for a tug, with heavy floats, projecting 100 feet ahead of her, without bow-lights, to go at a speed of 6 knots, within 200 feet of the Brooklyn piers in the East river, towards ferry-slips that are obscured.

In Admiralty. Suit to recover damages caused by collision.

Shipman, Larocque & Choate, for libellant.

Carpenter & Mosher, for respondent.

BROWN, J. A little before 7 o'clock on the evening of February 4, 1891, the libelants' ferry-boat, Jamaica, shortly after leaving her slip at Grand street, Williamsburg, bound for the foot of Houston street, New York, came in collision with the port forward corner of car-float No. 1, which was in tow of the Intrepid, and on her port side, going up the East river, against the ebb-tide. The above libel was filed to recover for damages sustained through the collision. The Intrepid is a powerful tug, which left pier 45, East river, with two car-floats in tow, one upon each side, each 240 feet long, projecting about 100 feet ahead of the tug, and each heavily loaded with 12 freight-cars, and bound for Wilson's point. The tug herself had no cars on her deck. The wind was fresh from the north-west. After passing Corlear's Hook the Intrepid met in succession a ferry-boat and two tows, one after the other, coming down nearly in the middle of the river, or a little towards the New York shore, all of which she passed in the neighborhood of South Seventh street, working her way over to within 200 feet, as her witnesses estimate, of the piers on the Brooklyn shore. She was proceeding at full speed, making about six knots per hour against the tide. The Jamaica, on starting to go out of her slip, had her view to the south near the shore obstructed by buildings on her port hand. When she was about half out of the slip, the green light of the Intrepid came in view, together with three pairs of vertical lights, which the tug and the two floats in tow carried near their sterns. The tug and tow were judged by the pilot of the Jamaica to be off about South Fifth street. The libel and the tug's witnesses state, and the answer admits that position of the tug and tow at the time when the red light of the Jamaica was seen coming out of the slip. A signal of one whistle was immediately exchanged between the two boats. The evidence is conflicting as to which boat gave the signal first, but that is immaterial, as all agree that the answer was given and heard at once. The Jamaica at that time was under the full speed of her engines, but had not acquired her full-speed headway. Her wheel was already to port, and on the exchange of signals was immediately put hard a-port, and so remained until the collision. The In-

trepid, on giving her signal of one whistle, slowed her engines, stopped them about 20 seconds afterwards, and reversed after another interval of about 20 or 30 seconds. The collision happened within 20 or 30 seconds after reversal, about abreast of the north side of the pier at South Second street, about 500 feet below the ferry-boat's point of departure, and about 250 feet from the end of South Second Street pier. The forward port corner of the port float struck the ferry-boat a little aft of amid-ships, and ran under her guard, but soon cleared, and each then went on her way. The tug and tows along-side were in all 99 feet wide. There are ten tugs regularly employed in transporting car-floats along-side up and down the East river, two of which belong to the claimant's line, namely, the Intrepid and the Express. All of these tugs, except the Express, take floats projecting a good deal beyond the tug; and all except the Intrepid and Express carry a white light on each of the projecting boats, on the outside corner in front, to indicate their position and extent, and do not carry vertical lights on the floats along-side, but on the tug only. Such has been their practice for a number of years past. The claimant's boats began running about two years ago. Their floats carry no head-lights, but carry two white vertical lights aft, and those on the Intrepid's two floats were 218 feet aft of the head of the tow, while the vertical lights of the tug were but about 25 feet ahead of those of the floats. The pilot of the Jamaica testified that, had he known that the tug and tow which he saw when he gave one whistle was the Intrepid, and that her boats projected so far ahead of her lights as afterwards appeared, he should not have given one whistle, but should have gone back into his slip. He also testified that he did not know that the tow he saw was that of the Intrepid, or that she was not in the habit of carrying head-lights on her tow, as the other tugs that carry projecting floats along-side are in the habit of doing. Not only from the admission in the answer, but from various circumstances in the evidence, I am satisfied that when the signal of one whistle was exchanged the tug and tow were about off South Fifth street; that is, about 800 or 900 feet from the point of collision. Had the Intrepid reversed when she gave her one whistle to the Jamaica, instead of waiting a considerable time before reversing, the collision would have been avoided, because she not only would have been stopped before reaching the track of the Jamaica, but the Jamaica would also have been from one to two lengths to the westward of the course of the Intrepid before the latter got near her. The Jamaica was on the starboard hand of the Intrepid; both were under way, and on crossing courses. The signals exchanged meant that the Jamaica should go ahead; and it was therefore the duty of the Intrepid to keep out of the way, both by the terms of the nineteenth rule of navigation, as she had the Jamaica on her starboard hand; (*The Narragansett*, 4 Fed. Rep. 244,) and also as a necessary consequence of the signals exchanged between them. The agreement made was a proper one for passing each other. The Intrepid could easily have kept out of the way, and the agreement imported that she would do so. It was her duty to use the proper and necessary means to do so. Any de-

lay in reversing was at her own risk if there was no subsequent fault in the Jamaica. The Intrepid, moreover, had knowledge of the precise place of the Jamaica, of the distance that separated them, and of her own power, and she was bound to make all necessary allowance for the sagging and winding course of the Jamaica under the well-known effects of the ebb-tide on coming out of her slip. *City of Springfield*, 29 Fed. Rep. 923, affirmed, 36 Fed. Rep. 568; *The John S. Darcy*, 29 Fed. Rep. 644, affirmed, 38 Fed. Rep. 619; *The Baltic*, 41 Fed. Rep. 603. Her delay in reversing was, therefore, the immediate cause of collision, and for this she must be held to blame. If the distance of the boats apart at the time the whistles were exchanged was not sufficient to enable the Intrepid to keep out of the way by reversing at once, then the two other faults of the Intrepid would become material, namely, her navigating without necessity so near to the Brooklyn shore, where the view of her was obstructed to the ferry-boat while leaving the slip, and her excessive speed of six knots in that situation, when so heavily loaded with floats; but, as the evidence leaves no doubt that there was plenty of time for the Intrepid to have kept out of the way by reversing at once after the exchange of signals, it is not necessary to dwell on these latter points. *The Titan*, 44 Fed. Rep. 510.

2. I do not think the evidence establishes any fault in the Jamaica. As the Intrepid was obscured from view when the Jamaica started from her slip, the latter was not in fault for starting; and, as she was half or two-thirds out of her slip, under full speed of her engines, and pursuing her usual course, when the Intrepid first became visible close to the Brooklyn shore, she was under no obligation to return to her slip, simply to accommodate the Intrepid, which was on her port hand, if the Intrepid was able to keep out of the way. The immediate exchange of signals in accordance with the rule of the local inspectors determined the obligations of both vessels, namely, that of the Jamaica to go ahead, and that of the Intrepid to reverse at once, if she could not otherwise avoid collision. Although the pilot of the Jamaica might, in the exercise of great prudence, have gone back if he had known that the Intrepid's tow projected as far ahead of her lights, I do not see how this affects the Jamaica with fault in the absence of that knowledge. As the situation appeared to the pilot of the Jamaica, there was plenty of room for her to pass ahead in accordance with the signals exchanged, and that was also the fact. The Jamaica did all that was required of her in putting her wheel at once hard a-port, and, when the projecting tow became first visible, giving another jingle for extra speed. The practice of the Intrepid not to carry head-lights on her tow, which differed from all the other tugs that carried car-floats projecting far ahead, was not brought home to the pilot's knowledge, and no such special habit of the Intrepid affected him with presumptive knowledge of her practice without actual notice of it. As respects the case generally, it should be said that the navigation of the Intrepid at full speed so near the Brooklyn shore with heavy floats projecting so far ahead of her without head-lights, and with tow-lights so far astern, was imprudent navigation.

When the whistles were exchanged the pilot of the *Intrepid* knew precisely all the facts and circumstances affecting the situation, whereas the pilot of the *Jamaica* did not know them. It was the duty of the *Intrepid* in that situation to have exercised corresponding care, and to have reversed at once. Nothing prevented her from doing so. As the *Jamaica* failed in no duty, the blame of the collision must rest wholly upon the *Intrepid*. Decree for libellant, with costs.

THE MIDLAND.¹

JENKS *et al.* v. THE MIDLAND.

(District Court, S. D. New York. November 20, 1891.)

COLLISION—Fog—DUTY TO COME TO STAND-STILL ON HEARING WHISTLES—NAVIGATION NEAR SHORE.

The freight and passenger steam-boat *J.*, when nearing New York in the Hudson river, ran into a fog so thick that vessels could not be seen more than 150 feet distant, and thereupon hauled in towards shore to keep in sight of the piers. The ferry-boat *M.*, bound from Forty-Second street to Weehawken, followed her usual course, in thick fog, of keeping the line of the New York shore to Sixtieth street. Each vessel heard the whistles of the other near at hand, and both stopped their engines, but the *J.* did not reverse at all, and the *M.* not until the other vessel was seen, within 150 feet, and too late to avoid collision. *Held* that, under the circumstances, the navigation of the boats near the shore was not a fault, but in a dense fog, and with fog-signals sounding very near, and nearly ahead, it was the duty of each to come to a stand-still in the water, by reversing as soon as possible, until their respective positions were discovered. As each was in this respect chargeable with the same fault, the damages were divided.

In Admiralty. Suit for damage by collision.

Hyland & Zabriskie, for libellants.

Ashbel Green, (*Herbert E. Kinney*, of counsel,) for claimants.

BROWN, J. About 10 minutes past 9 in the morning of March 13, 1891, during a dense fog, the libellants' passenger and freight steamer *S. A. Jenks*, bound from Sing Sing to New York, while navigating near the New York docks, came in collision, about 150 feet outside of the slip between Forty-Fifth and Forty-Sixth streets, North river, with the ferry-boat *Midland*, which a few minutes before had left her slip at Forty-Second street, bound for the old ferry landing in Weehawken. It was clear weather when the *Jenks* left Sing Sing, and continued so until she reached Ninety-Sixth street, New York, when fog set in. The *Jenks* thereupon hauled in towards the shore, and reduced her speed to 5 or 6 miles per hour, and came down parallel with the piers, about 150 feet distant from them, as her officers estimate, and blowing her fog-whistle, as required. When she arrived off Forty-Ninth street one blast of the whistle was heard on her starboard bow. Her engines were there-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

upon stopped, and so remained until collision, without backing; and signals of two blasts of the whistle were given. The Midland was soon seen through the fog, estimated at only a little over 100 feet distant on the starboard side, coming at nearly right angles, and at considerable speed, as the Jenks' witnesses assert, until she struck with her stem the starboard side of the Jenks, running under her guard, and smashing through the iron plate below, beginning about 20 feet from her stem, and extending about 25 feet aft, bending the knees, and raising a part of the guard. The witnesses for the Jenks contend that for two or three minutes before collision their own headway had been entirely checked, and that the Jenks was remaining still, parallel with the line of the shore. The Midland, on leaving her slip, was pursuing her usual course in thick fog, namely, to keep the line of the New York shore until she reached Sixtieth street. The tide was within two hours of high water. Her pilot testifies that she was brought around to a course of east north-east, parallel with the line of the shore; that he gave fog-signals, as required, and that the whistles of the Jenks were heard on his port bow, whereupon his engine was stopped; that a little afterwards the Jenks was sighted on his port bow, crossing his course from port to starboard at a considerable rate of speed, heading towards the New York shore; that, as soon as she was seen, the Midland reversed, and had got stern-way down river before collision. Her witnesses almost all agree with those of the Jenks that the collision was at nearly right angles.

There is the usual contradiction in the testimony of the witnesses in this case, but, making allowance for the prepossession of the witnesses, the liability to mistake in fog, and taking into account the testimony of disinterested witnesses, I have little doubt that the truth lies somewhat between the extreme claims of either side. It is not credible that the Midland was heading squarely towards the New York shore. There was no reason for such a course, and it is emphatically denied. But, on leaving her slip, she had got several hundred feet out in the river, and, in order to see the line of the piers, as was her custom in fog, she had to haul in towards the shore. Her course, as stated by the pilot, east north-east, was not parallel with the shore, but angling at least two and a half points towards the shore; and I have no doubt that she was headed at least that amount towards the shore at the time when she was first seen from the Jenks, and probably more. All the outside witnesses, on the other hand, state that the Jenks was also headed somewhat towards the shore at the time of the collision. The two whistles which she repeatedly gave to the Midland after hearing her fog-whistle imported that she would pass on that side, and I have little doubt that she was headed in about a couple of points. The evidence of the witnesses from the Stag, moreover, leaves no doubt that the Midland was further out in the river than the Jenks; and the fact that the Jenks' whistles, and the Jenks herself, when seen, were both on the Midland's port bow, further proves that the Midland was heading considerably towards the New York shore, probably as much as four points, at the time of collision. Her intention evidently was to go between the Jenks and the shore. The square

break made through the iron plate of the Jenks, and the comparatively little damage or marks left upon the Jenks aft of that break, satisfy me that the blow was inflicted mainly by the forward motion of the Midland, rather than by the forward motion of the Jenks. But, while the Midland was moving towards the New York shore, she was also moving up river, both by the tide and by her own angle. As the tide was within two hours of high water, there must have been an upward current of at least two knots at the place of collision. The speed of the Jenks through the water could not have been wholly stopped, because there was not sufficient time for this after her wheels had been stopped, without reversing them; and because, if she had been stopped, she would have been moving up river with the tide at the rate of at least two knots, and no one claims that she was moving up at all. It is probable, however, that at the time of the collision she had about come to a stand-still by land, so that she was really moving through the water at the rate of about two knots. She was, therefore, not drifting, and consequently was not bound to ring her bell instead of sounding her fog-whistle. Immediately after the collision, by which the head of the Jenks had been knocked around to port, probably a couple of points, she started up her engines, and went into the slip between Forty-Fifth and Forty-Sixth streets, and in doing so ran against the string-piece of the Forty-Sixth street pier about 300 feet inside of the slip, and made a considerable cut in it, which left a mark showing an angle of about 45 degrees with the side of the pier.

Considering the special circumstances, I am not prepared to hold either vessel blamable as regards the general plan of navigation she adopted. The Jenks, a freight and passenger vessel, surprised by fog, might lawfully, I think, make her way cautiously along the shore, and within sight of it. The ordinary duty to keep near the middle of the river was not applicable; and, though other and swifter ferry-boats may be able to make directly for the Jersey ferry-slips on a diagonal course, (*The Orange*, 46 Fed. Rep. 411,) I cannot say that the practice of the Midland, whose full speed was only six or seven knots an hour, to hold the New York shore until she got to Sixtieth street, before crossing, was unreasonable or blamable; so that for turning towards the New York shore, in order to keep it in sight after leaving the slip, I cannot hold the Midland out of her course, or in fault.

There only remains the question of the management of each in such thick fog, when each was endeavoring to hold the New York shore. The obligation to use adequate caution to avoid collision was incumbent on both alike. The evidence showed that each was previously running at only half speed, and both stopped their engines when the signal of the other was heard. The Midland, however, did not reverse until the Jenks hove in sight, not 150 feet off, and that was too late to avoid running upon the Jenks, though the latter was going not directly towards her, but at nearly right angles to her course. She might and should have reversed when the Jenks' signal was heard near, as it must have been, and she should not have delayed reversing, headed, as she evidently

was, across the Jenks' course, until the Jenks came in sight. The Jenks is also chargeable with the same fault, in that she did not back at all, as she might and should have done when the signals were heard off Forty-Ninth street. She was then going at the rate of five or six knots, at least, probably 7 knots, through the water, and at collision she was moving through the water at the rate of at least two knots. In a fog so dense that vessels cannot be seen more than 150 feet distant, with fog-whistles sounding so near, it was the duty of both to come to a stand-still in the water as soon as possible, until their respective positions were discovered. *The Britannic*, 39 Fed. Rep. 395, 399, and cases there cited. As each in this respect is chargeable with the same fault, the damages and costs are apportioned. A decree, with an order of reference to compute the damages, may be prepared accordingly.

THE HOWARD B. PECK.

ENGSTROM v. THE HOWARD B. PECK.

(District Court, D. Connecticut. November 23, 1891.)

1. COLLISION—VESSEL AT ANCHOR—FAILURE TO SHOW TORCH.

Where a vessel at anchor in the night-time can see the lights of an approaching vessel, there is no reason to suppose that her own lights, properly set and burning brightly, cannot be seen; and hence her failure to display a torch before the approaching vessel collides with her is not such a fault as will entitle the colliding vessel, confessedly in fault, to a division of the damages.

2. SAME—FAILURE TO SHIFT HELM.

The failure of the anchored vessel, which was lying in a tide-way, to put her helm hard over when the collision appeared imminent, is not such a fault as to call for a division of the damages, where it is not shown that the swing to result from such shifting of the helm in the tide-way would have carried her clear of the colliding vessel.

In Admiralty. On libel for collision.

J. Langdon Ward, for libellant.

Samuel Park, for claimant.

SHIPMAN, J. This is a libel *in rem* against the schooner Howard B. Peck to recover damages to the bark Storcken occasioned by a collision in Hampton Roads on March 26, 1891. The owners of the schooner filed a cross-libel. The Swedish bark Storcken reached Hampton Roads, on its way to New York, on March 18, 1891, and anchored in about the middle of the channel, in the same place where the collision occurred. On March 26th she was anchored with a starboard anchor and 45 fathoms of chain. For four days vessels bound northward had encountered head winds, and on March 26th there was an impending easterly storm. The wind was E. N. E., blowing hard. The evening was cloudy, with dark clouds passing by, but without rain or fog, until after

9 o'clock. Lights could be seen distinctly. By that evening, quite a large number of vessels, how many did not appear, had come into Hampton Roads to avoid the coming storm. A number of vessels were anchored near the Storcken. The three-masted schooner Howard B. Peck, on her way from Georgia to New London, came also into the Roads on that evening seeking refuge. She carried three fore and aft sails, three jibs, and a fore stay-sail, all of which were set when she was coming up the bay. She took in her spanker about one and one-third miles from Fortress Monroe. Her lights were properly set and burning. The tide was about half flood, with a probable velocity of three miles per hour, and flowing in a west-south-westerly direction. As she reached the water battery, two large steamers met there, and showed their search-lights just ahead of the Peck. The effect of these electric lights was to temporarily blind the captain of the Peck as to objects beyond the glare of the lights. When the search-light went down, he saw a vessel, close by, on his port bow. The steamers again showed their search-lights, and showed enough to see that there were many lights there. In the language of the captain of the Peck, "there were quantities of stuff in the way there,—vessels or something else." As soon as the vessel which was on his port bow was passed, the captain of the Peck starboarded his wheel, so as to cross the channel. He did not diminish the speed of his vessel, which had wind and tide with her. In a few minutes the mate reported a light on the Peck's starboard bow, and immediately after another light close to the first. The Peck starboarded her wheel, and forthwith struck the bark in the after part of her fore-rigging, carried away her jib-boom, and did other damage, caused her to drag her anchor, passed across her bow, scraped along her starboard side, and anchored astern. After the collision the Peck's captain found that "the place was full of vessels." The collision took place at 7:45 p. m. The Storcken had a proper anchor light, properly set and brightly burning. She was riding at anchor, heading E. N. E. The carpenter was on deck, keeping the anchor watch; the rest of the crew were below. The captain was on deck. He saw the Peck's red and green lights about two points on the Storcken's port bow, and thought that she was about half a mile away. Immediately after the two lights were sighted he saw that the red light was shut in. He looked at the Peck for two or three minutes, and saw that she was about to collide with his vessel. He called the hands to come on deck, but by the time they came the collision had occurred. The Storcken was dragging her anchor; he let go the port anchor, and paid out 45 fathoms of chain. At the turn of the tide he tried to take in chain, but did not accomplish much, and fouled with the four-masted schooner Carrie Bronson, sustaining additional damage. The Storcken was not anchored in a dangerous place. It was rather unusual to be so near the middle of the channel, but that part of the channel, on that day and evening, was full of vessels, which had sought refuge from the coming storm.

Divers grounds of negligence on the part of the Howard B. Peck were claimed by the libellant, but it is not necessary to examine them, be-

cause the claimant conceded that she was in fault for going so fast, and that she should have reduced her speed when she found that it was dangerous to go ahead, and turned to go across the channel. Conceding negligence on the part of the Peck, her counsel invoked the aid of the principle of law that "errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent collision," (*The Sunnyside*, 91 U. S. 208;) and insisted that it was the duty of the Storcken to show a torch, to pay out chain, or shift her helm, in order to avoid the coming collision, and therefore that the damages should be divided. The Storcken could see the lights on board the approaching schooner, and had no reason to suppose that her own lights were invisible or that there was occasion for a torch. The hands were promptly summoned to pay out chain, but the injury happened before they could get on deck, and whether the collision could have been avoided by shifting the helm, after the captain became convinced that the approaching vessel was not apparently intending to change her course, is not certain. If the helm had been shifted from amidships to hard either way, it would have changed the position of the Storcken 50 feet, and she would have swung in an arc of a circle of which the anchor would have been the center and the chain the radius. Whether she could have thereby avoided the Peck, which was rapidly coming down nearly at right angles with her, nobody can tell. Perhaps she could, but a court is not called upon to divide the damages between an anchored vessel, which is acting in accordance with the rules, and is surprised by the approach of a vessel in motion, which is confessedly in fault, upon the surmise that, if the anchored vessel had shifted its helm, it might have escaped the collision. Let there be a decree for the libellant, with costs, and for a reference to a commissioner in regard to the amount of damages, and a dismissal of the cross-libel.

NOBLE v. MASSACHUSETTS BEN. ASS'N.

(Circuit Court, N. D. New York. November 20, 1891.)

1. REMOVAL OF CAUSES—PETITION AND BOND—WHERE TO BE FILED.

The petition and bond for the removal of a cause must be filed in the clerk's office of the county in which the venue is laid, and, if filed in another county where the court is then sitting, it does not effect a removal, though approved by the presiding judge.

2. SAME—APPROVAL BY STATE COURT.

In view of the fact that section 3 of the removal act requires the state court to accept a sufficient petition and bond when filed, and that section 7 empowers the court to which the cause is removable to issue a writ of *certiorari* commanding the state court to return the record to it, a removal may be effected by simply filing the petition and bond, without presenting it to a judge of the state court, or in open court, for approval.

At Law. On motion to remand to the state court.

John E. Pound, for plaintiff.

J. K. Hayward, for defendant.

WALLACE, J. This is a motion by the plaintiff to remand this action to the state court from which it originated. The suit was brought in the supreme court of the state of New York, Niagara county being specified in the complaint as the place of trial. Before the expiration of the time to plead or answer to the complaint, the defendant presented a petition, accompanied by a bond properly conditioned and with good and sufficient security, at a term of the supreme court then in session in the county of Erie, and the justice presiding indorsed his acceptance upon the petition and bond. Thereupon the defendant filed the petition and bond with the clerk of the county of Erie. It is conceded by the plaintiff that the petition and bond were properly presented at the term of the court in session in Erie county; but the plaintiff insists that they should have been filed with the clerk of the county of Niagara; and the motion proceeds solely upon the ground that, because they have not been filed with the clerk of the county of Niagara, the action has not been properly removed. The clerks of the several counties of this state are clerks of the supreme court within their respective counties; and the clerk of the county of Niagara is the custodian of the records in all suits in the supreme court the venue of which is laid in that county. Section 3 of the act of March 3, 1875, as amended by the act of March 3, 1887, provides that "whenever any party entitled to remove any suit * * * may desire to remove such suit from the state court to the circuit court of the United States, he may make and file a petition in such suit in such state court, * * * and shall make and file therewith a bond, with good and sufficient surety," and "it shall then be the duty of said state court to accept said petition and bond, and proceed no further in such suit." The statute requires the bond to be conditioned for the entering by the removing party in such circuit court, on the first day of its then next session, of a copy of the record in such suit. Section 7 provides that if the clerk of

the state court in which any such cause shall be pending shall refuse to any party, applying to remove the same, a copy of the record therein, he shall be deemed guilty of a misdemeanor; and also provides that the circuit court to which the suit shall be removable shall have power to issue a writ of *certiorari* to said state court, commanding said state court to make return of the record in any such cause. It is manifest from these several provisions that the petition and bond which are to be filed in the suit in the state court are to be filed with the clerk of that court, who has the custody of the records in the suit, and can supply a copy of the record to the removing party, or to the circuit court, upon return to a writ of *certiorari*.

It is also apparent that, unless the petition and bond are filed by the removing party in the office of the clerk of the county of the venue, neither the opposite party nor the state court would have any formal or adequate notice of the removal of the suit, and of the consequent inability to proceed further in the state court. The statute does not require any notice of the proceeding to be given by the removing party to the adverse party, except by the filing of the petition and bond; and, in my judgment, notwithstanding recent opinions to the contrary by judges whose views are entitled to great weight, it does not require the removing party to present his petition or bond to a judge, either in vacation or in open court, but is satisfied when he files them with the official custodian of the records of the court. The statute requires him to make and file a petition and bond "in the suit" in the state court. It does not, in terms, require him to make any other presentation of them to the court; and if he moves the consideration of the court, or of a judge, upon them, his rights are not enlarged or abridged by the action of the court or judge. The statute requires the state court to "accept" the petition and bond, and "proceed no further in the suit." As is pointed out by Justice FIELD in *Wilson v. Telegraph Co.*, 34 Fed. Rep. 561, no order of the state court accepting them is contemplated to transfer jurisdiction of the action. As he says:

"The denial by the state court of a petition in no respect affects the jurisdiction of the circuit court of the United States, if the action is removable, and the bond offered such as the statute requires. The statute makes the removal upon the filing of the petition with the necessary bond."

If a state court declines to accept a sufficient bond, and erroneously decides it to be insufficient, the removal is effected nevertheless, and its jurisdiction ceases. *Removal Cases*, 100 U. S. 472. The state court is not prohibited from proceeding further in the suit unless the petition and bond are insufficient to entitle the application to a removal; consequently it is at liberty to decide that the petition does not show a removable cause, or is insufficient upon its face, or that the bond is insufficient. If it decides correctly, it does not lose jurisdiction, and can proceed, but its erroneous decision cannot impair the jurisdiction of the circuit court. *Crehore v. Railroad Co.*, 131 U. S. 243, 9 Sup. Ct. Rep. 692. Certainly it is the decorous practice for the removing party to present his petition and bond to the judge of the state court, and obtain

the formal acceptance of the court. It is also the safer practice, because he can thereby have an opportunity to obviate any remediable objections which are suggested to their sufficiency in case the court refuses to accept them. But this is not indispensable, and when they are brought to the attention of the court in the manner prescribed by the statute, by filing them in the suit, the court can proceed no further, if they are sufficient. When filed, they become a part of the record in the cause, and the court is judicially informed that its power over the cause has been suspended. *Insurance Co. v. Pechner*, 95 U. S. 185. Judge DRUMMOND decided in *Osgood v. Railroad Co.*, 6 Biss. 340, that the bond and petition need not be filed in term-time. "They are to be filed in the suit pending in the state court; that is, with the clerk in the ordinary way in which papers are marked and filed in a suit." This, as it seems to me, is the correct view of the statute, and it is to be regretted that it has been departed from recently in some of the circuit courts. If a petition can only be presented in open court in many cases, the right to a removal will be lost, because it sometimes happens that there is no court in session during the 20 days within which, by the practice in this state, a defendant must plead or answer to the complaint. The defendant in the present case acted upon the theory that he was obliged to find an open session of the state court, and present his petition and bond to the judge presiding for approval and acceptance. There was no court in session in Niagara county, and none in the judicial district, except in Erie county. Having presented his papers to and obtained the approval of the judge presiding, he very naturally handed them to the clerk of the court who was present. This slip in practice, however, cannot be cured, because the papers were not filed with the clerk of the proper court before, or even since, the expiration of the time to plead or answer to the complaint. Being filed only in the clerk's office of Erie county, the petition and bond did not become a part of the record in a suit pending in Niagara county, and such a filing did not convey notice to the adverse party or to the state court that the power to proceed further in the state court was gone. The motion is granted.

LOS ANGELES FARMING & MILLING CO. v. HOFF *et al.*

(Circuit Court, S. D. California. December 7, 1891.)

1. REMOVAL OF CAUSES—FEDERAL QUESTION—PETITION.

A petition for removal, which merely avers that the determination of the controversy involves the construction of the homestead laws of the United States and the validity of a patent from the United States, but fails to allege any facts from which the court may see that such questions do actually arise, is insufficient.

2. SAME—EJECTMENT—MEXICAN GRANTS.

In an ejectment suit removed to a federal court the pleadings showed that plaintiffs had been in possession under a patent issued in confirmation of a Mexican grant for many years before defendants entered. Defendants denied that the lands were subject to grant, and also denied the validity of the confirmation of the grant and of the patent issued thereon, and they claimed the land was subject to homestead entries. *Held*, that these pleadings raise no federal question, to enable the court to retain jurisdiction, for defendants, being strangers to the paramount title, cannot question the validity of plaintiff's patent.

3. SAME—BOUNDARIES.

The issue raised by defendants as to whether the land sued for was included in the grant, as defined by the patent, presents no federal question, as it merely involves the location of boundary lines.

At Law. On motion to remand. Action by the Los Angeles Farming & Milling Company against Hoff and others.

Stephen M. White and Graves, O'Melveney & Shankland, for plaintiff.

H. Bleecker and John D. Pope, for defendants.

Ross, J. This action was commenced on the 24th of October last in the superior court of Los Angeles county. It is an action of ejectment, the complaint being duly verified. In it, it is, among other things, alleged that the plaintiff is, and has been for many years continuously last past, the owner in fee and in the possession of the tract of land upon which the defendants are alleged to have entered on the 8th day of October, 1891, and from which they are alleged to have then ousted the plaintiff, consisting of a part, embracing many thousands of acres, of the Rancho San Fernando, for which rancho it is alleged the government of the United States, on the 8th of January, 1873, duly issued and delivered to one Eulogio F. De Celis a patent, in confirmation of a Mexican grant therefor to him made June 17, 1846, by Pio Pico, then governor of the department of the Californias, and whose title to the portion of the rancho here in controversy it is alleged vested, through various mesne conveyances, in the plaintiff long prior to the defendant's entry upon the premises. It is alleged that the patent so issued has never been set aside or modified in any respect, and that it is still in full force and effect; that for 20 years last past plaintiff and its predecessor in interest have been continuously and uninterruptedly engaged in farming and pasturing the portion of said rancho so owned and possessed by them, and have produced annually large crops of grain thereon, and have erected and maintained at great expense numerous farming stations thereon, and have reduced large areas of said land to a high state of cultivation. It is upon land so patented and possessed that defendants

are alleged to have entered, and from which they are alleged to have ousted the plaintiff. The defendants are many in number, and many of them were sued by fictitious names, their true names being, as alleged, unknown to the plaintiff. In the superior court counsel appeared for "the defendants," without naming any of them, and in their behalf moved that the case be removed to this court, stating in the petition therefor, in addition to the value of the property in dispute, "that the controversy in said action involves the construction of the statutes of the United States respecting the location of homesteads on the public lands thereof, and a determination of the rights of the petitioners, who claim an interest in said lands as *bona fide* holders of homestead locations thereon; and said controversy also involves the determination of the validity of the alleged patent of the United States under which plaintiff claims to own the premises described in the complaint, which patent defendants claim is illegal, fraudulent, null, and void." At the same time the petitioners tendered a bond, with the required conditions, signed by one of the defendants as principal and by two sureties. The bond was accepted by the superior court and the order of removal made. Upon the filing of the papers in this court a motion was made by the plaintiff to remand the case to the state court. Before its hearing an amended petition was filed on behalf of the defendants, and also an answer to the complaint.

The provisions of the act of congress under which it is contended on behalf of the defendants the case was properly removed, and should be retained here, are as follows: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution and laws of the United States;" and "that any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, * * * of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district." 24 U. S. St. at Large, 552. The original petition filed on behalf of the defendants, and on which the order of removal was made, did not state a single fact upon which the court could exercise its judgment and determine whether the suit in question did or did not arise under the laws of the United States. The statement in respect to that matter in that petition was confined solely to the conclusions of the petitioners, which are manifestly insufficient. It is the duty of the parties to state the facts, and the province of the court to declare the conclusions. The defendants cannot raise a federal issue simply by saying that it exists. It is essential that facts be stated from which the court can see that such a question will be involved. In *Trafton v. Nougues*, 4 Sawy. 183, Judge SAWYER, in construing a petition for removal, said:

"The only other allegation is that the right to said mining ground by plaintiff depends upon the laws of congress, and the right or title of defendant to said mining ground aforesaid must also be determined, by the acts of congress under which defendant and petitioner claims title, and that the right of the plaintiff as against the defendant must be determined under the laws of the congress of the United States." This is, in substance, two or three times repeated; but it is only the statement of a legal conclusion, rather than a fact, and a conclusion manifestly founded upon the general idea that all mining claims are so held that an action relating thereto, involving the rights of the parties to the mine, necessarily arise under the acts of congress, within the meaning of the act giving jurisdiction to the national courts,—an erroneous conclusion, if I am right in the views above expressed. These allegations express merely the opinion of the petitioner that the jurisdictional question will arise. In my judgment, such averments are insufficient to justify a transfer or retaining the case now brought here. The precise facts should be stated out of which it is supposed the jurisdictional question will arise, and how it will arise should be pointed out, so that the court can determine for itself whether the case is a proper one for consideration in the national courts."

The amended petition contains, in addition to the statements set forth in the original petition, the following:

"And petitioners say that they do in good faith claim possession and the right of possession to the premises described in plaintiff's complaint by virtue of homestead locations made under the laws of the United States; and they also say that they deny that there ever was any Mexican grant, or any other kind or description of grant, to the lands described in the complaint herein, or any part thereof, to the said Eulogio F. De Celis. They allege that the lands described in the complaint were mission lands at the date of the alleged grant mentioned in the complaint; and they deny that Pio Pico, as constitutional governor, or otherwise, had any right, power, authority, or jurisdiction to grant said lands, or any part thereof. They allege that the decree of confirmation of said pretended grant, under and by virtue of which it is claimed by plaintiff that a patent was issued to said Eulogio F. De Celis, did not cover or include any part of the premises described in the complaint; that said decree of confirmation, only confirmed to said Eulogio F. De Celis fourteen leagues of land, or sixty-two thousand two hundred and sixteen acres; that the lands so confirmed to the said Eulogio F. De Celis were bounded on the north by the Rancho San Francisco, on the west by the Santa Susanna mountains, on the east by the Rancho Miguel, and on the south by the Portezuelo; that said boundaries did not cover or include any part of the lands demanded in the complaint, and that said alleged patent, if the same does cover or include any part of the said lands, is illegal, fraudulent, null, and void."

The answer filed by the defendants is as follows:

"(1) They deny, on information and belief, that there ever was any Mexican grant, or any other kind or description of grant, to the lands described in the complaint herein, or any part thereof, to the said Eulogio F. De Celis. (2) They allege, on information and belief, that the lands described in the complaint were mission lands at the date of said alleged grant; and they deny, on information and belief, that Pio Pico, as constitutional governor or otherwise, had any right, power, authority, or jurisdiction to grant said lands, or any part thereof. (3) They allege, on information and belief, that the decree of confirmation of said pretended grant under and by virtue of which it is alleged in the complaint that a patent was issued to the said Eulogio F. De Celis did not cover or include any part of the premises described in the com-

plaint; that said decree of confirmation only confirmed to said Eulogio F. De Celis fourteen leagues of land, or sixty-two thousand two hundred and sixteen acres; that the lands so confirmed to the said Eulogio F. De Celis were bounded on the north by the Rancho San Francisco, on the west by the Santa Susanna mountains, on the east by the Rancho Miguel, and on the south by the Portezuelo, and that said boundaries did not cover or include any part of the lands demanded in the complaint; and that said alleged patent, if the same does cover or include any part of said lands, is illegal, fraudulent, null, and void. (4) As to whether the said alleged patent to the said Eulogio F. De Celis, as issued, covers or includes all the lands demanded in the complaint, or as to what part or portion of said premises is covered or included in said pretended patent, or whether the premises in possession of defendants, or either of them, are within the boundaries of said alleged patent, defendants have not sufficient information or belief to enable them to answer, and on that ground they deny that said pretended patent covers or includes the said demanded premises. (5) Defendants allege that they, in good faith, claim possession and the right of possession to the premises described in the complaint, in severalty and not jointly, by virtue of homestead locations made under the laws of the United States."

As already observed, the law is that, before this court can be required to retain, or can be justified in retaining, this or any similar suit under its jurisdiction, the record must show a state of facts from which the court can see that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of some law of the United States. By the pleadings of the parties to the present suit the fact stands admitted that at the time of the entry of the defendants upon the premises in question the plaintiff was, and for many years had been, in the actual possession and enjoyment of the land under a patent issued by the government of the United States to the predecessor in interest of the plaintiff, in confirmation of a grant made to him therefor by the Mexican government. True, the defendants deny that any Mexican grant was ever made to De Celis for the land in question, and deny that Pio Pico, as governor of the Californias, had any power to grant it; and they allege that the lands purported to have been granted by him were mission lands; and, further, that the decree of the United States tribunals confirming the grant did not include the lands in dispute. The answer to all of this is that those are matters that do not concern the defendants. The record contains no fact tending to connect them with the title to the property or with the government of the United States. If there is anything well and thoroughly settled with respect to patents issued by this government in confirmation of Mexican grants, it is that they conclusively establish the validity of the grant upon which such patents are based, and the correctness of the location of the land granted, as against strangers to the paramount source of title, as are the defendants. The facts admitted by the pleadings show them to be mere intruders upon the possession of the party holding under the solemn patent issued by the government of the United States in recognition and confirmation of the grant made by Pico to De Celis. As such trespassers, they cannot be heard at all to question the validity of the grant upon which the patent was based, or the correct-

ness of the location of the granted lands by the officers of this government whose duty it was to locate them. *Smelting Co. v. Kemp*, 104 U. S. 645; *French v. Ryan*, 93 U. S. 169; *Marquez v. Frisbie*, 101 U. S. 475; *U. S. v. Atherton*, 102 U. S. 372; *U. S. v. Schurz*, Id. 404; *Patterson v. Tatum*, 3 Sawy. 172; *Chapman v. Quinn*, 56 Cal. 266. Those are questions with which defendants can have nothing to do. In respect to lands so patented it is impossible that any question under the homestead laws of the United States can arise, so long as the patent stands, for those laws apply only to the lands of the government. The issue as to whether or not the lands in controversy in this suit are embraced by the grant to De Celis, as defined in the patent, presents no federal question. It merely involves the location of the boundary lines. These views render it unnecessary to consider the technical objections made to the bond. An order will be entered remanding the case to the state court from which it came, at the cost of the parties bringing it here.

CAMPBELL PRINTING-PRESS & MANUF'G CO. v. MANHATTAN EL. RY. CO.

(Circuit Court, S. D. New York. November 7, 1891.)

EQUITY PRACTICE—MOTION FOR DECREE ON BILL AND ANSWER.

Application for a decree upon bill and answer must be made, not at chambers, but at the equity term after the cause is put upon the calendar.

In Equity. Suit by the Campbell Printing-Press & Manufacturing Company against the Manhattan Elevated Railway Company for infringement of a patent. On motion for an injunction *pendente lite* and for a decree for an accounting. Denied.

The patent in question in this case is No. 401,680, issued April 16, 1889, to Edward S. Boynton, assignor of the complainant, for an improvement in valves for pneumatic pipes or tubes. A motion for a preliminary injunction was denied by Judge LACOMBE, (47 Fed. Rep. 663,) and the defendant then filed its answer, admitting the validity of the patent in suit, title, and infringement, but denying that it had ever made any gains or profits by reason of its unlawful use of the patented devices, and also denying that it had thereby damaged the complainant except nominally. To this answer a general replication was filed; and thereafter complainant moved, upon the bill, answer, replication, and all proceedings had, for an order directing that defendant be enjoined *pendente lite*; and for a decree for an accounting pursuant to the prayer of the bill; and for such other and further relief as to the court might seem just.

Charles De Hart Brower and Philip R. Voorhies, for complainant.

Davies, Short & Townsend and Maynadier & Beach, for defendant.

BROWN, J. The settled practice of this circuit is that, upon a bill and answer, application for judgment must be made, not at chambers, but at

the equity term after the putting of the cause on the calendar. This may be done on short notice, after evidence of such damages has been taken as would warrant sending the cause to the commissioner. Motion denied, without prejudice.

J. L. MOTT IRON-WORKS v. STANDARD MANUF'G CO.

(Circuit Court, W. D. Pennsylvania. December 12, 1891.)

DEPOSITIONS—FILING—STIPULATIONS.

When the parties to an equity cause stipulate that testimony may be taken before any officer or magistrate, qualified to administer oaths, without special appointment by the court as an examiner, the depositions thus taken must be filed of record, as required by equity rule 67, in cases where an examiner is regularly appointed; and the party in whose behalf the testimony was taken has no right to suppress it.

In Equity. Suit by the J. L. Mott Iron-Works against the Standard Manufacturing Company. Heard upon motion to compel the filing of depositions. Motion granted.

Connolly Bros., for the motion.

Francis Forbes, opposed.

REED, J. It appears that, by stipulation between counsel for the parties, it was provided that testimony on behalf of the respective parties might be taken before any officer or magistrate, qualified to administer oaths, without special appointment by the court as an examiner. Under this stipulation notice was given by complainant's counsel that they would take proofs for final hearing in the city of Brooklyn. At the time fixed by the notice, one James Foley was called by the complainant, and examined orally by counsel for both parties, before Richard P. Marle, United States commissioner. A certain form of waste-valve marked by the commissioner was produced by complainant, and used in the examination and cross-examination of the witness. After that hearing, counsel for the parties stipulated that the testimony taken before Mr. Marle might be retained by complainant's counsel until the next hearing, to be fixed by counsel. Subsequently notice was given to defendant's counsel by complainant's counsel that the testimony of Mr. Foley would not be filed. A motion was then made by defendant's counsel for an order compelling the filing of the testimony and the exhibit used in the examination of the witness Foley. Upon the argument it was contended by defendant's counsel that the defendant was entitled to have the testimony and the accompanying exhibit filed, so that, if complainant did not see fit to use them on final hearing, the defendant might avail itself of the testimony, if it desired. On the other hand, complainant took the position that it might use the testimony or not, as it saw fit; and, if defendant desired the testimony, it could call and examine Mr. Foley as its witness. The sixty-seventh equity rule requires

the examiner to return the original deposition to the clerk of the court, to be there filed of record; and this testimony would seem to have been taken under the provisions of that rule, the stipulation of the parties simply providing for the acting of some person competent to administer oaths, as an examiner, in lieu of an appointment by the court of such an examiner. Either party, therefore, would have the right to insist that the testimony (and necessarily the accompanying exhibits) should be filed by the examiner. The rule in suits at law has long been that, when a deposition was filed, either party was entitled to read it, under the rules which might govern as to its competency and relevancy, and that it could not be suppressed by the party at whose instance the witness was examined in chief. *Bennett v. Williams*, 57 Pa. St. 404; *Nussear v. Arnold*, 13 Serg. & R. 323. If this be so in proceedings at law, where nothing is in evidence before the jury until formally offered and admitted, much more would it seem to be the case in proceedings in equity, where there is no formal offer of testimony at the final hearing, where all testimony taken in the case is at once practically in evidence, to be regarded or disregarded by the court, in making its decree, as it shall regard it as competent and relevant or otherwise.

In the case of *Bank v. Forest*, 44 Fed. Rep. 246, an action at law, the commissioner before whom a deposition *de bene esse* had been taken refused to file it under instructions from the counsel of the party on whose behalf the witness had been examined. But the court held that the deposition was not under the control of the party at whose instance it had been taken, and that an order should be made for its filing at the instance of the other party, saying:

"The deposition in the hands of the commissioner is just as much beyond the control of the parties as though the same had been filed in court. When filed in court, the party on whose motion the deposition was taken is not obliged to read the same in evidence unless he chooses, but he cannot prevent the other party from reading it as part of the latter's case. So, when a deposition has been taken before the commissioner, the party moving therein may ignore it,—that is, may refuse to further deal with the deposition on his own behalf; but he cannot deprive the other party, who participated in the taking thereof, of the right to have the deposition returned into court in order that he may adopt it, and read it as part of his evidence."

In the *Case of Rindskopf*, 24 Fed. Rep. 542, the court said, respecting a deposition *de bene esse*, where the party on whose behalf the witness was examined sought to stop the cross-examination, by withdrawing the proceedings for taking the deposition:

"The party who started the taking of it appears to have no right to its custody or to its suppression. The authority taking it appears to represent the court *pro hac vice*, for the purpose of authenticating the testimony of the witness and preserving it for the trial, according to its admissibility and weight. When taken, it is taken in the cause for the use of either party, according to its relevancy and competency. The party making this motion was interested in the testimony that was taken, and seemed to have the right to have it affected by cross-examination, as it might be whether used by one party or the other."

In *Sturgis v. Morse*, 26 Beav. 562, the master of the rolls said:

"I apprehend that evidence given for any defendant is evidence for the whole cause, and that the plaintiff may make use of it, both in argument or comment. I have known it done repeatedly, and I think that the evidence in the cause may be made use of by the plaintiffs against the defendants, and by the defendants against the plaintiffs."

Upon principle and authority, therefore, I think that this testimony, taken in accordance with the stipulation of the parties, should be filed in the clerk's office. The fees of the commissioner should, however, be paid by the defendants before the testimony is filed,—the question as to which party shall ultimately pay them being left for future decision; but at present the defendant, desiring the use of the testimony, should pay the fees. *Frese v. Biedenfeld*, 14 Blatchf. 402. As I understand counsel are ready to file the testimony, or cause it to be filed, if so decided, no order will be made at present.

DODGE v. FULLER *et al.*

(*Circuit Court, W. D. Michigan, S. D. March 27, 1880.*)

MORTGAGES—REDEMPTION BY JUNIOR MORTGAGEE.

Under Comp. Laws Mich. 1871, § 6922, which provides that, in case mortgaged lands are redeemed after sale, the deed given on the sale shall be void and of no effect, a junior mortgagee, who redeems after sale, will be treated as an assignee of the prior mortgage, and entitled to interest at the rate per cent. which that mortgage bore, and not as the holder of an equitable lien for the money paid, with legal interest only.

In Equity. Suit to foreclose a mortgage.

WITHEY, J. The bill in this cause was filed to foreclose a mortgage made by the defendant Hettie Fuller to the complainant's assignee, William P. Hall, and also a certain mortgage executed by the same defendant to John Marley, and from which the complainant was compelled to redeem, for his protection, after a sale had been had upon foreclosure proceedings, instituted by advertisement under the statute. The complainant claims that this redemption put him in position of assignee of the mortgage, and it becomes necessary to determine whether the position taken by complainant is correct, as, if he is entitled to enforce the mortgage as assignee, he will be entitled to interest at the rate per cent. which the mortgage bore, viz., 10 per cent.; while if, on the other hand, he is simply entitled to an equitable lien for the money paid on redemption, he must content himself with the legal rate of interest, as equity cannot go so far as to make a contract for the parties, fixing the rate of interest. There is no question that, had the redemption occurred before any proceedings were had to foreclose the mortgage given to Marley, the complainant would have become in equity the assignee of such mort-

gage. Jones, Mortg. § 1086; *Mattison v. Marks*, 31 Mich. 421. It remains to be determined whether any different rule obtains where proceedings to foreclose have been taken, which have not terminated in a complete foreclosure by the expiration of the equity of redemption. Section 6922, Comp. Law 1871, provides, in effect, that in case of redemption after sale the deed given on the sale shall be void and of no effect. We think that the effect of the redemption by complainant was to annul the sale, and that, as the complainant was under no obligation to pay the mortgage, such payment will not in equity be treated as operating to discharge the same, but that, as in case of redemption before any proceedings to foreclose are taken, he will be treated as assignee of the mortgage lien. It follows that he will be entitled to interest upon this mortgage at the rate of 10 per cent.

Let a decree be entered in accordance with these views.

GLOVER *et al.* v. BOARD OF FLOUR INSPECTORS.

(Circuit Court, E. D. Louisiana. December 13, 1891.)

1. INJUNCTION—DOUBTFUL QUESTION—DEMURRER.

A bill sought to enjoin an inspection of flour about to be made under Laws La. Ex. Sess. 1870, p. 156, upon the ground that the statute was unconstitutional because the inspection provided for was confined to flour coming to New Orleans "for sale," thus discriminating in favor of those who bought for their own use, and in favor of resident merchants, as against merchants residing in other states, contrary to the interstate commerce clause of the federal constitution. *Held*, that as the question was a doubtful one, and it seemed probable that the court would be aided by proof of the manner in which the statute operated, a demurrer to the bill would be overruled.

2. CONSTITUTIONAL LAW—INTERSTATE COMMERCE.

The fact that the statute applied only to the port of New Orleans, and that no penalty was provided for its violation, were matters for the consideration of the legislature alone, and did not go to the question of its validity under the federal constitution.

In Equity. Suit for injunction by Booth F. Glover and others against the board of flour inspectors of New Orleans. On demurrer to the bill. Demurrer overruled.

W. W. Howe, for complainants.

W. H. Rogers, Atty. Gen., for defendants.

BILLINGS, J. The question in this case is presented by a demurrer to an injunction bill in equity. The plaintiffs are dealers in flour. The defendants are inspectors of flour. The bill is aimed at the statute under which the defendants are appointed. The question is whether, under the constitution of the United States, that statute is an unauthorized interference with, or an unwarranted regulation of, interstate and foreign commerce. That statute is found in No. 71 of the Acts of the Extra Session of 1870, at page 156. The statute is entitled "An act to amend and re-enact an act entitled 'An act to establish a board of flour inspect-

ors for the city and port of New Orleans,' approved March 28, 1867, and numbered 159," (Acts 1867, p. 297.) That statute authorized the governor, with the advice and consent of the senate, to appoint a board of flour inspectors of the city and port of New Orleans. They are required to inspect all flour imported or coming to the port of New Orleans for sale, solely for the purpose of ascertaining its purity and soundness, and whether of lawful weight, but not for the purpose of classification and grading. They are to brand each barrel of sound and full-weight flour, and not to brand any other flour; such examination to be on the levee or in the warehouse, as the receiver may elect. It is declared not to be lawful to sell any flour as sound and merchantable unless the same is branded. The fee of the inspector is fixed at two cents per barrel.

The incompleteness of this statute, in that it provides for no examination of flour which shall come into any other port of Louisiana than the city or port of New Orleans, and its inefficiency as a means of securing sound, pure, and full-weight flour, in that it imposes no penalty, and simply makes it "unlawful to sell flour as sound and merchantable unless it has on it the official brand," are manifest. These imperfections could be considered by the legislature of the state alone. The grave objection to the statute is that it applies only to flour imported or coming to the city of New Orleans "for sale." The citizen of Louisiana, bringing in either from another state or from abroad flour for his own use or consumption, need have no inspection,—need pay no tax. The citizen of Missouri, or any other state, who brings in his flour for sale, must have inspection and must pay a tax. Does this statute create such an inequality, either in its terms or by its necessary operation, as brings it within the line of unconstitutional laws, as defined and expounded in the case of *Brimmer v. Rebman*, 138 U. S. 78, 82, 11 Sup. Ct. Rep. 213, and the cases there referred to? This is a question not easy to determine. It is a question most proper for the supreme court. It is possible that the proofs which will be offered as to the manner in which the law was enforced may aid this and the appellate court in the consideration of the case. The circuit judge, when he granted the injunction, seems to have dealt with the question guardedly, and required a bond which will amply protect the defendants until the end of the litigation, in case the injunction should, in the court of last resort, be dissolved, or, if the bond already given is not ample, application may be made for a further bond. The argument for the validity of the statute of 1870 comes from the reservation in the constitution to the states to impose taxes absolutely necessary for the execution of inspection laws, (article 1, § 10, par. 2;) for, while aimed at protecting only the pocket of the community, and not at the protection of its health, and imperfect as to locality, and inefficient, because lacking sanctions or penalties, it is nevertheless, in form and by designation, an inspection law. On the other hand, there is the argument that the statute, in substance and necessary operation, while laying a burden upon interstate commerce, lays it unequally upon the domestic citizen and the importer who is a citizen of another state. On the whole, I am of the opinion that I should overrule the demurrer, and let the stat-

ute, and such facts as the proof may establish as to the necessary operation of the statute, come before the court to be dealt with upon the final hearing and in the appellate court.

In re CENTENNIAL BOARD OF FINANCE.

(Circuit Court, E. D. Pennsylvania. June 29, 1891.)

DISSOLUTION OF CORPORATION—DIVISION OF ASSETS.

"A body corporate," incorporated by act of congress, having certain specified duties to perform, and required by the act "to convert its property into cash, and to divide, after the payment of all liabilities, the remaining assets among the stockholders, will not be relieved from this duty on the ground of the smallness of the dividend or the difficulty of distribution.

In Equity.

Petition of Thomas Cochran, John S. Barbour, Frederick Fraley, William Sellers, Clement M. Biddle, N. Parker Shortridge, James M. Robb, Edward T. Steel, John Wanamaker, Amos R. Little, Thomas H. Dudley, Edwin H. Fitler, William V. McKean, John Baird, Henry D. Welsh, W. W. Justice, Joel J. Bailey, John Cummings, John Gorham, Abram S. Hewitt, William L. Strong, John B. Drake, George Bain, and A. T. Goshorn, officers and directors of the Centennial Board of Finance, setting out that it had fully discharged its duties; that it had on hand two funds, one \$4,960.03, the amount still unclaimed from two dividends, and a general fund, \$8,630.87. This latter fund would pay a dividend of between two and three cents a share. The shares were widely scattered. Prayer that the petitioners be relieved from further custody of the fund, and that the court should appoint a suitable custodian of it, after certain payments had been made. The Centennial Board of Finance was incorporated by act of congress of June 1, 1872, as "a body corporate, to be known by the name of the 'Centennial Board of Finance,'" and section 10 of the act provided:

"That as soon as practicable after the said exhibition shall have been closed it shall be the duty of said corporation to convert its property into cash, and, after the payment of all its liabilities, to divide its remaining assets among its stockholders *pro rata*, in full satisfaction and discharge of its capital stock. And it shall be the duty of the United States Centennial Commission to supervise the closing up of the affairs of the said corporation, to audit its accounts, and submit, in a report to the president of the United States, the financial results of the Centennial Exhibition."

S. S. Hollingsworth and Thos. Dudley, for petitioners.

BUTLER, J. The petitioners are not ordinary trustees, but the officers of a corporation, with active duties to perform as such. The distribution of the moneys in their hands is provided for by the statute out of which the corporation grew. The petitioners are required to divide it

among the stockholders. From the performance of this duty we cannot relieve them. Their situation is rendered embarrassing by the circumstances stated in the petition, and we would relieve them if we had the power to do so, and could thus exercise it with propriety. Relief may probably be found through application to congress.

MERCANTILE TRUST CO. v. MISSOURI, K. & T. RY. CO. *et al.*

FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO. v. EAST LINE & RED RIVER R. CO. *et al.*

(Circuit Court, N. D. Texas. June 6, 1890.)

1. FEDERAL AND STATE COURTS—CONFLICTING JURISDICTION—RAILWAY MORTGAGES—FORECLOSURE.

An interstate railway company purchased a small road lying entirely within a state, and afterwards mortgaged the whole system, including the new purchase. After several years, suit to foreclose was brought in the federal circuit court, and the whole property was placed in the hands of a receiver. In the mean time, by proper proceedings in the state court, the charter of the state road was declared forfeited, and a receiver of its property appointed. This receiver then petitioned the federal court for possession, alleging that the sale of the road was *ultra vires* and void, and that, therefore, the federal court had no jurisdiction. *Held*, that this merely raised the question as to the validity of the sale, which question could properly be tried in the federal court, and hence it would retain possession.

2. SAME.

The fact that the mortgagees of a prior mortgage, which was placed upon the state road before its sale, had intervened in the federal court for the protection and enforcement of their prior lien, was also a sufficient ground for retaining jurisdiction and possession of the road.

3. SAME—FOLLOWING STATE LAWS.

The fact that the state statutes provide for the payment of the corporation's debts after its charter is forfeited, and for the distribution of its assets, does not give the state courts exclusive jurisdiction, since these directions will be complied with in the federal courts.

In Equity. Petition by W. M. Giles, who was appointed receiver of the East Line & Red River Railroad, in a proceeding in the state court of Texas to forfeit its charter, to obtain possession of the road as against receivers appointed by the federal court. Petition denied.

Alexander & Green and *E. Ellery Anderson*, for Mercantile Trust Co.

James Hagerman, for receivers of Missouri, K. & T. Ry. Co.

Simon Sterne and *Charles F. Beach, Jr.*, for Missouri, K. & T. Ry. Co.

John C. Bullitt and *Samuel Dickson*, for Fidelity Insurance, Trust & Safe-Deposit Co.

R. C. Foster, for East Line & Red River R. Co.

Sawnie Robertson, for W. M. Giles, receiver.

Before MILLER and LAMAR, Justices, and PARDEE and CALDWELL, JJ.

MILLER, Justice, (*orally*.) We have given this application our attentive consideration, and, as there is no difference of opinion among the four judges who have been asked to consider the case, there is no reason

to delay the decision in order to deliver a well-prepared opinion. This is a petition brought by Mr. W. M. Giles, who is the receiver of the state court in Travis county, Tex., to obtain possession of a railroad and its appurtenances constructed and lying within the state of Texas, which railroad is now and has for some time been in the hands of the receivers of the circuit court of the United States for the district of Texas and of the circuit court of the United States for the district of Kansas. These receivers, who now have possession of the road, are the receivers under proceedings against what is called the "Missouri, Kansas & Texas Railway Company," which proceedings were to foreclose large and extensive mortgage or mortgages upon that road. That road itself—at least in its running connections, and in the control of lines of road which it had—commenced somewhere in the state of Missouri, I think, on the Mississippi river, running south-westerly through the states of Missouri and Kansas, the Indian Territory, and through the state of Texas to the Gulf, practically the line of road known as the "Missouri, Kansas & Texas Railway," and owned by the company having that name. June 6, 1888, a proceeding was commenced by a corporation called the "Mercantile Trust Company," which was the trustee of the mortgage on all that road, to foreclose it for failure to pay installments of interest. That proceeding resulted in the appointment of receivers to take charge of the whole line of road above mentioned. Of course, as the road lay in different districts, some kind of proceeding was necessary by which the action of the courts which might have control of the road should be simultaneous and harmonious. Therefore the order for the appointment of these receivers was made in the circuit court of the United States for the district of Kansas and in the circuit court of the United States for the district of Texas. Those proceedings, in the course of two or three years, culminated in a final decree, which was rendered within the last two or three months in the circuit court for the district of Kansas, (36 Fed. Rep. 221, 41 Fed. Rep. 8,) and which was also rendered in the circuit court for the district of Texas, ordering the property to be sold to pay the mortgage which was the foundation of the original suit. It is not material to go into that decree further than to say that the mortgage which was sought to be foreclosed covers also a road in Texas called the "East Line & Red River Railroad," and this was ordered, by the decree which has been mentioned, to be sold as a part of the property of the Missouri, Kansas & Texas Railway Company, in satisfaction of the bonds given with the mortgage, which included that road among all the other property of the mortgagor. This East Line & Red River Railroad Company was a corporation organized by the state of Texas, and had built a road, or mostly built it, about 150 miles long, exclusively within the state of Texas, and which company attempted to make a sale of its road to the Missouri, Kansas & Texas Railway Company. It did make such sale, so far as a form of contract and conveyance, by use of words and instrumentalities to make conveyance, could do so.

It is denied by the petitioner in this case that it had the power or authority to make such a sale, and it is denied that the Missouri, Kansas

& Texas Railway Company had the power to buy. This piece of road, it should be observed, was bought before the Mercantile Trust Company's mortgage was made, which is in process of foreclosure now, and in which suit this application is made by way of intervention. We are not inclined to say decisively whether the two roads had the power to make this sale and transfer or not. We do not think it necessary, as that question is not raised in the case before us. It is very clear that the Missouri, Kansas & Texas Railway Company, for seven or eight years before these foreclosure proceedings commenced, had possession of the road, which it had bought. It is very clear that it thought it had made a valid purchase of that road. It is very clear that neither that railway company itself, nor any of its stockholders, are known to have made any objection to that sale, or to have taken any steps whatever up to the present hour to set it aside; that original railway company or some of its officers were made parties to this foreclosure proceeding; they had an opportunity to contest the right of the Missouri, Kansas & Texas Railway Company to make this mortgage covering their road. They made no objection. The argument of the petitioner here is that because the sale of the Texas road to others was forbidden by the laws of Texas, or was without sufficient authority under those laws, therefore the circuit courts of the United States, in the proceedings for foreclosure of the mortgage of the Missouri, Kansas & Texas Railway Company, were without any jurisdiction over that piece of road, or over the mortgage which covered this property. We think that that is a mistake. Every suit which is erroneously brought on the supposition that the plaintiff is entitled to the property, and that the defendant is not entitled, would, according to that rule, be without jurisdiction. Suppose suit is brought in ejectment for a piece of land. The defendant says, "You cannot sue me; I don't own the land; you have no jurisdiction over me." Who would listen a moment to any objection of that kind? It is the business of the court to determine whether a lawful claim is set up or not, and the trial of that question cannot be defeated by simply saying, "You have no right to the property you claim; you have no right to sue me for it."

Take these principles as applied to the case before us. The Missouri, Kansas & Texas Railway Company has had possession of the road for many years. It mortgaged that road. The parties to whom it was mortgaged advanced their money on it. They seek to get their money back by a suit for foreclosure of that mortgage. The Missouri, Kansas & Texas Railway Company does not deny the jurisdiction of the court. The East Line & Red River Railway Company does not deny the jurisdiction. But a third person comes here and says, "You have no jurisdiction over this case because the Missouri, Kansas & Texas Railway Company never owned this road." The reply is, "That is the very question to be tried; that is the thing in issue here. If the Missouri, Kansas & Texas Railway Company, or any one else interested in it, or anybody having a right to represent it, chooses to contest it, here is the place to contest it." The plaintiffs say, "We have taken a valid mort-

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gage on it." The Missouri, Kansas & Texas Railway Company says, "Yes, we owned the road and mortgaged it." The other company says nothing. But, put it in the best possible position. Suppose that the East Line & Red River Railroad Company should then set up in that cause the very thing which the applicant here now sets up,—that it never sold its road. What is to be done about it? Would the court dismiss it for want of jurisdiction? On the contrary, the court would have jurisdiction to try that question, and it would try it. That is the only answer on that branch of the subject that we choose to make to the application here, in which it is proposed, in this short and summary way, to take the property out of the hands of the officers of the courts of the United States on the ground that those courts had no jurisdiction. It seems to be contended by counsel on the one side that those courts had no jurisdiction, while the counsel on the other side say that it had. We are very clear, whatever may be the rights under the original sale, that the circuit court of the United States for the district of Texas had jurisdiction of that case, has jurisdiction of it now, and will have jurisdiction until these proceedings are ended in some way.

There is another objection to the application which is clearer than that. Whatever may be the difficulty about the sale of the road and its effect upon the jurisdiction of the court, there is no question that the Fidelity Insurance, Trust & Safe-Deposit Company of Philadelphia had a valid mortgage on this piece of road before it came into the hands of the Missouri, Kansas & Texas Railroad Company, and, as the first mortgagee, has the first equitable right to that road or to have it disposed of for the payment of its debt. It is shown that that debt has all become due—*First*, because the interest was not paid according to the contract, and, *second*, because the trustees or owners of the bonds exercised their privilege of declaring that all the principal was due for non-payment of interest, so that the whole sum is now due; and that road, if it stood alone, is liable to the proceeding instituted by the Fidelity Company to foreclose its mortgage and secure its debt. That company, finding itself in that position, with its debt due, none of its interest paid, and its property about to be sold under another mortgage later in date, bestirs itself to protect its rights. It finds the railroad, which is its security, in the hands of the receivers of the circuit court of the United States. It finds that the company which made the mortgage to it is insolvent. It is useless to sue that company. Its remedy is a proceeding to hold that road which the petitioner is seeking to have placed in his hands for the debt due to the Fidelity Company. Not one of us has any doubt as to the proper course. They cannot fly in the face of authority. They do not want to sue the Missouri, Kansas & Texas Railway Company; it has nothing. They do not want to sue anybody who has no control of or interest in the company. So we must say the present petitioners wisely come to the court which has possession of the property, and ask to be permitted to intervene for the protection of their rights. The Fidelity Company do not want the property taken out of the possession of this court, and turned over to Mr. Giles, the receiver in the state court suit.

They resist that, because they feel that the property is safer where it is. They have security in the decree which has already been rendered, that on the sale of that property their priority of right will be recognized. They are therefore satisfied, and do not want to be turned over to the state court, which has made no such regulation, and with which they have nothing to do, and never had anything to do. Therefore we think it very clear that this road, being in the hands of receivers, and those receivers having, by the express order of the court appointing them, powers extending to the protection of the rights of the Fidelity Company, cannot be taken out of the hands of those receivers for the purpose of turning it over to the state jurisdiction, which has not recognized any such rights as seem in some way to pertain to the owner of the property. These are the defenses, properly speaking, to the petition of the plaintiff. We are agreed that the plaintiff has no superior right or authority to the possession of this property, even upon his own showing, to the rights as established by the proceedings in the circuit court of the United States.

Under the judicial proceedings in the state courts against the corporation called the "East Line & Red River Railroad Company," in a *quasi* criminal proceeding to forfeit its charter rights, to clear it away as an incumbrance of the ground, we regard it as having no longer the authority which the state had once given it to build a line of railroad. Mr. Robertson's language may be as strong as he chooses to put it, so far as that railroad company is concerned, to show that it has been rendered as dead as possible, and we have no doubt that has been done. But when it is urged that under the statutes of Texas, which give this right to pursue a corporation, and take away its charter, and put an end to its corporate existence, there is also coupled with that right some instruction about what is to be done with the property of the company, and what is to be done about its debts, and that, therefore, that jurisdiction with regard to those debts, with regard to the disposition of its property and with regard to the rights of its stockholders and of its creditors, is an exclusive jurisdiction,—when all this is urged, you cannot, therefore, oust other courts that have jurisdiction, and especially if they have commenced proceedings and taken possession of the property, because we may also, in addition to declaring the charter forfeited, dispose of its assets. With regard to questions of that kind, cases have been before us so often that it is hardly worth while to cite authorities. There is hardly a state in the Union that does not provide for the administration of a dead man's assets in a particular court, an orphans' court, a surrogate's court, or under whatever name the court may be established. Those are the courts invested with the power of administering upon the estates of decedents, and there is never any difficulty about them, with reference to any other court having jurisdiction, except that in some cases chancery has ancillary jurisdiction. But suppose a man who lives outside of the state where these surrogates' courts are established says, "I am the owner of that piece of property which you are seeking to administer upon; I bought it and paid my money for it; and, although

the man who is dead may have been in possession under claim of title, yet it is mine." Is he bound by the administration of the surrogate's court? Has he no remedy? Must he stand by and let that court do what it will? Is he bound to submit his rights to that probate court? Manifestly not. We have decided in a half a dozen instances that he can come to the courts of the United States, and assert any right that he has, provided the law for the administration of the estate, as prescribed in the statutes of the state, be observed. That law is as capable of enforcement and as likely to be enforced correctly in the courts of the United States as in the courts of the state. Aside, therefore, from all questions about priority of dates, whether the receivers were appointed in these cases before proceedings were had in the Texas courts to dissolve the corporation, we are of opinion that the circuit courts of the United States had jurisdiction of the question of the foreclosure of this mortgage, of the right to sell that property in satisfaction of debts, and that the nature of the proceedings in the state courts of Texas gave no superior rights to those courts to interfere and have the property withdrawn from their exclusive jurisdiction. The result of all these considerations is that we are of opinion that the petitioner makes no case which authorizes the circuit court of the United States in Texas to turn over to him the property which he asks. His petition to that effect must be dismissed.

Of course it is proper to say that, while four judges have taken part in this hearing, this was done by request of counsel, and that the decree of judgment can only become valid upon its being entered by the judge holding the proper court in the circuit court of the United States for the district of Texas. It seemed, however, to be the wish of counsel, and of Judge PARDEE and of Judge CALDWELL, that they should have the benefit of the judgment of all the judges in the two circuits (the fifth and eighth) where this property is found and in whose courts it is held, and that they should all unite in hearing this case. We are glad to say that our opinion is unanimous, and at the proper time that Judge PARDEE will properly have entered an order denying the prayer of this petition.

RAND v. UNITED STATES.

(District Court, D. Maine. November 28, 1891.

1. UNITED STATES COMMISSIONERS—FEES—RES JUDICATA.

The rejection by a district court of a United States commissioner's claim for fees because of a supposed want of jurisdiction is no bar to a subsequent suit therefor, when the circuit court, in a similar case, has held in favor of the jurisdiction.

2. SAME—DOCKET FEES—RETROACTIVE LEGISLATION.

The clause in the deficiency act of August 4, 1886, (24 St. 274,) which declares that United States commissioners shall receive no docket fees, being general legislation, intended as an amendment to Rev. St. U. S. § 847, that clause must be held prospective only in its operation, and docket fees earned prior to its passage must be allowed.

3. SAME—PRELIMINARY EXAMINATION OF OFFENDERS—FEES FOR RECOGNIZANCES.

Rev. St. § 1014, declares that the examination of persons charged with offenses against the United States is to be conducted agreeably to the usual mode of process in the state. Rev. St. Me. c. 133, §§ 10, 11, provide for taking the recognizance of an offender upon any adjournment of the examination. *Held*, that a United States commissioner examining offenders in Maine is entitled to fees for taking their recognizances from day to day.

4. SAME—LENGTH OF RECOGNIZANCES.

Fees for such recognizances must be allowed, although the instruments exceed the length arbitrarily fixed by the comptroller as sufficient, when, upon inspection, they disclose no unnecessary verbiage.

5. SAME—LENGTH OF COMPLAINTS—CHARGING DIFFERENT OFFENSES.

Persons arrested upon a complaint charging one offense cannot be held thereunder if the examination discloses a different offense, and therefore complaints cannot be objected to as too long because of charging more than one offense.

6. SAME—PER DIEM FEES.

Commissioners are entitled to their *per diem* fees pending the preliminary examination of an offender, even though no witnesses are examined and no arguments heard on some of the days. *U. S. v. Jones*, 10 Sup. Ct. Rep. 615, 134 U. S. 433, and *U. S. v. Ewing*, 11 Sup. Ct. Rep. 743, 140 U. S. 142, followed.

7. SAME—FEES FOR RECOGNIZANCES OF WITNESSES.

Commissioners conducting preliminary examinations are entitled to fees for recognizances of witnesses from day to day, and for final appearance at court, as well as fees for the acknowledgements thereto, but only for one recognizance in each instance for all the witnesses; and the length of such recognizances must be left to the commissioners' discretion.

8. SAME—RETURNS AND COMMITMENTS.

Commissioners are entitled to fees for entering returns of warrants and summons, for filing complaints and warrants for commitments from day to day, and for the return of proceedings to court, and copies thereof, the same not being unnecessarily prolix.

9. SAME—WARRANTS.

When a prisoner is transferred from state to federal custody, a new warrant is necessary, and the commissioner is entitled to a fee therefor.

At Law. Petition by Edward M. Rand for allowance of fees as a United States commissioner. Judgment for petitioner.

Edward M. Rand, pro se.

Isaac W. Dyer, U. S. Atty.

WEBB, J. This petition is for the allowance of fees as commissioner of the circuit court, which have been rejected by the comptroller of the treasury. As originally presented, the claim amounted to a total of \$409.85. Subsequent amendments made under recent decisions of the supreme courts, in respect to fees of various officers, have stricken out items amounting to \$162.75, leaving only the sum of \$247.10 to be passed

upon by this court. The case is heard on demurrer, and the contention by the United States is that, though the services have all been performed, the petitioner is not legally authorized to charge them or to be paid for his work. Though the items are numerous, they belong only to a few classes. A portion of these items were included in the proceeding by this same petitioner in 1888, and was then, upon the authority of *Bliss v. U. S.*, 34 Fed. Rep. 781, held not to be within the jurisdiction of this court. *Rand v. U. S.*, 36 Fed. Rep. 671. Such disposition of the claim for supposed want of jurisdiction to pass upon its merits does not operate as a bar to this petition. The former ruling against the jurisdiction, because the demand has been rejected by the comptroller prior to March 3, 1887, must be regarded as erroneous, under the decision of the circuit court in this circuit and district in *Harmon v. U. S.*, 43 Fed. Rep. 560.

In this portion of the petition are charged docket fees aggregating \$17, prior to August, 1886. The supreme court has declared that the proviso in the deficiency appropriation act of August 4, 1886, (24 St. 274,) was general legislation intended as an amendment of Rev. St. § 847, and not a mere restriction upon the use of the moneys appropriated by that act. *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. Rep. 743. The enactment was, then, prospective in its operation, and had no retroactive effect upon docket fees before earned, and upon the authority of *U. S. v. Wallace*, 116 U. S. 398, 6 Sup. Ct. Rep. 408, the petitioner is allowed the \$17 so charged. In the petition so amended no other docket fees are claimed. The items are: (1) Recognizances of parties, from day to day and final; (2) complaints; (3) *per diem* allowances; (4) recognizance of witnesses; (5) entering warrants and summons and warrants to commit; (6) copies of returns to court; (7) acknowledgments to recognizances; (8) warrants to commit from day to day.

The charges for recognizances of defendant from day to day are objected to as unwarranted. The objection has no weight. Proceedings for examination of persons charged with offenses against the United States are to be conducted "agreeably to the usual mode of process against offenders in such state." Rev. St. § 1014. The statute of the state of Maine expressly provides for recognizance of the party upon any adjournment of an examination. Rev. St. Me. c. 133, §§ 10, 11.

A further objection is that the recognizances exceed the length arbitrarily decided by the comptroller to be sufficient in all cases. Inspection of the records of these recognizances does not reveal any useless and unjustifiable verbiage. On the contrary, they are carefully and prudently framed for the protection of the government, if resort to the security of the recognizances should be necessary, and at the same time preserve the rights of defendants.

The fees for complaints are proper. *Rand v. U. S.*, 36 Fed. Rep. 672, 38 Fed. Rep. 666; *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. Rep. 743.

It is suggested by the comptroller that a party arrested and brought before a commissioner upon a complaint for one offense may, without

any new proceeding, be bound over, or committed to answer for anything else in respect to which, in the progress of his examination, evidence against him may appear. Upon this ground complaints, charging in proper terms distinct offenses, are declared to be of excessive length, and fees for the same are reduced. The reasoning is, if upon the hearing it should transpire that the defendant cannot be held upon the charge made in the complaint, but had committed some distinct offense, "there would be no difficulty in holding him to answer for the latter, because the defendant is not held by the commissioner upon the papers issued, but upon the testimony as it is developed upon the hearing." To such a proposition no answer is necessary.

The fees for *per diem* allowance have been withheld upon the theory that such fees are not chargeable upon days when there was no examination of witnesses or arguments of counsel. This question may be regarded as now finally determined in favor of the charges. *U. S. v. Jones*, 134 U. S. 483, 10 Sup. Ct. Rep. 615; *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. Rep. 743.

Recognizances of witnesses from day to day, when hearing was adjourned, and final, for their attendance at court, are proper charges. The length of the recognizance must be left to the discretion and integrity of the commissioner. It is not practicable to say beforehand what length is sufficient in all cases. By amendment, all charges in excess of one recognizance for all the witnesses in a case have been stricken out from the petition. Like amendment has been made in respect to acknowledgments of recognizances. The charges are proper. *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. Rep. 743.

The return of proceedings to court, and copies returned to court, were in compliance with the requirement of a rule of court. There is no evidence that they were unnecessarily prolix. The petitioner has a right to be paid for them. He is also entitled to receive the amounts charged for entering returns of warrants and summons, and for filing complaints and warrants. *Rand v. U. S.*, 38 Fed. Rep. 666; *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. Rep. 743; *U. S. v. Barber*, 140 U. S. 177, 11 Sup. Ct. Rep. 751. The theory that no warrant is necessary when the party accused is already in custody under process from the state court is untenable. When the state's custody ceases, there must be a proper process to authorize holding him in behalf of the United States. Warrants of commitment from day to day during the examination before the commissioner are proper. Rev. St. Me. c. 133, §§ 10, 11; *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. Rep. 743.

On examination of treasury statements 116,967 and 121,602, I find in them errors of computation amounting together to \$2.15, as claimed in the petition. No resistance to correction of these errors is made. No valid objection is found to any charge in the petition as amended, and judgment is ordered for the petitioner for the sum of \$247.10, and for costs.

SPRINGFIELD FIRE & MARINE INS. CO. v. RICHMOND & D. R. CO., (SAVANNAH FIRE & MARINE INS. CO., Interveners.)

(Circuit Court, D. South Carolina. December 9, 1891.)

1. PARTIES—ACTIONS OF TORT—INSURANCE.

Property covered by many different insurance policies was destroyed through the negligence of a railroad company, and a few of the insurers paid their proportion of the loss, taking an assignment of a proportional part of the claim against the railroad company. Suits were brought against the other insurers, pending which one of the companies which had paid sued the railroad on its assigned cause of action, whereupon another one petitioned to be made a party plaintiff, and that the insured be also joined as plaintiff. *Held* that, as the latter had the legal title to the cause of action, and the predominant beneficial interest therein, it could not be compelled to join as plaintiff against its will, notwithstanding that the cause of action, being for a tort, was indivisible, and only one action could be maintained thereon.

2. SAME—STATE LAWS.

The right to join the insurer, either as plaintiff or defendant, cannot be asserted under Code Civil Proc. S. C. § 143, providing that "when complete determination of a controversy cannot be made without the presence of other parties the court must cause them to be brought in," as this section must be read in connection with section 140, which provides that "of the parties to an action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained he may be made defendant;" and by thus reading them it is apparent that their provisions were derived from the practice in equity, and therefore can have no application to an action at law in a federal court.

At Law. Action by the Springfield Fire & Marine Insurance Company against the Richmond & Danville Railroad Company. Heard on the petition of the Savannah Fire & Marine Insurance Company to be made a party plaintiff, and to have the Pelzer Manufacturing Company also joined as plaintiff. Petition denied.

Abney & Thomas, for plaintiff.

Cothran, Wells, Ansel & Cothran, for defendant.

Julius H. Heyward, for petitioner.

SIMONTON, J. This is a case of novel aspect. In order to understand it a statement is necessary. The Pelzer Manufacturing Company had over a thousand bales of cotton stored with Cely Bros., warehousemen. The cotton was insured in bulk in the name of Cely Bros., as warehousemen, in several insurance companies, for some \$45,000 in the aggregate, each insurance company taking its own several risk. The cotton was all consumed at one time by a fire originating, it is said, from sparks of a passing locomotive belonging to the Richmond & Danville Railroad Company. It is also alleged that the warehouse was on the right of way of the Richmond & Danville Railroad. The cotton having been totally destroyed, Cely Bros. assigned to the Pelzer Manufacturing Company all the policies in which the cotton belonging to it was insured. This company proceeds to enforce them. One of the companies, the plaintiff in this action, paid its share of the loss to the Pelzer Manufacturing Company,—some \$4,500. Taking assignment from the Pelzer Manufacturing Company of so much of its claim upon the railroad company as would cover this sum, it brought suit in the

state court thereon in its own name. Section 1511 of the General Statutes of South Carolina makes a railroad company responsible for property destroyed on its own right of way by sparks from a locomotive. The defendant removed the case to this court. The cause being on the docket awaiting trial, a petition is filed by the Savannah Fire & Marine Insurance Company, stating that it also was an insurer upon this lot of cotton so stored with Cely Bros., and destroyed by fire; that it had paid the full amount of its risk—some \$2,800—to the Pelzer Manufacturing Company; that the prosecution of the suit as it stands may affect its rights. It prays that the complaint be so amended as to protect its right. The order proposed directs the summons and complaint to be so amended that the Pelzer Manufacturing Company be made a formal party plaintiff in this action, and that judgment be demanded for the full value of all the cotton owned by the Pelzer Manufacturing Company and destroyed by fire, as alleged in the complaint. The plaintiff does not seem to object to the motion, provided that its rights are not affected. The defendant filed a demurrer to the petition as if it were in equity. At all events, it objects. Neither of them were present at the motion for the amendment. The counsel for the Pelzer Manufacturing Company was present without notice, and protested against the proceeding, subsequently filing his written protest. This was put, among other grounds, on the fact that it had been served with no summons, notice, or other proceeding. The position of the plaintiff is this: The Pelzer Manufacturing Company has the right to obtain from the Richmond & Danville Railroad Company damages for the destruction of this cotton. The insurers who indemnify the manufacturing company and pay the losses are subrogated to the remedies which the assured had against the railroad company, (*Hall v. Railroad Co.*, 13 Wall. 370,) and to the use of the name of the assured in any suit to this end, (*Railroad v. Jurey*, 111 U. S. 595, 4 Sup. Ct. Rep. 566;) in which suit he cannot be affected by any act of the assured disclaiming, forbidding, or seeking to dismiss or release the suit, (*Hart v. Railroad Co.*, 13 Metc. [Mass.] 100;) but that this subrogation is to the rights which the assured had, no greater, no less, (*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469;) and, as the action of the assured is upon a tort,—a single and indivisible right of action,—only one suit can be brought, (*Ætna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. 1;) that the present suit may exhaust the remedy, and thus preclude it; that its only protection is a suit in the name of the Pelzer Manufacturing Company. These positions seem to be sustained by the authorities. It would be premature on this motion to decide them.

Assuming, for the purposes of this case, that they are well taken, we are met by a condition of facts which occur in none of the cases quoted. The plaintiff and the petitioner have paid but a small proportion of the entire loss. They may be—personally I have no doubt that they are—entitled to share *pro tanto* in any rights the Pelzer Manufacturing Company may have against the railroad company. It may become neces-

sary for them to obtain the use of the name of the company in securing their rights. I have no doubt that at the proper time and in appropriate proceedings they can obtain the aid of the court to this end; but this cannot be done now, nor under this form of proceeding. The court hesitates to compel the Pelzer Company to lend its name in this case in the manner proposed. This lot of cotton was insured, not for its full value, in some 15 companies. Of these three paid voluntarily and one by compulsion. Suits are now pending in the circuit and supreme courts of South Carolina against the others. During the pendency of these suits the Pelzer Company offered to the insurance companies that if the loss be paid, it would begin suit against the railroad company, and either conduct it for or turn it over to them. This offer was not accepted. When the loss occurred the Pelzer Manufacturing Company (assuming that the railroad company is liable) had its remedy either against the insurance companies on their several contracts, or against the railroad company under the statute. It had the right to determine for itself, and to elect its course. This right it exercised and is now using. The court cannot interfere with the right and compel it to make use of both remedies. Story, Eq. Jur. 640. Notwithstanding that each of the four companies has paid its share of the loss, and to this extent shares with the Pelzer Company the claim upon the railroad company, by far the largest proportion of the loss is still borne by that company. If it be made a party in this case it could be in no sense a nominal party, whose substantial rights would not be affected by the result. The court cannot compel a person to come in and seek a vindication of his rights as plaintiff. A plaintiff comes into court; he is not brought in. Were this company made plaintiff it would be the party most interested. It would be an anomaly, not only to make it plaintiff, but to make it use the complaint prepared and amended by another party, and to intrust its case to counsel selected by that party. We cannot make the companies who paid a part of the loss *domini litis*. Nor is it within the power of the court to force a party in, who must be *dominus litis*. A careful search into all the authorities has failed to discover a case at law in which one having a substantial right, a beneficial interest, as well as the legal title, in a cause of action, alone or with others, has been compelled to come in and bring or unite in an action as plaintiff.

The counsel for the party intervening calls attention to the provisions of the Code of Civil Procedure of South Carolina, § 143: "When complete determination of a controversy cannot be made without the presence of other parties the court must cause them to be brought in." But we must read this in connection with section 140 of the same Code: "Of the parties to an action those who are united in interest must be joined as plaintiffs, or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made defendant."

But the case at bar is a law case in tort. There is no precedent of an action at law in which the tort-feasor is joined with the principal sufferer as a party defendant. These provisions of that Code are derived from

the practice in equity, and have no place whatever on the law side of this court. *Hurt v. Hollingsworth*, 100 U. S. 100. Indeed, the present application itself proceeds upon practice in equity. The petitioner is entitled to and seeks to enforce an equity. The issues in the case on the docket are between the Springfield Fire & Marine Insurance Company and the Richmond & Danville Railroad Company. With the issues—that is, whether the defendant shall pay certain damages to plaintiff—the petitioner has no direct concern. It is directly interested in the principle upon which such damages would be allowed or refused, as it is in every case analogous to its own. The counsel for the petitioner insists that he has a direct immediate interest in this suit, and that its prosecution in its present shape may preclude his client entirely. The action is upon a tort from its nature indivisible. A recovery in an action upon it precludes any other. The petitioner stands precisely in the same plight as the plaintiff. The plaintiff's suit may preclude it. If this position be correct, it may demonstrate that the plaintiff has no standing in court. If it does not do this, it at least shows that the petitioner has a strong equity, which will be protected on the other side of this court, which cannot be protected on this side of the court. And, in order to obtain the wishes of the petitioner, the Pelzer Manufacturing Company must be a party to such a proceeding. Being such party, its rights must also be considered, and, if the equities are equal, the legal right will turn the scale. Let the petition be dismissed without prejudice. The motion to amend is refused also, without prejudice.

JOHN V. FARWELL CO. v. MATHEIS *et al.*

(Circuit Court, D. Minnesota, Third Division. December 10, 1891.)

STATUTES—ENACTMENT AND APPROVAL—"SESSION" OF LEGISLATURE DEFINED.

Const. Minn. art. 4, § 11, providing that within three days after the adjournment of the legislature the governor may approve, sign, and file in the office of the secretary of state "any act passed during the last three days of the session, and the same shall become law," means the last three days of sitting for business, and does not include Sunday; and hence a bill passed on Saturday was within the provision, though the adjournment did not occur until the following Tuesday.

At Law. Action by the John V. Farwell Company against John Matheis, and Theodore Draz, garnishee. On motion to discharge the garnishee. Granted.

Edward P. Sanborn, for garnishee.

Howard L. Smith and *Lusk, Bunn & Hadley*, opposed.

NELSON, J. The defendant, Matheis, made an assignment under the insolvent laws of the state of Minnesota to Theodore Draz, assignee. The plaintiff seeks to reach by garnishment proceedings the property held under the assignment; and the assignee, setting up the facts of the assignment, and the possession of the property, and presenting the deed

thereof, asks to be discharged. It is claimed that the deed of assignment is void for the reason, among others, that chapter 30, Laws Minn. 1889, authorizing a statutory assignment, never became a law, and ought not to be in the statute book. It appears from the official records that chapter 30 was house file 1,318, and that after having passed the house it was received in the senate and passed Saturday, April 20, 1889. The legislature adjourned April 23d, Tuesday, and the same day the governor indorsed upon the bill the words, "Approved April 23, 1889," and filed it with the secretary of state, April 25th, two days after the adjournment of the legislature. The last clause of section 11, art. 4, of the constitution of the state of Minnesota, declares that "the governor may approve, sign, and file in the office of the secretary of state, within three days after the adjournment of the legislature, any act passed during the last three days of the session, and the same shall become a law." This act did become a law unless Sunday is counted as one of the three days of the session, within the meaning of this provision of section 11, art. 4.

The correct construction of this clause depends upon the definition of the word "session" as therein used. The prime definition of this word, when applied to a legislative body, is the actual sitting of the members of such body for the transaction of business. It also may be used to denote the term during which the legislature meet daily for business, and also the space of time between the first meeting and the adjournment. The context affords the light for determining the meaning of the word "session" when used in the constitution. In section 19, art. 4, the meaning of the word "sessions" is manifest: "Each house shall be open to the public during the sessions thereof, except in such cases as in their opinion may require secrecy." "Session" here means the actual assembly of the members for business. Section 1, art. 4, fixes the limit of the session of the legislature. The context shows that the word "session" is here used to denote the space of time between the meeting and the adjournment of the legislature. In section 11, art. 4, which relates to the passage of bills by the two houses of the legislature, and the formalities necessary to enact laws, the context determines the meaning of the word "session" to be the actual sitting of the members of the legislature. Such construction of the constitution is in accordance with its true spirit and intent to carry into effect the will of an enlightened people by whom it was adopted. Sunday is *non dies* for work, even in a legislature; and, if business is ever transacted on Sunday, no record of it is kept as being performed on that day. The "last three days of the session," in section 11, means working days, when the legislature is in actual session for the transaction of business. The journals of the two houses show this. It appears from them that Saturday, April 20, 1889, when chapter 30 passed the senate, was the seventy-eighth day of the session, and that the legislature adjourned on Tuesday, April 23, 1889, the eightieth day of the session, Sunday not being a day of the session. In my opinion, chapter 30 was duly passed and approved by the governor in time, and became a law. It is unnecessary to consider the other questions presented. The garnishee is discharged, and it is so ordered.

UNITED STATES v. MICHIGAN CENT. R. Co.

(Circuit Court, N. D. New York. December 10, 1891.)

IMMIGRATION—ALIEN CONTRACT LABOR LAW.

A railroad company which knowingly employs at its office in New York, near the Canadian border, a person who resides in Canada, and comes daily to his work in the United States, is not engaged in assisting or encouraging the "importation or migration" of an alien, within the meaning of the alien contract labor law. Act Cong. Feb. 26, 1885, § 3.

At Law. Action to recover the penalty for a violation of the alien contract labor law. Judgment for defendant.

John E. Smith, for the United States.

Daniel H. McMillan, for defendant.

WALLACE, J. This is an action to recover the penalty imposed by section 3 of the act of congress of February 26, 1885, entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia." Briefly stated, the facts are these: The defendant, a Michigan corporation, operates a railway between Chicago and Buffalo, the route of which, between the states of Michigan and New York, is through Canada. It has an office at Suspension Bridge, in New York. One Blount applied at that office for employment as a clerk, and was engaged by the defendant at wages of \$50 per month, but for no stated period. He continued in the employ of the defendant for several months. Before the expiration of the first month the officers of the defendant ascertained that Blount was an alien, residing in Canada, and having a family there, and that he came from his home each morning to the office of the defendant, and after performing his day's work returned home each night. Nevertheless defendant retained him in its service.

The defendant's liability under the act of congress is precisely the same as though it had made a new contract with Blount at the beginning of his second month of service, with full knowledge of the facts. At the end of the first month the existing contract between them was at an end, and thereafter there was an implied contract of the same tenor. The statute, by section 1, makes it unlawful for any person or corporation to prepay the transportation, or in any way assist or encourage the importation or migration, of any foreigner into the United States under contract or agreement; express or implied, made previous to the importation or migration of such foreigner; and, by section 3, declares that for every violation of the provisions of section 1, the person or corporation violating the same, by knowingly encouraging the migration or importation of an alien to perform labor or service of any kind under contract or agreement, expressed or implied, made with the alien previous to his becoming a resident or citizen of the United States, shall forfeit and pay for such offense the sum of \$1,000. Notwithstanding the defendant

knowingly encouraged a foreigner to come into this country and perform services here under an implied contract previously made with him, it is not liable for the penalty unless it has encouraged the "importation or migration" of the foreigner. The statute, being penal, must be strictly construed, and cannot be extended to a case which is not manifestly within its meaning. Some light upon the meaning of the terms "importation or migration" is derived by reading other sections of the act. One of these imposes a penalty upon the master of a vessel in which the assisted foreigner has been brought here; another prohibits collectors of ports from permitting such foreigners to land; and another authorizes the secretary of the treasury, "in case he shall be satisfied that an emigrant has been allowed to land" contrary to law, to cause such emigrant to be returned at the expense of the importing vessel, or, if he entered from an adjoining country, at the expense of the person previously contracting for his services.

The several provisions of the act are directed against assisted immigrants, as well as those who prepay their transportation or encourage their migration or importation by previous contract. Blount was not an immigrant, because he did not come here intending to acquire a permanent or a temporary home. As he did not migrate here, the defendant did not encourage his "migration." He was not imported, nor did the defendant assist in his "importation," any more than he was exported, and assisted in his exportation, when he went home at night. It may be that such a case as this is within the mischief which the promoters of the law intended to remedy, but it is not within the ordinary import of the words of the statute. If every person who comes into this country migrates or is imported, within the meaning of the statute, because he remains temporarily and works here, the statute will reach many cases in which its application would be a manifest absurdity. If the construction of the act contended for by the government is correct, every alien sailor who is engaged in a foreign port for a round voyage, and comes here on the ship, and performs his duty while she is within one of our seaports, migrates here or is imported here; and the vessel owner who engages him assists in his "importation or migration," and is liable for the penalty imposed. There are other railroad corporations besides the defendant whose railways are operated both in Canada and in this country. If one of them, like the Grand Trunk for instance, having its domicile and main line in Canada, has branches or a terminus here, and a conductor or brakeman who is a Canadian brings in one of its cars, it would be liable, according to the contention for the government, to the penalty of the act, if it engaged the conductor or brakeman in Canada. This does not seem to be a reasonable interpretation.

Judgment is ordered for the defendant.

UNITED STATES v. COPPELL *et al.*

(District Court, S. D. New York. February 13, 1891.)

CUSTOMS DUTIES—TRANSPORTATION BOND—LIABILITY OF PRINCIPAL AND SURETY.

Where transportation bonds, pursuant to sections 3000, 3001, Rev. St. U. S., were executed by principals and surety, conditioned for the transportation of merchandise from bonded warehouse in New York city to be entered and rewarehoused in New Orleans, La., and where such merchandise, through no fault of the principals on the bonds, was not entered at the port of New Orleans, nor rewarehoused therein, but was, upon arrival at New Orleans, shipped by rail to its destination in the republic of Mexico, through a mistake or oversight of the United States inspector of customs at New Orleans, *held*, that the principals and surety upon the bonds remained liable for double the amount of the duties upon said merchandise, according to the condition of the bonds and the provisions of sections 3000 and 3001, Rev. St. U. S.

At Law.

This was a consolidated action, brought by the United States government to recover the penalties upon two transportation bonds given by the defendants as principals and surety. The bonds were in the same form, both dated May 23, 1889,—one being in the penal sum of \$100, the other in the penal sum of \$300,—conditioned for the transportation from New York to New Orleans, La., of certain drums of caustic soda, which merchandise was contained in bonded warehouse at the port of New York. The condition in both of the bonds was in the usual form provided by articles 725 and 726 of the United States treasury regulations of 1884, and was as follows:

"Now, therefore, the condition of this obligation is such that, if the above-bounden principals shall within four months [days] from the date hereof transport or cause to be transported in Cromwell's line of steamers to New Orleans, and shall within the time herein specified deliver the same to the collector at the said port of destination, and cause due entry thereof to be made for rewarehousing, and shall also within the time herein specified produce to and deposit with the collector of said port of withdrawal a certificate of the collector of the said port of destination that the said merchandise has been delivered to him according to law and rewarehoused, and the duties thereon paid or secured; or, failing so to do, shall pay to the proper collecting officer of the United States at the said port of withdrawal the amount of duties to be ascertained as due and owing on the merchandise aforesaid, and an additional duty of 100 per cent., pursuant to the statute in such case made and provided; then this obligation to be void; otherwise it shall remain in full force."

The merchandise was withdrawn from bonded warehouse at the port of New York by two transportation entries in the usual form, both dated May 21, 1889, and providing that the "merchandise was intended to be withdrawn from warehouse by M. P. & Co. for transportation to New Orleans by route or vessel, Cromwell's line, SS. New Orleans." It was proved upon the trial that the merchandise in both cases was shipped at the port of New York on the steamer New Orleans, of Cromwell's line, on or about the 25th of May, 1889, and arrived in the said steamship at the port of New Orleans on or about the 3d day of June, 1889. The special manifest in each case was in the usual form prescribed by the

treasury regulations for the transportation of merchandise in bond from one collection district in the United States to another; and stated upon its face that the merchandise was "laden on board Cromwell's line for transportation and exportation to New Orleans in the state of Louisiana by way of ———, to be delivered to the collector or other proper officers of the customs on arrival at the port of destination;" and giving the consignees as "A. M. & Co." It was further proved that the general manifest of the steam-ship contained no special reference to the merchandise in question. The defendants offered testimony, which was received, under objections by the United States attorney, that it was their intention to ship the goods direct from the port of New York to the ultimate intended destination thereof in Mexico, but that they found upon inquiry that there was no bonded carrier between the port of New York and Mexico. They therefore proceeded to withdraw the goods from warehouse under the transportation entries above referred to, and to ship the same by the Cromwell line of steamers, which were bonded carriers, to New Orleans, intending to rewarehouse the goods at that port, and then to withdraw them for transport to Mexico. They therefore delivered the receipt or bill of lading received from the Cromwell line of steamers to the agent of the Mexican Central Railway Company, in the city of New York, and received from the Mexican Central Railway Company a bill of lading for the merchandise in question, providing that said merchandise should be transported from said initial line and connections, (viz., the Cromwell line of steamers,) and delivered to the Mexican Central Railway Company at El Paso, Tex., thence to be transported over the line of said Mexican Central Railway Company to Aguas Calientes, and delivered to the consignees, etc. It was shown by testimony taken in New Orleans in behalf of the defendants that the United States district inspector at New Orleans was notified by the delivery clerk for the Cromwell line that certain bonded freight was on board the steamer New Orleans, and that such United States district inspector came to the ship, and a special manifest of the bonded goods was delivered to him, and that the said United States inspector indorsed the same, and certified to the transfer of the merchandise to the cars of the Texas Pacific Railroad Company; that the merchandise was transferred and forwarded to Mexico by the Texas Pacific Railroad Company. It also appeared that A. M. & Co., the consignees of the goods at New Orleans, were the agents of the Cromwell line at that port. The defendants further introduced testimony, likewise against the objection of the United States attorney, showing that the merchandise in question arrived at Ciudad Juarez, in Mexico, about June 15, 1889, and that the usual "landing certificate" in respect to such goods was duly executed, which certificate was certified by the United States consul. In behalf of the government (plaintiff) testimony was introduced showing that the merchandise in question had never been delivered to the collector of the port of New Orleans personally, or to his chief deputy collector, and that there were no records at the New Orleans custom-house showing the delivery of the same; that it was the duty of the bonded common carrier to report the arrival of bonded mer-

chandise, which was not done in this case; and also that the two transportation entries, together with certified extracts of the invoices for the goods, were received at the office of the collector in New Orleans on May 27, 1889, having been forwarded to said collector by the collector of the port of New York in accordance with customs regulations, and had remained uncalled for since that date. It was also proved by the testimony of the United States district inspector of customs at New Orleans, above referred to, that he did not receive any verbal or written authority in regard to the case in question specially; that, if the manifest required that the bonded goods should be warehoused at New Orleans, then it was an oversight on his part not to require this to be done; and that by reason of such oversight the merchandise was allowed by him to be transferred to the port of ultimate destination without rewarehousing at New Orleans. At the conclusion of the testimony counsel for the plaintiff moved the court to direct a verdict for the government on the bonds.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty.

Olin, Rives & Montgomery, for defendants.

BROWN, J. On the first question I think it my duty to rule for the government, as regards the contingencies that prevented the intention of the shippers from being carried out and the undertaking specified in the bond from being fulfilled. All such contingencies as interfere with the performance of the stipulations of a bond like this are at the risk of the bondsmen and owners of the goods who undertake to transfer them from one warehouse to another. So far as the United States are concerned, this bond did not contemplate any transportation of the goods to Mexico. No doubt that was the ultimate intention of the owners; but, finding that they could not make any arrangement to send the goods directly to Mexico, because the carriers had not given the bonds required by law to enable them to take goods there, a different proposition had to be made to the government, which was simply that the goods should be transported from the warehouse in New York to the warehouse in New Orleans. This bond, construed with the statutes and regulations, imports virtually a contract between the parties and the government to do that thing, and nothing more. The government had possession of the goods, holding them for duties. It was the right of the importers under the laws to ship them directly and continuously to Mexico, provided they could find carriers who complied with the necessary conditions. Not being able to do so, they had to avail themselves, therefore, of another provision of the law, which allowed a removal of the goods from the warehouse in New York to the warehouse in New Orleans. That they arranged to do by giving the bond upon which this suit is brought. The government officers having the goods in their possession for the payment of duties, could not release them or deliver possession of them to any one, except under the provisions of law by which the duties are either to be paid or secured. The law provides for the removal from one port of the United States to another port in

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the United States upon conditions somewhat different from those for removal to a foreign country; and, as these owners could not remove the goods directly to Mexico, they arranged to remove them to New Orleans. That was all that the United States assented to in this case, although I have no doubt that it was merely the first step, so far as the shippers were concerned, in the intended transportation to Mexico. In order to remove the goods to the New Orleans warehouse the defendants gave this bond, which provides expressly that they shall deliver the goods to the collector there, enter them suitably for warehousing, and then produce here a certificate that the goods have been warehoused there. The last two provisions are merely designed to secure the first, namely, the proper delivery to the collector there. The proper delivery for warehousing must be made by means of an entry for warehousing. The defendants agreed to make that entry, or else pay double the amount of duties imposed upon them here. Such a bond is one that it is competent for the secretary of the treasury to require under the act of congress.

Mr. Rives. We make no exception to that point, your honor.

Brown, J. Section 3000 states what should be done:

"Any merchandise duly entered for warehousing may be withdrawn under bond, without payment of the duties, from a bonded warehouse in any collection district, and be transported to a bonded warehouse in any other collection district and rewarehoused thereat; and any such merchandise may be so transported to its destination wholly by land, or wholly by water, or partially by land and partially by water, over such routes as the secretary of the treasury may prescribe; and may be likewise conveyed over any foreign territory, the government of which may have or shall by treaty stipulations grant a free right of way over such territory."

The next section provides:

"The secretary of the treasury shall prescribe the form of the bond to be given for the transportation of merchandise from a port in one collection district to a port in another collection district, as provided in the preceding section, also the time for such delivery; and for a failure to transport and deliver within the time limited any such bonded merchandise to the collector at the designated port a duty of double the amount to which said merchandise would be liable shall be collected, which duty shall be secured by such bond."

That is a statutory requirement, which the secretary had no right to waive. He was required to take a bond, in which, among other things, it was conditioned that, if this delivery was not made as required, double duty should be paid. Concede, then, all that has been testified to in this case. The goods arrived at New Orleans under a special manifest, which on its face showed what was the obligation of the parties there, namely, to deliver them to the collector at New Orleans for warehousing. This required not merely a nominal and formal delivery to some representative of the collector, or the mere bringing of them into the collection district, but an actual entry, and a delivery of them to the collector for warehousing. And, that there should be no doubt about that, the regulation of the treasury department prescribes that specific duty, and that

is one of the conditions of this bond. That was a suitable provision to secure the object of the statute. When the goods arrived at New Orleans it was no doubt through the mistake or blunder of the inspector of customs there that the proper disposition of the goods was not made. They were not sent to the warehouse. No steps were taken to that end; but the inspector, having been notified that there were goods in bond there on the vessel, looks at the paper,—this very manifest, which it is proved was put into his hands,—indorses it, makes some memorandum upon it, and then directs the goods to be loaded on the Texas Pacific cars for El Paso. They were so shipped, and went on to Mexico. No doubt, if there had been any existing agreement by which the government had arranged for the transportation of these goods to Mexico, the inspector's act would have been a mere irregularity, from which it suffered no harm or loss. But it is impossible for the court to look beyond the actual arrangement to which the government was a party; and, as I said in the beginning, the only arrangement to which the government was a party was a transfer of these goods from a New York bonded warehouse to a New Orleans bonded warehouse. That was interrupted, as may be assumed from the evidence in this case, by no fault whatever of the shippers; no more than if the ship had foundered on the voyage, or the goods been burned at the wharf, or captured by pirates, or otherwise lost. The intention of the shippers was defeated; indeed, by something over which they had no control; but nevertheless the thing that they had contracted for was not done. At whose risk were these contingencies? Upon a bond like this, they were, I think, at the risk of the bondsmen. The government, having possession of the goods for the purpose of collecting duties, in effect says to the owner: "You may ship the goods to New Orleans, if you choose; but you must put them in warehouse there, as security for the duties; and you must take all the risk of the passage, and of whatever may defeat the due entry of the goods for warehousing in New Orleans,"—save perhaps the act of God and of public enemies. What the owners and these defendants agreed to do has not been done, and the government loses its duties. Is it any defense in a suit upon such a contract to say that the goods failed to reach the warehouse through no fault of the defendants? I think not. The inspector's negligence, if it was simple negligence, was not legally chargeable against the government as its own negligence. The inspector's fault was not the government's fault. The government did not assume these risks. On this ground I must direct a verdict for the government, there being no disputed question of fact. I have purposely received almost all the evidence offered, in order to show as fully as possible the facts as to these two points, viz., whether the failure to warehouse in New Orleans occurred by any fault on the part of the shippers; and, second, whether the goods did go into Mexico, where the owners intended them to go; so that the legal question may be presented in its simplest form, and any error on my part, if there be error, most easily reviewed and corrected. On both points I am quite satisfied; so that, if the defendants' design

had been accomplished by the government's assent, and in the way provided by law, the government would not have lost anything. But I must hold the defendants liable, for the reason that the government never did assent, and was no party, to the defendants' ultimate design. The only arrangement the government made was that it would permit the removal of the goods from the New York bonded warehouse to the New Orleans bonded warehouse, leaving the parties, after the goods arrived there, to obtain by some new arrangement with the government the right to remove the goods to Mexico. Verdict directed for the plaintiff in double the amount of the duties, with interest.

LOUISVILLE PUBLIC WAREHOUSE CO. v. SURVEYOR OF PORT AT LOUISVILLE.

(Circuit Court, D. Kentucky. December 1, 1891.)

CUSTOMS DUTIES—REIMPORTED WHISKY—WITHDRAWAL FROM BOND.

The tariff act of October 1, 1890, (26 U. S. St. 624,) provides, in section 22, that on the reimportation of an article manufactured in the United States, and once exported without paying an internal revenue tax, it shall pay a duty equal to the internal revenue tax on such article. Section 50 declares that any merchandise deposited in bond before the date of the act may be withdrawn for consumption on payment of the duties in force before the act, and that, when such duties are based upon the weight of the goods, the weight shall be taken at the time of the withdrawal. *Held*, that while, under the internal revenue laws, the proof of spirits is determined by weight, yet the tax is always assessed upon the gallon measurement, whether the spirits are above or below proof, and hence reimported whisky, when withdrawn from bond, must pay according to the number of gallons at the time of importation and not at the time of withdrawal.

At Law. Appeal from a decision of the board of general appraisers. *George W. Jolly*, U. S. Dist. Atty., for surveyor. *Willson & Thum*, for Warehouse Company.

BARR, J. This is a proceeding filed by the Louisville Public Warehouse Company, asking for a review of the decision of the board of general appraisers under the fifteenth section of an act of congress approved June 10, 1890, (26 St. at Large, 138.) The Louisville Public Warehouse Company, as the importer and consignee of certain whiskies exported from the United States, and afterwards, on the 6th day of January, 1890, reimported into the United States, complains that said company was compelled to pay the collector a tax of 90 cents on 7 gallons of whisky more than the law authorized to be collected. The warehouse company imported and entered into bond for warehousing five barrels of whisky on the 6th day of January, 1890, and said company withdrew same on the 28th day of November, 1890, and the difference in the quantity of whisky entered into said warehouse in January, 1890, and when withdrawn from same, on November 28, 1890, was seven gallons, as ascertained by the gauge at the

separate times. The company states the collector required the payment of tax on the quantity entered, which tax was paid under compulsion. The said company appealed from the action of the collector to the board of general appraisers, and the decision and action of the collector was approved by them, and this is the decision said company asked to be reviewed. The defendant has demurred to the petition, and moves to dismiss the appeal.

The petitioner's claim that the quantity of taxable whisky is to be ascertained at the time of withdrawal from the warehouse, and not at the time of the entry, is under a proviso in section 50 of the tariff act known as the "McKinley Bill," approved October 1, 1890, (26 St. at Large, 624.) This proviso is as follows:

"Provided, that any imported merchandise deposited in bond in any public or private bonded warehouse, having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: provided, further, that when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

The contention of the warehouse company is that the duty on the five barrels of whisky reimported by it is by law based upon its weight, and therefore this duty should have been levied and collected on the weight of the whisky at the time of the withdrawal, and not at the date of its importation. The twenty-second section of this act provides:

"That upon the reimportation of articles once exported, of the growth, product, or manufacture of the United States, upon which no internal tax has been assessed or paid, * * * there shall be levied, collected, and paid a duty equal to the tax imposed by the internal revenue laws upon such articles."

Schedule H of said act provides that—

"The duty on brandy and other spirits manufactured or distilled from grain or other materials, and not specially provided for in this act, two dollars and fifty cents per proof gallon." Sections 329, 330. "Each and every gauge or wine gallon of measurement shall be counted as at least one proof gallon; and the standard for determining the proof of brandy and other spirits or liquors of any kind imported shall be the same as that which is defined in the laws relating to internal revenue: * * * provided, that it shall be lawful for the secretary of the treasury, in his discretion, to authorize the ascertainment of the proof of wines, cordials, or other liquors, by distillation or otherwise, in cases where it is impracticable to ascertain such proof by the means prescribed by existing laws and regulations."

Internal revenue taxes, as well as customs duties, are assessed and collected on distilled spirits by the proof gallon, when the spirits are above proof; and it is now insisted by the learned counsel for the petitioner that these taxes and duties are ascertained and determined by weight, and not by gauge or measure. It is, however, true that taxes and duties are collected on spirits on and by the wine gallon as well as the proof gallon; the wine gallon, when at or under proof, and the proof

gallon, when above proof. That is, when the spirits are above proof, the proof spirits are measured and weighed; but the tax or duty, as the case may be, is assessed and paid by the gallon as thus ascertained. Section 3249, Rev. St. U. S., defines proof spirits thus:

"Proof spirits shall be held to be that alcoholic liquor which contains one-half its volume of alcohol of a specific gravity of seven thousand nine hundred and thirty-nine ten-thousandths (.7939) at sixty degrees Fahrenheit."

Thus the cubic measure or the volume of the spirits is always the basis of the assessment and collection of taxes and duties. If, however, the spirits are above proof, as defined in the statute,—that is, have more alcohol in proportion to the cubic measure than prescribed by the law,—then they are taxed accordingly. The proof of distilled spirits is, we believe, usually taken by comparing the weight of a certain volume of spirits with the same volume of distilled water. Alcohol is lighter than water, and hence, by weighing the distilled spirits, which contain both water and alcohol, the proof can be ascertained. This is an easier method than by distillation. But the volume must be measured, because, if the spirits are only proof, or less than proof, as prescribed by the statute, the tax is to be levied on the wine gallon by the express terms of the statute. See § 3251, Rev. St. This is not the only reason why the spirits must be measured by gallons. The volume must be known before the proof gallons can be ascertained, by comparing the weight of the spirits with distilled water, and thus assessing the tax. It is quite true, we believe, that a wine gallon of 231 cubic inches of distilled water contains 8.355 pounds, but the internal revenue wine gallon is never ascertained by pounds or weight. The tax or duty, as designated by the internal revenue laws and by the tariff, is so much per gallon; and neither the tax nor the duty is based upon the weight as used in the fiftieth section of the tariff of 1890. If the contention of the warehouse company was sustained, it would lead to the absurd conclusion that when liquors are at proof or under they would be taxed on the quantity imported and entered into the warehouse, and when over proof, although of the same invoice, on the quantity at the time of withdrawal, which might be much less. The proviso of section 50 of this act should be construed with reference to other parts of the act and of existing laws, and I am of opinion that the tax or duty upon this whisky was not "based upon the weight of the merchandise deposited," within the meaning of this proviso. The demurrer of the collector is therefore sustained, and his decision and that of the board of general appraisers is approved and affirmed.

CALIFORNIA ELECTRICAL WORKS v. HENZEL.

(Circuit Court, N. D. California. December 7, 1891.)

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIM—ELECTRIC-LIGHTING GAS-BURNERS.

In letters patent No. 230,590, issued July 27, 1886, to George F. Pinkham, as assignee of Jacob P. Tirrell, the claim is for, "In an electric-lighting gas-burner, a magnet for turning the gas-cock by one electric impulse, combined with a fixed electrode, *a'*, and a movable electrode, *c'*, normally in contact, and mechanism connecting the armature with the movable electrode, to break the contact between *a'* and *c'* the instant after the gas is turned on, and create a spark for ignition, substantially as described." In the drawings *a'* designated a platinum point on the fixed arm, and *c'* a small bent arm normally in contact with the fixed electrode. *Held*, that the word "electrode" generally, and especially as used in the patent, means the platinum or other metal points constituting the poles of the circuit.

2. SAME—INFRINGEMENT.

The mechanism being otherwise substantially the same, the fact that defendant's apparatus has a horizontal armature, which moves in a vertical direction, while the patented apparatus has a vertical armature, which moves in a horizontal direction, does not prevent infringement.

3. SAME—PAST INFRINGEMENTS—EQUITY JURISDICTION.

When a patent has been assigned, together with all claims for past infringements, the fact that a person sued by the assignee has not sold any of the infringing articles since the assignment, and testifies that he intends to sell no more, is not sufficient to exclude equitable jurisdiction, when it appears that he still has them in stock, and has published a catalogue offering them for sale, and that in his answer he asserts a right to sell them.

In Equity. Suit by the California Electrical Works against George L. Henzel for infringement of patent. Decree for injunction and an accounting.

Langhorne & Miller, for complainant.

Wheaton, Kallach & Kierce, for defendant.

HAWLEY, J. This is a suit in equity for the infringement of letters patent No. 230,590, granted to George F. Pinkham, as the assignee of Jacob P. Tirrell, on July 27, 1880, for electric gas-lighting apparatus. Complainant is a territorial grantee of all rights under the patent for the state of California. Defendant claims that the patent is void, because the bill of complaint alleges that it was issued upon the joint application of the inventor and his assignee. It affirmatively appears by the letters patent that Jacob P. Tirrell, the inventor, made the application for the patent, and that, having assigned his right, title, and interest to George F. Pinkham, the letters were granted to said Pinkham. Complainant was allowed to amend his bill so as to conform to the proofs in this respect. This obviates the necessity of investigating or deciding the question whether an application for letters patent can be legally made jointly by the inventor and the assignee.

Defendant claims that the bill should be dismissed because the only infringement shown was committed before the assignment to the complainant, and that, inasmuch as there is a plain, speedy, and adequate remedy at law, equity has no jurisdiction. The question whether an injunction should be issued in such cases depends upon the facts presented in each particular case. Section 723, Rev. St. U. S., provides

that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." It is well settled that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained. *Root v. Railway Co.*, 105 U. S. 189; *Hayward v. Andrews*, 106 U. S. 672, 1 Sup. Ct. Rep. 544. In order to sustain the jurisdiction in equity, it must affirmatively appear that some ground of equitable jurisdiction exists, or that complainant has not a complete remedy at law for the wrongs complained of. What are the facts? It appears from the evidence that from January 11, 1881, until March 24, 1888, the California Electric Gas-Lighting Company held and owned the patent in question; that on the said 24th of March, 1888, it assigned and sold to complainant the said letters patent, "together with any and all claims, demands, and causes of action for past infringement upon said patent," etc.; that defendant is a dealer in electrical supplies, and had been so engaged for a period of over eight years; that prior to the month of March, 1888, he had sold a number of burners of the character and kind claimed to be an infringement of complainant's patent; that he has not sold any since February, 1888, and he testifies that he has not intended selling any more of them since the 1st day of February, 1888; that he still has on hand some of the burners capable of being used at any time; that he has published a catalogue, and still has it on hand for circulation, offering said burners to the public; and asserts in his answer that he has the right to sell them.

The assignment to complainant is sufficient to authorize it to recover its claim for profits and for damages for past infringements prior to the time of its ownership of the patent. In *Packer Co. v. Eaton*, which was a suit in equity to restrain defendants from further infringement, this precise question was passed upon. SHIPMAN, J., in the course of his opinion, said:

"The infringement took place in this district in the year 1878, while the Martin patent was owned by H. H. Doubleday, who assigned it to the plaintiff on April 4, 1879; and on June 10, 1879, also assigned to the plaintiff all his right, title, and interest in and to any claims for past infringements of said patent within and throughout the state of Connecticut. * * * The plaintiff, when the suit was commenced, owned the patent, and owned the entire interest in the claim for profits and damages which is here sought to be recovered, and has a right, by virtue of such ownership, to recover in this suit the profits and damages for infringements committed in this district before it owned the patent." 12 Fed. Rep. 870.

Defendant's prior infringement, taken in connection with the fact that he still has some of the infringing burners on hand and advertises them in his catalogue, is sufficient to sustain complainant's right to equitable relief, notwithstanding the fact that he has not sold any of them, and states that it has not been his intention to sell any, since February, 1888. In *Celluloid Manuf'g Co. v. Arlington Manuf'g Co.*, the defendant claimed that it had ceased to infringe before the bill was filed, and asserted that it did not intend to renew the use of the infringing machine. WALES, J., said:

"It still continues in possession of all the contrivances and appliances to enable it to violate the patent, but promises not to use them for that purpose. This is a naked and unsupported promise. The practice of the courts in such cases is well settled. In *Woodworth v. Stone*, 3 Story, 749, it was decided that a bill for an injunction will lie, if the patent-right is admitted or has been established, without an established breach, upon well-grounded proof of an apprehended intention, on the part of the defendant, to violate the plaintiff's right. *A fortiori* should an injunction issue where, as in the present case, the defendant has already infringed, and nothing but a mere promise stands in the way of its doing so again." 34 Fed. Rep. 324.

To the same effect see Walk. Pat. §§ 676, 701; 3 Rob. Pat. § 1191; *American Bell Tel. Co. v. Globe Tel. Co.*, 31 Fed. Rep. 732.

Defendant contends that no infringement has been proven. The specification in the patent states that—

"The invention relates to apparatus for lighting gas by electricity in which the gas-cock is opened and closed by electric action upon a mechanical device connecting with such cock and a battery, and in which are employed, in combination with a burner, a stationary metallic arm terminating in a platinum or other metallic point in near proximity to the orifice in the burner, this arm or electrode being fixed to the burner, and insulated from it, and connected to one pole of a battery and a movable arm or electrode, which is connected to the other pole of the battery, and pivoted or otherwise connected to the burner, in such manner as, when vibrated, to make and break circuit with the latter, and produce a spark to ignite the gas. In this apparatus I employ two electro-magnets, and a vertically arranged vibrating armature, connected with the gas-cock, and arranged between the magnets, in combination with a movable and a fixed electrode, the latter being secured rigidly to and insulated from the body of the burner, and is connected with a button wired to an electric battery, while the burner itself is connected with the opposite magnet and a battery by a button, thereby making connection with the movable electrode; the whole being so arranged that the movement of the armature, when attracted to one magnet, which is charged from the battery by a pressure upon its button, serves to open the gas-cock, and when attracted to the opposite magnet, by depolarizing the first and charging the second by pressure upon its button, the cock is closed, while, as long as the first magnet remains charged by the pressure upon its knob, the movable electrode vibrates with rapid intermissions, and certain lighting of the gas is thereby insured. My present improvements consist in the employment of a horizontal swinging arm attached to the lower end of the vertical gas-cock, this arm being forked, and straddling an upright bar erected upon the top of a vibrating armature, disposed between two pairs of electro-magnets, and caused to vibrate by the closing and opening of an electro-circuit from a suitable battery, the vibration of the armature effecting reciprocation of the lever and cock. My invention also consists in connecting the armature with the lower end of the movable electrode or arm in such manner that, as the armature moves in one direction and opens the cock, it causes the movable electrode to separate from the fixed and insulated electrode, thus breaking the electric circuit, and producing a spark to light the gas; while a reverse movement of the armature closes the cock, and allows the movable arm to return by the stress of a spring, and make contact with the fixed arm."

Then follow certain specified details of construction, wherein reference is made to the drawings accompanying the specification.

The claim of the patent alleged to be infringed reads as follows:

"(1) In an electric-lighting gas-burner, a magnet for turning the gas-cock by one electric impulse, combined with a fixed electrode, α' , and a movable electrode c' , normally in contact, and mechanism connecting the armature with the movable electrode, to break the contact between α' and c' the instant after the gas is turned on, and create a spark for ignition, substantially as described."

The claim sued upon is a combination claim, and defendant's contention is that the burner of defendant does not have one of the elements of the patented burner, in this: that in defendant's burner the armature strikes the movable electrode by direct contact without any "mechanism connecting the armature with the movable electrode." In the catalogue defendant specifies that his burner—

"Contains two electro-magnets, one on either side of the gas-way, which govern an armature by a lever, so that, when an electric current is established through one magnet, the armature is attracted to that magnet, and the lever turns the stop-cock and lets on the gas. At the same instant the armature comes in contact with the breaking lever, the electric circuit is broken at the burner tip, and the emitting sparks ignite the issuing gas. When a current of electricity is sent into the other magnet the armature is drawn to it, thus shutting off the gas."

This definition, as well as a comparison of the respective exhibits, shows that, while there are some slight differences in the construction of the two burners, their operation and effect are substantially the same. The defendant's contention is that the electrodes of the patent are not merely the platinum or other metallic points at their upper ends, but they are the entire shaft, of which the metallic point is only a small part; and the defendant's burner shows that the armature comes in direct contact with the lower end of the movable electrode without any connecting mechanism of any nature or kind; and that, inasmuch as that mechanism is one of the elements of the combination of the first claim in the patent burner, the defendant's burner does not infringe. The controversy touching the question under discussion is principally confined to the definition which should be given to the word "electrode," complainant claiming that the movable electrode in defendant's burner consists "of a small platinum point attached to the upper end of a brass stem;" and, if this contention is correct, then there is a "mechanism connecting the movable electrode with the armature." Numerous definitions of the word "electrode" have been cited from the various dictionaries. The Century Dictionary defines it as "a pole of the current from an electric battery, * * * applied generally to the two ends of an open circuit." Webster's International Dictionary gives the following definition: "The path by which electricity is conveyed into or from a solution or other conducting medium; (especially,) the ends of the wires or conductors, leading from the source of electricity, and terminating in the medium traversed by the currents." These definitions seem to support the contention of complainant. All the other definitions agree that electrodes are simply the poles of an open electric circuit, and that the poles are the ends of the two wires, or the points of the wires. But the patent itself is the best evidence as to what is meant by

the word "electrode,"—"combined with a fixed electrode, *a'*, and a movable electrode, *c'*, normally in contact, and mechanism connecting the armature with the movable electrode, to break the contact, *a'* and *c'*, the instant after the gas is turned on." Now, referring to the drawings, it will be seen that *a'* designates the platinum point on the fixed arm, and that *c'* designates a small bent arm, normally in contact with the fixed electrode. From this it appears that complainant is fully justified in calling the two points on the arms the "electrodes," and, applying this definition to the defendant's burner, it is apparent that there is a mechanism connecting the movable electrode with the armature.

The fact that the patented burner has a vertical armature, which moves in a horizontal direction, while the defendant's burner has a horizontal armature, which moves in a vertical direction, does not in any manner tend to support the plea of non-infringement.

In *Electric Co. v. Fuller*, which was a suit instituted for the infringement of the first claim of this identical patent against defendant, Fuller, upon a similar burner to the one used by the defendant in this case, COLT, J., said:

"The defendant's apparatus is the same in principle, though its construction differs somewhat from the plaintiff's. The magnets have their cones parallel with the burner, while the magnets in the patent are substantially at right angles thereto. The movable electrode has a vertical movement to break the circuit, while the movable electrode in the patent has a laterally vibrating movement. In defendant's apparatus the armature is horizontal instead of vertical, and the means for breaking the circuit are somewhat different. I am of opinion, however, that the defendant's apparatus embodies the substance of the patented invention, and that changes in the details of construction should not protect them from the charge of infringement. The fact that the main features in the patented apparatus, such as the circuit breaker, single circuit, operating the gas-cock directly by the armature, were old, should not limit the complainant to the exact form of mechanism found in the patent. The patent covers an important improvement in the art of lighting gas by electricity, and it should receive a reasonably broad construction, and those should be held to be infringers who accomplish the same result by substantially the same or equivalent means." 29 Fed. Rep. 517.

Complainant is entitled to a decree for injunction and for an accounting. Let the usual decree be entered.

GERARD v. DIEBOLD SAFE & LOCK Co.

(Circuit Court, E. D. Texas. December 10, 1891.)

PATENTS FOR INVENTIONS—LIMITATION OF CLAIM—BURGLAR-PROOF SAFES.

Letters patent No. 246,748, issued September 6, 1881, to Alonzo Gerard, are entitled, "an improvement in burglar-proof safes," and the inventor repeatedly uses this description in the specifications, also stating that the object is to provide "a safe" with non-explosive seams, and that "any suitable locking device may be operated to throw a bolt on the inner face of the door * * * which will prevent the shaft and handle from being operated to unfasten the door." The claims are for "a combination of a safe" specified, with a particular locking device described. *Held*, that the patent was for a burglar-proof "safe" and not for a burglar-proof "safe lock," and hence was not infringed by the use of a similar device in the construction of jail cages.

In Equity. Suit by Alonzo Gerard against the Diebold Safe & Lock Company for infringement of patent. On demurrer to the bill. Sustained.

Fizet & Miller, for complainant.

H. F. Ring, for defendant.

PARDEE, J. The complainant's bill is for an injunction and an accounting in the matter of an alleged infringement of a patent. The bill sets forth, in the usual form, that the complainant was the original and first inventor of a certain new and useful improvement in burglar-proof safe locks, letters patent United States No. 246,748, with the usual allegations as to prior knowledge and prior use. The bill proceeds to charge—

"That the defendant, in violation of the exclusive right of complainant, without any license, at Canton, in the county of Starke, state of Ohio, has made or caused to be made, sold, and has used, in the construction of locks upon jail cages; at divers places, one or more locks embodying the invention and improvements described and claimed in said letters patent; that the said defendant has been notified of his said infringement, and requested to desist therefrom, but that he refuses to do so, and persists in the use of said infringing apparatus or locks in open disregard and defiance of complainant's exclusive rights under said letters patent."

To this bill the defendant has interposed a general demurrer. The points made thereunder are that it appears from the bill, and the letters patent proffered in connection therewith, that complainant's invention is a combination, one of the essential elements of which is a safe, while the bill affirmatively shows that the defendant is using something not in combination with a safe,—a character of device of which a safe cannot be one of the parts; that the bill upon its face excludes the hypothesis of a safe forming one of the parts of the device used by the defendant, as alleged, in the construction of locks upon jail cages; and that it is also apparent upon the face of the bill that the stated object of complainant's invention, to-wit, "to provide a safe with non-explosive seams," is entirely foreign to the object of the device employed by the defendant, which is described in the bill as something used in the construction of locks upon jail cages.

An inspection of the letters patent No. 246,748, dated September 6, 1881, proffered with the bill, shows that the patent, as described generally by the patent-office, is for "an improvement in burglar-proof safes;" that the inventor, in his specifications, declares he has invented certain new and useful improvements "in burglar-proof safes;" that his invention relates "to burglar-proof safes," the object being to provide "a safe" with non-explosive seams; that the safe is constructed of the usual materials, in such a way that at its front, between the inner and outer walls, on all sides, is a series of projecting shoulders, or tongues and grooves, which correspond with similar projections and depressions on the inner face of the door, which fits flush within the outer projecting rim of the safe; and that, when the door of the safe is closed and secured, these interlocking projections and depressions form a close seam, into which it is impossible to introduce an explosive to a sufficient distance to have any injurious effect upon the joint,—and, after further describing the apparatus and its operation, says "that any suitable locking device may be operated to throw a bolt on the inner face of the door * * * which will prevent the shaft and handle from being operated to unfasten the door."

The claims are:

"(1) The combination with a safe having grooves, G, G, of a door provided with oblong rectangular plates, C, secured at the edges thereof, sliding plates, D, arranged under said fixed plates, and adapted to enter the grooves in the inside of the safe; a vertical main lever, E, attached to the upper sliding plate, and connected by pivoted levers, e, e, with lugs on the side and bottom sliding plates, and having link, e, and crank handle, F, whereby said sliding plates are actuated through their attached levers, substantially as specified.

"(2) The combination of the safe, A, having notched lugs, I, I, and casings, L, L, the door, B, provided with bearings, g, g, and sliding hinges, K, K, having slots, k, engaging with pins, k', in the casings, L, and the double-crank shaft, H, having eccentrics, h, h, and pins, h', h', engaging with the notched lugs, I, substantially as set forth."

From the specifications and the claims, it is difficult to separate from the alleged combination a burglar-proof safe. It is well-settled patent law that a combination is an entirety. If one of its elements is omitted, the thing claimed disappears. Every part claimed is conclusively presumed to be material. *Vance v. Campbell*, 1 Black, 430, reaffirmed in *Gould v. Rees*, 15 Wall. 194; *Gill v. Wells*, 22 Wall. 26; *Cammeyer v. Newton*, 94 U. S. 225; *Fuller v. Yentzer*, Id. 297; *Schumacher v. Cornell*, 96 U. S. 554,—and many other cases.

It is clear that the patent is not for a burglar-proof safe lock, nor for an improvement in burglar-proof safe locks, nor for a combination of elements constituting a burglar-proof lock; for, aside from the fact that the specifications and claims do not cover any locking device, the specifications declare that any suitable locking device may be operated to throw a bolt "which will prevent the shaft and handle from being operated to unfasten the door,"—that is, to lock the door; and, if the locking device be omitted, it puts an end to all claim that the apparatus is burglar proof. The most favorable view that can be taken of the complain-

ant's invention is that it is an improvement in the door of a burglar-proof safe, combining the elements claimed, all acting together so as to render the door, when closed, impervious to the admission of explosive substances. The objection to this construction is that it is not what the patentee claimed, nor what the patent-office allowed. See *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76, where it is said:

"While the patentee may have been unfortunate in the language he has chosen to express his actual invention, and may have been entitled to a broader claim, we are not at liberty, without running counter to the entire current of authority in this court, to construe such claims to include more than their language fairly imports. Nothing is better settled in the law of patents than that the patentee may claim the whole or only a part of his invention, and that, if he only describe and claim a part, he is presumed to have abandoned the residue to the public. The object of the patent law in requiring the patentee to 'particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery,' is not only to secure to him all to which he is entitled, but to apprise the public of what is still open to them. The claim is the measure of his right to relief; and, while the specification may be referred to to limit the claim, it can never be made available to expand it."

As the bill claims a patent for an improvement in burglar-proof safe locks, which is not supported by the letters patent proffered, and as the infringement charged is wholly incompatible with complainant's patent, as shown by his letters patent, the demurrer is well taken, and should be sustained; and it is so ordered.

HAUGHEY v. LEE *et al.*

(Circuit Court, E. D. Pennsylvania. May 9, 1890.)

PATENTS FOR INVENTIONS—INVENTION.

The claim of patent No. 879,644, of March 20, 1889, was for an "interfering device," to be placed around a horse's leg to protect it from contact with the hoof of the other leg, and to widen the stride, consisting of the pendant of "suitable material, loosely jointed to the strap passing around the leg of the horse." Devices for this purpose were old, and had been constructed in the form of a strap with leather loops, forming "strikers,"—i. e., the part adapted to hit the other hoof,—attached, standing out horizontally towards the other leg, and of a pliable material wound round the leg with the ends inside, and projecting horizontally towards the other leg, to form the "striker." A strap having a pendant had been attached to the leg of horses to prevent stall kicking. *Held*, in view of the state of the art, no invention was shown in changing the position of the "striker" from a horizontal to a pendent position.

Bill in Equity by Michael Haughey to enjoin Lee & Sons from infringement of patent granted to complainant for interfering device for horses.

E. J. O'Brien and Edward P. Bliss, for complainant.

Ernest Howard Hunter, for respondents.

BUTLER, J. The plaintiff sues for infringement of patent No. 379,-644, dated March 20, 1889,—“interfering device for horses.” The claim is as follows:

“The interfering device, consisting of the pendant made of rubber, wood, or other suitable material, loosely jointed to the strap passing around the leg of a horse, substantially in the manner shown, and for the purposes set forth.”

The answer attacks the patent, and denies infringement. To support the former appeal is made to the state of the art. From this source it appears that interfering devices are of great antiquity, and of various forms, all having the same object,—protection of the leg, and spreading the stride. One of the earliest was the “boot,” made of leather or other pliable substance, padded, and fitted to the leg,—the main purpose of which was to protect the leg. Even this, however, was supposed to exert some influence on the step. Following it came various other contrivances, the dominant object of which was to produce a wider step,—called “spreading.” All these devices are still employed. Some consist of a strap strung with balls of wood, gum, or other similar material, made to buckle around the leg, above or below the pastern-joint. These balls stand out a little further than the “boot.” Others consist of a strap with leather loops attached to the outward side, two to five inches long. These loops at first are stiff, standing out horizontally, and are struck more readily than the “boot,” or balls. After a little use the loops hang, though not perpendicularly. Others are made of bands of platted straw, of gum pipe, and similarly pliable substances, and so fitted to the leg that the two ends form a “striker.” It is unnecessary to extend the enumeration. The object in all cases is to protect the leg, and induce a wider step. By this means it is sought to cure the vice of interfering. The projection on the strap is called a “striker.” A strap with pendent chain, or rope, has long been used to prevent kicking in the stall. This is attached to the leg in the same manner as the other devices. The chain is of various lengths, usually a foot or more.

The defendant has also shown, (if the testimony is credible,) the use of an interfering device made of a strap and pendent striker, loosely hung. The witnesses testify to having seen it used at a race-course near Norristown. One witness testifies to having seen a similar device,—the pendant being of gum or wooden balls,—at the stable of Mr. Hitner, in the same vicinity. One witness, a harness-maker, in Philadelphia, testifies that he assisted to make a number of similar devices, for a farrier, the strikers of which consisted of gum pipe—illustrated by an exhibit in proof. Another testifies that he saw these in the shop-window when made. The witnesses who testify to the devices used near Norristown, speak of a period 20 years past; and the same is true of the witnesses who testify to the Philadelphia device. The plaintiff called a number of persons, familiar with the general subject, who say they never saw any such devices. This does not, however, disprove their existence. I should hesitate to disregard the testimony of the plaintiff's witnesses, or to accept the suggestion that these devices were experiments

merely. Yet I would hesitate to declare the patent invalid on this testimony. The case may be put on safer ground. In view of the other devices shown—about whose existence there is no question,—it seems clear that the slight change in form which the plaintiff made did not require invention. He simply altered the “striker” from a horizontal to a perpendicular position. He found it standing out laterally, and loosened it so as to hang. This was all. Surely no invention was required to do it. Any mechanic to whose line the work belonged (or indeed any handy person, though not a mechanic) could do this. The idea or conception that this change might be beneficial, was not patentable. The question is simply, was invention required to make the change? In my judgment it was not. The kicking device exhibited a method of doing it. This device indeed required nothing but shortening the chain to make it correspond in every essential respect with the plaintiff's. Applying this to a horse in motion, instead of one standing in his stall, is not even a new use. If new it would be analogous to the old. Patents are constantly overturned for want of invention, where its absence is not so clear. The later volumes of reports are full of such cases; eight are contained in the last issue—132 U. S. It is sufficient to cite a few of them. *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. Rep. 717; *Thompson v. Boisselier*, 114 U. S. 1, 5 Sup. Ct. Rep. 1042; *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. Rep. 220; *Bussey v. Manufacturing Co.*, 110 U. S. 131, 4 Sup. Ct. Rep. 38; *Gardner v. Herz*, 118 U. S. 180, 6 Sup. Ct. Rep. 1027; *Weir v. Morden*, 125 U. S. 98, 8 Sup. Ct. Rep. 869; *Holland v. Shipley*, 127 U. S. 396, 8 Sup. Ct. Rep. 1089; *Aron v. Railway Co.*, 132 U. S. 84, 10 Sup. Ct. Rep. 24; *Day v. Railway Co.*, 132 U. S. 98, 10 Sup. Ct. Rep. 11; *Roemer v. Bernheim*, 132 U. S. 103, 10 Sup. Ct. Rep. 12; *Watson v. Railway Co.*, 132 U. S. 161, 10 Sup. Ct. Rep. 45. It is said by some of the plaintiff's witnesses that his striker taps the leg to which it is attached, as well as the other, and his counsel urge this as important. The specifications say nothing about it, but ascribe the device's superiority to the fact that it strikes the opposite leg, by a “swinging tangential motion.” The claim also is silent on the subject. The counsel (as we understand) concede that the device would be old but for the capacity to perform this additional function. If that is true the patent is clearly void, because the claim embraces devices that will not perform it; and is therefore too broad. But aside from this, the tapping of the leg referred to, is unimportant. Every device used strikes and rubs the leg to which it is attached. Whenever the projection is hit by the opposite leg the blow is communicated to the other. The effect must necessarily be similar to the supposed tapping. I would rather sustain the patent than overturn it, (I feel this inclination in all cases,) but the proofs will not allow me. The bill must be dismissed, with costs.

COLT *et al.* v. COLT *et al.*

(Circuit Court, D. Connecticut. July 22, 1881.)

1. CONSTRUCTION OF WILLS—CODICIL—REVOCATION OF BEQUEST.

A will gave to each of several legatees a specified number of shares of stock in a manufacturing company, including a bequest of 500 shares to testator's brother for life, and then provided that the residue of such stock owned by the testator at the time of his death "shall be divided among the several persons and parties to whom I have hereinbefore given legacies of stock, in the ratio and proportion in which said legacies of stock are hereinbefore given; * * * meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock, and in precisely the same ratable proportions." By a codicil testator provided that "I also revoke and cancel, for reasons growing out of his late unbrotherly conduct towards me, the legacy of 500 shares of the stock * * * given in the aforesaid will" to his brother. *Held*, that the proportional part of the residuary stock which would fall to the brother by virtue of the specific legacy was separate and independent from it, and hence was not revoked by the revocation of the latter.

2. SAME—REVOCATION OF TRUST.

The will also gave to the executors and their successors 500 shares of such stock, "in trust for the issue" of such brother, "the profits and dividends thereof to be applied to the education of his said issue * * * until the youngest surviving of said issue shall have reached the age of 21 years," when the stock and the accumulations thereof should go to them in equal proportions absolutely. By a second codicil testator gave to each child of the said brother a legacy of \$100, and then declared that "I hereby cancel and wholly revoke any and all other legacies or devises by me heretofore at any time made to or for the use and benefit of said children, or any of them; * * * and I hereby give" to certain children of a different brother "the property, to-wit, 500 shares" of such stock, "which in and by said original will is bequeathed to my executors in trust for the use" of the children of the first mentioned brother, "to be held by my executors for said children in the same manner, and subject to the same limitations, as are provided in said original will in the bequest to the children" of the first-mentioned brother. *Held*, that this was not a mere substitution of the children of one brother for those of the other, the title remaining in the trustees, but was a complete revocation of all legacies given to the one set of children, including their proportional part of the residue of stock, and operated to divest the title of the trustees, and revert it in them in favor of the other set; and hence this change did not carry with it any proportional part of the residue of stock, under the provision of the original will.

3. SAME—SUIT TO CONSTRUE—PARTIES—EXECUTORS AS TRUSTEES.

Where a will bequeaths property to the executors, in trust for certain legatees, and an action is brought by another legatee to construe the will, service upon the executors simply as such is sufficient to also make them parties in their capacity as trustees, and in that capacity they are bound by the decree.

4. JUDGMENT—COLLATERAL ATTACK.

In an action in a state court which had jurisdiction of the subject-matter, an order was made finding as facts that certain minor defendants and their guardian had been served with process, that "the parties appeared by their respective counsel, and the said minors were duly represented by their guardians." Subsequent orders and decrees recited that the "respondents" and the "parties" appeared by their counsel, filed their answer, etc. *Held* that, while these orders and decrees stand unimpeached by direct proceedings in the state court, the questions therein determined cannot be raised in an independent suit in a federal court, on the ground that the minors were not in fact represented by counsel.

5. SAME—GUARDIAN AD LITEM.

In an action in a state court having jurisdiction of the subject-matter, an order which finds that certain minor defendants "were duly represented by their guardian" is conclusive, until set aside by direct proceedings, that they were properly represented; and, in a collateral action, a federal court will not entertain the suggestion that, under the state law, the general guardian had no power to represent the minors, and that they were not bound by the decree because no guardian *ad litem* was appointed.

Affirmed in 4 Sup. Ct. Rep. 553.
v.48p.no.6—25

In Equity. Suit to recover certain shares of stock of the Colt's Patent Fire-Arms Manufacturing Company.

A. Payne, T. W. Dwight, L. C. Ashley, and S. E. Baldwin, for plaintiffs.

George G. Sill, for defendants, children of James B. Colt.

A. P. Hyde and C. E. Perkins, for other defendants.

BLATCHFORD, Circuit Judge. This case involves questions arising under the will of Samuel Colt and the codicils thereto. The will was executed June 6, 1856. Only certain provisions in the will and the codicils need be noticed. The only property involved in this suit are shares of the capital stock of Colt's Patent Fire-Arms Manufacturing Company, and the dividends thereon. That company was a corporation. Its capital stock consisted of 10,000 shares, of \$100 each, of which the testator owned 9,996 at the time of his death. He died January 10, 1862. The will gave to his wife, the defendant Elizabeth H. Colt, a gross legacy of money, and "the use and improvement, during her life," of 1,000 shares of said stock; and, subject to said bequest, it gave said stock to the children which should thereafter be born to him in lawful wedlock, and their heirs, as an absolute estate in fee-simple. It also gave to each of the children who might thereafter be born to him in lawful wedlock 500 shares of said stock. It also gave to his brother James B. Colt "the use and improvement, during his life," of 500 shares of said stock, and, after the death of his said brother, "to his issue lawfully begotten, as an absolute estate," on condition that said James B. Colt should "waive and relinquish all claims and demands, actual or pretended," which he might have against the testator or against said company. It also gave to his executors, and their successors in said office, 500 shares of said stock, "in trust for the issue of said James B. Colt lawfully begotten, the profits and dividends thereof to be applied to the education of his said issue, so far as the same may be necessary for that purpose, until the youngest surviving of said issue shall have reached the age of 21 years, when said stock, and all accumulations thereof, if any, shall go to said issue, in equal proportions, as an absolute estate." It also gave to the defendant Samuel C. Colt a legacy of money in gross, and 500 shares of said stock. It also gave to the plaintiff Isabella De Wolf Colt (now the wife of the plaintiff Frank E. De Wolf) a legacy of money in gross, and 100 shares of said stock, she being a daughter of his late brother, Christopher Colt; and to each of the other children of his said brother Christopher Colt a legacy of money in gross, and 100 shares of said stock. It also gave to L. P. Sargeant, under certain contingencies, 50 shares of said stock; and to E. K. Root, under certain contingencies, 50 shares of said stock; and to M. Joslin, under certain contingencies, 50 shares of said stock; and to J. Deane Alden, under certain contingencies, 25 shares of said stock. It also gave to certain persons, as trustees, 2,500 shares of said stock, to establish a school for the education of practical mechanics and engineers. It also gave "to each of my

executors hereinafter appointed" 50 shares of said stock. The will then proceeded:

"All the rest and residue of my estate, of every kind and description, not herein disposed of, I give, bequeath, and devise as follows: All the remaining stock of said Colt's Patent Fire-Arms Manufacturing Company of which I shall die possessed shall be divided among the several persons and parties to whom I have hereinbefore given legacies of stock, in the ratio and proportion in which said legacies of stock are hereinbefore given. All my other residuary estate shall be divided amongst the several persons to whom I have hereinbefore given pecuniary legacies in gross, in the ratio and proportion in which I have hereinbefore given such pecuniary legacies, meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock, and in precisely the same ratable proportions, and that my other residuary estate shall be shared by the same persons to whom I have given gross pecuniary legacies, and in precisely the same ratable proportions. I hereby nominate and appoint my wife, Elizabeth Hart Colt, and my friends Richard D. Hubbard and Henry C. Deming, of said city of Hartford, to be executors of this will, with all such powers and authorities as may be necessary to execute the same; and, in case my wife shall decline this trust, I hereby nominate and appoint Richard W. H. Jarvis, of Middletown, Conn., in her stead, and, in case the office of either of said executors shall become vacant by death, resignation, or otherwise, at any time thereafter, I hereby authorize and empower my surviving or remaining executors to nominate and appoint a successor to fill said vacancy. And to each of said executors, in compensation for services in the execution of this trust, I hereby give and bequeath, in addition to the legacy and devise hereinbefore given, one-fourth of one per cent. of the cash value of my whole estate."

On the 12th of January, 1858, the testator executed a codicil to said will, which contained the following provisions:

"I also revoke and cancel, for reasons growing out of his late unbrotherly conduct towards me, the legacy of 500 shares of the stock of Colt's Patent Fire-Arms Manufacturing Company, given in the aforesaid will to James B. Colt for life, remainder to his children; and, in lieu thereof, I give and bequeath said 500 shares of stock to the trustees named in said will, for founding a school for practical mechanics and engineers, subject to the uses and trusts created in said will for that purpose."

It also gave to J. Deane Alden 50 shares of said stock, in lieu of 25 shares named in said will, subject to conditions named in said will. It also revoked the appointment of Henry C. Deming as executor, and appointed in his place R. W. H. Jarvis. It then continued:

"I also revoke and cancel the legacy given in said original will to the children of my late brother, Christopher Colt, so far as the oldest son of my said brother is concerned, and so far only; and in lieu thereof I give and bequeath to said oldest son one-fourth part of what he would have received if the legacy to him in said original will had not been revoked."

On the 2d of February, 1859, the testator executed a second codicil to said will, which stated that it was in addition to said codicil of January 12, 1858. It canceled and revoked the legacy made by the original will and codicil to trustees for founding said school. It also contained the following provisions:

"I hereby give and bequeath to each of the children of James B. Colt a legacy of one hundred dollars, and I hereby cancel and wholly revoke any and all other legacies or devises by me heretofore at any time made to or for the use and benefit of said children, or any of them. I give to the oldest son of my brother Christopher Colt a legacy of one hundred dollars, and no more, and all legacies heretofore made in his favor are canceled and revoked; and I hereby give, bequeath, and devise to the other children of my said brother (said eldest son not being included herein) the property, to-wit, five hundred shares of the stock of the Colt's Patent Fire-Arms Manufacturing Company, which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt, to have and to hold to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children; and the property hereby bequeathed is to be held by my executors for said children in the same manner, and subject to the same limitations, as are provided in said original will in the bequest to the children of said James B. Colt. And I hereby confirm and establish said original will, as altered, changed, and modified by this and the previous codicil, as and for my last will and testament."

The will and the two codicils were proved and approved, and ordered to be recorded in the probate office of the probate court within and for the county of Hartford, in the state of Connecticut, on the 6th of February, 1862. The bill in this case is filed by Theodora G. Colt, widow of said Christopher Colt, (as assignee of the interest of Edward D. Colt, deceased, who was her son and a son of said Christopher Colt,) and by Le Baron B. Colt, Samuel P. Colt, and Isabella De Wolf Colt, (three children of said Christopher Colt,) in their own right, and by Frank E. De Wolf, husband of said Isabella. The oldest son of said Christopher Colt was George D. W. Colt. At the time of the death of the testator, the said Isabella was of age, and the said Edward D., Le Baron B., and Samuel P. were minors. Edward D. became of age on the 28th of May, 1865, Le Baron B. on the 25th of June, 1867, and Samuel P. on the 10th of January, 1873. The said Theodora G. Colt was, as early as January, 1863, appointed by the said probate court the general guardian of the persons and estates of said Edward D., Le Baron B., and Samuel P. Letters testamentary on said will and codicils were issued by said probate court to Elizabeth H. Colt, Richard D. Hubbard, and Richard W. H. Jarvis. Four children were born to the testator and Elizabeth H. Colt. Two of them, Samuel J. and Elizabeth E., died without issue, after the execution of the codicils, and before the death of the testator. One of them, Henrietta J., died without issue, a few days after the death of the testator. The said Elizabeth H. Colt became her administratrix. The fourth child, Caldwell H. Colt, is still living. While he was a minor, the said Elizabeth H. Colt was his guardian. Joslin and Alden, named in the will, died before the testator.

On the 1st of June, 1864, the said James B. Colt brought a suit in equity in the superior court of the state of Connecticut for the county of Hartford. The suit was commenced by a petition. It set forth a copy of the will and of each of the two codicils. It claimed that James B. Colt had thereunder an interest absolutely or for his life, in

such proportion of the excess of the stock of said company owned by the testator at the time of his death, above the amount of stock disposed of in said will, as 500 shares bears to the whole amount of legacies thereof given in said will. It set forth the names of the persons then living who were interested in the 9,996 shares. It set forth, as so interested, among others, Isabella De Wolf Colt, (then unmarried,) and the said Edward D., Le Baron B., and Samuel P., and averred that Theodora D. Colt (who is the same person as the plaintiff Theodora G. Colt) was the guardian of the last-named three persons; that the inventory of the estate amounted to \$3,257,644.63; that none of said stock, or the dividends thereon, would be needed to pay debts, and all thereof could be transferred and paid over to the legatees entitled thereto; that the executors had received dividends on the stock in which the petitioner was interested, but they denied that he had any interest in any of said stock or dividends; and that the amount of the stock and dividends to which he was entitled was over \$200,000. The petition went on to say:

"And this petitioner avers that the respondents to this petition, and each of them, have, or claim to have, some interest, either legal or beneficial, in said residuary portion of said stock, and that it is necessary that they, and each of them, should be made parties to this proceeding, that their respective rights in said residuum may be so ascertained and fixed as to be binding on all said parties."

The petition prayed that the court would "ascertain and fix the amount of said residuum, and the parties entitled thereto, and their proportions under said will," and that the executors pay to the petitioner the dividends already collected or due, with interest, belonging to the shares of stock in which he held an interest under said will, and that he have the future dividends thereon. On this petition process was issued by a justice of the peace, directing the summoning of the following persons named in the process to appear before said superior court on the third Tuesday of July, 1864, to answer unto the foregoing petition, and show cause why its prayer should not be granted: Elizabeth H. Colt, as claiming an interest under said will, and as executrix of it, and as administratrix of Henrietta J. Colt, and as guardian of Caldwell H. Colt; Richard D. Hubbard, as claiming an interest under said will, and as executor of it; Richard W. H. Jarvis, as claiming an interest under said will, and as executor of it; E. K. Root; Henry C. Deming; Caldwell H. Colt; Isabella De Wolf Colt; Le Baron B. Colt; Edward D. Colt; Samuel P. Colt; Theodora D. Colt, guardian of the last-named three persons; Samuel C. Colt; and Luther P. Sargeant. The record of said suit in equity shows that the petition and the summons thereon were personally served, on the 2d of June, 1864, on the said Elizabeth H. Colt, Richard D. Hubbard, Richard W. H. Jarvis, E. K. Root, Henry C. Deming, Caldwell H. Colt, Isabella De Wolf Colt, Le Baron B. Colt, Edward D. Colt, Samuel P. Colt, Theodora D. Colt, and Samuel C. Colt, and on the 29th of June, 1864, on the said Luther P. Sargeant. At the September term, 1865, of said superior court an order was made by it, reciting that said

petition was brought by James B. Colt against the 13 respondents before named, to said court, at said July term, 1864, and reciting the substance of the contents of said petition, and referring to it as on file, and then stating that—

"This court doth find that the said petition was duly served and returned to this court at a term thereof holden on the third Tuesday of July, A. D. 1864, when the parties appeared by their respective counsel, and the said minors were duly represented by their guardians, and the said cause was continued to ———, when the respondents filed a demurrer to said petition, and the parties were at issue thereon, and this court, having heard them by their respective counsel, adjudged said demurrer insufficient, and overruled the same, and ordered the respondents to answer over, and, by legal removes and continuances, the petition comes to the present term of this court, when the parties again appear, and are at issue upon a general denial of the allegations in the plaintiff's bill as on file, and now the court, after due inquiry and examination made, doth find as follows:"

The order then set forth the will and the codicils, and the *status* of the stock and the parties, as before stated, with the fact that Edward D. Colt had, since the last term of the court, arrived at his majority, and that the executors had refused to pay over to James B. Colt any part of the dividends on said stock, because they were advised that, under the will and the codicils, he took no interest in said stock, or, if otherwise, that the nature and extent of his interest was so uncertain that they could not safely transfer said stock, or any interest therein, or pay the dividends thereon to him, until specifically advised by the judgment of the court in respect to the nature and extent of said interest; and also because the time allowed by the court of probate for the settlement of the estate had not expired. The order then proceeded:

"This court reserves for the advice of the supreme court of errors next to be holden in the county of Hartford the following questions arising on the foregoing record: (1) Whether the interest taken in the residuum by James B. Colt is a life-estate or an estate in fee. (2) Whether said Colt shall receive interest upon the dividends made on his residuary stock, and, if so, from what time. (3) Have the legacies which the children of the testator who deceased in his life-time would have taken had they survived him lapsed, or are they to be considered and treated as intestate estate? (4) Do the said children of Christopher Colt take any share in the residuum of stock in respect to their legacy of 500 shares given to them in the codicil to said will? (5) Do the said R. W. H. Jarvis and H. C. Deming both take a legacy of stock under said will, or only one of them, or neither of them? (6) What is the amount of the residuum of stock, and who are entitled thereto, and in what proportions? This court also reserves all other questions arising upon the record, and also the question as to what decree shall be passed in this suit."

The said supreme court of errors, at its February term, 1866, for Hartford county, made an order in said suit in equity, reciting the parties, as before named, and the reservation of said questions for its consideration and advice, and then proceeding:

"And now, said parties having been fully heard, this court doth consider, and doth advise said superior court: (1) That the interest of James B. Colt in the residuum of stock is a life-estate only. (2) That James B. Colt is not to receive interest on the dividends of stock, unless the superior court, on

further inquiry, find that interest has been made by the executors, or the money has been used by them or by the Arms Company in their business, so that they may fairly be said to have made interest upon the money, either directly or otherwise. (3) That the legacies to the deceased children who died before the testator are to be treated as intestate estate. (4) That the children of Christopher Colt do not take any share in the residuum of stock, in respect to their legacy of 500 shares given to them in the codicil to said will. (5) Jarvis takes, Deming does not. (6) The amount of residuum of stock is 5,346 shares, of which Mrs. S. Colt takes 1,149 21-31; J. B. Colt, for life, 574 26-31; Samuel C. Colt, 574 26-31; Henrietta Colt, deceased, 574 26-31; Elizabeth E. Colt, deceased, 574 26-31; Samuel J. Colt, deceased, 574 26-31; Christopher's children, 459 27-31; Caldwell H. Colt, 574 26-31; R. D. Hubbard, executor, 57 15-31; R. W. H. Jarvis, executor, 57 15-31; Mrs. E. H. Colt, executor, 57 15-31; L. P. Sargeant, 57 15-31; E. K. Root, 57 15-31."

At the March term, 1866, of the said superior court, a final decree was made by it, reciting that the said petition of James B. Colt was brought to the term of said court held on the third Tuesday of July, 1864, "to which court the same was made returnable, when and where the petitioner appeared, and the respondents also appeared;" that "the respondents thereupon demurred to the sufficiency of said petition, which demurrer was overruled, and, by legal continuances, the said action came to the term of said court holden on the fourth Tuesday of September, A. D. 1865, when and where the respondents filed their answer, as on file, and this court, upon a hearing, found the following facts, as proved in said case:" The decree then quotes the findings contained in said prior order, made at the September term, 1865, including the matter before quoted herein from said prior order, and states the reservation, for the advice of the supreme court of errors, of the six questions before set forth, in the terms before quoted herein from said prior order, and then proceeds:

"And now, in pursuance of the advice of the supreme court of errors, given upon the reservation aforesaid, and upon further hearing before this court upon the question of interest upon dividends heretofore declared, this court doth order, adjudge, and decree as follows, viz.: that the legacies by said will to certain children of the testator who deceased before him are to be treated as intestate estate; that the children of Christopher Colt do not take any share in the residuum of stock in respect to their legacy of five hundred shares of said stock given to said executors in trust for him in the codicil of said will; that the said Henry C. Deming does not take under said will the legacy of fifty shares given by said will to each of the executors thereof, nor does he take any interest in the residuum; but the said Richard W. H. Jarvis does take said legacy of fifty shares, and does also take a proportionate interest in the residuum. The amount of the residuum of stock is five thousand three hundred and forty-six (5,346) shares, of which Mrs. S. Colt takes, in the manner specified in said will, 1,149 21-31 shares; James B. Colt, for life, 574 26-31; Samuel C. Colt, in the manner specified in said will, 574 26-31; Caldwell H. Colt, 574 26-31; Henrietta Colt, deceased, 574 26-31; Elizabeth E. Colt, deceased, 574 26-31; Samuel J. Colt, deceased, 574 26-31; children of Christopher Colt, in the manner specified in the will, 459 27-31; R. D. Hubbard, executor, 57 15-31; R. W. H. Jarvis, executor, 57 15-31; Mrs. S. Colt, executor, 57 15-31; L. P. Sargeant, 57 15-31; E. K. Root, 57 15-31. And this court doth further find that the right, title, and interest of the said James B. Colt in and to the aforesaid 574 26-31 shares of stock is a life-estate only."

The court further found that the net amount of dividends on said 574 26-31 shares, since the death of the testator, to which said James B. Colt and his assigns were entitled, with interest thereon, and deducting income tax paid by the executors, amounted to \$84,575.01, which amount the decree required the executors to pay to said James B. Colt and his assigns, with \$330.09 as the costs of said petition. This decree was made May 21, 1866.

In pursuance of the will and codicils and said decree of the Connecticut court, the executors proceeded, in May and June, 1866, to dispose of the 9,996 shares of stock, and the accumulated dividends thereon. The dividends up to that time, from the death of the testator, had amounted to 150 per cent. on the par of the stock, being, on the 9,996 shares, \$1,499,400. They paid to the parties determined by said decree the back dividends on their primary legacies of stock and on their legacies of residuary stock. They held in reserve for Mrs. S. Colt, for her life, her 1,000 primary shares and her 1,149 21-31 of the residuary shares. They transferred to Caldwell H. Colt his 500 primary shares and his 574 26-31 of the residuary shares, and to Richard W. H. Jarvis, administrator of Henrietta J. Colt, (in place of Elizabeth H. Colt,) the 500 primary shares and the 574 26-31 of the residuary shares belonging to Henrietta J. Colt. They passed over to the distributors of the estate the 500 primary shares and the 574 26-31 of the residuary shares given to Samuel J. Colt, and the 500 primary shares and the 574 26-31 of the residuary shares given to Elizabeth E. Colt, and adjudged to be treated as intestate estate, and which shares the probate court directed to be distributed, one-third to Mrs. Elizabeth H. Colt, one-third to Caldwell H. Colt, and one-third to Henrietta J. Colt, to be held by her administrator, R. W. H. Jarvis. Those 2,149 21-31 shares were transferred by the executors accordingly. They held in reserve for James B. Colt and his assignees, for the life of said James B., his 574 26-31 of the residuary shares. They held in reserve for the four children of Christopher Colt (Isabella, Edward D., Le Baron B., and Samuel P.) the 500 primary shares given to them by the second codicil, and the accumulated dividends thereon, as required, until the youngest of them should become of age, less what was allowed for their education; and, when that event happened, they, in January, 1873, transferred to each of the four 125 shares, and paid to each of them one-fourth of said accumulated dividends, the said Theodora D. Colt taking the share of Edward D. Colt, then deceased, as his assignee. They transferred to Samuel C. Colt his 500 primary shares and his 574 26-31 of the residuary shares. They transferred to the said Isabella her 100 primary shares and her 114 30-31 of the residuary shares, and to the said Edward D. his 100 primary shares and his 114 30-31 of the residuary shares. They held in reserve for the said Le Baron B. and said the Samuel P., each of them, his 100 primary shares and his 114 30-31 of the residuary shares, and transferred to each of them his share when he became of age. They transferred to the estate of L. P. Sargeant its 50 primary shares and its 57 15-31 of the residuary shares, and to the estate of E. K. Root its 50 primary

shares and its 57 15-31 of the residuary shares, and to each of the three executors his or her 50 primary shares and his or her 57 15-31 of the residuary shares. The back dividends received by the executors on the stock were all disposed of by either being paid at the proper time to the parties receiving the transfers of stock, or by being paid into the general estate of the testator, and so distributed, because decided not to belong to the parties receiving the stock as legacies. Powers of attorney were given by the executors to Mrs. S. Colt and to James B. Colt, respectively, to draw, during their respective lives, the dividends on their respective life-shares of stock. Thus all the stock, and all the back dividends on it, and all control over future dividends on it, was parted with by the executors, as such, before this present suit was brought, under what they relied upon as competent judicial authority, purporting to dispose of the title to said stock and dividends, in a suit to which all persons interested therein were supposed by the executors and the parties to the suit, and by the courts which adjudicated the questions raised and decided, to have been parties, except that the 2,149 21-31 shares set apart for Mrs. S. Colt for life remain, to go, after her death, as prescribed by the will; and the 574 26-31 shares which James B. Colt enjoyed for his life remain now in the names of the executors, to go, with the dividends thereon since his death, to whoever may be entitled to them; James B. Colt having died on the 28th of October, 1878.

It does not appear from any record put in evidence in the present suit what questions were raised or decided on the demurrer to the sufficiency of the petition, nor that anything was decided thereon except to overrule the demurrer, nor is any order on the demurrer set forth, except what is recited as to its being overruled, in the order and the decree of the superior court which are set forth, nor does the record show that the questions raised on the demurrer were adjudged by the supreme court of errors, except as oral testimony alludes to that fact. But all parties have referred to the reports in the supreme court of errors of the case of *Colt v. Colt*, 32 Conn. 422, and 33 Conn. 270, as if they were made part of the record. The case in 32 Conn. is a report of the suit brought in the superior court on the demurrer to the petition, and states that the case on the demurrer was reserved for the advice of the supreme court of errors. It gives the arguments of counsel in support of and against the demurrer, and shows that the questions raised and adjudged were as to the right of James B. Colt to a life-estate in residuary shares of said stock, in virtue of the primary legacy of 500 shares to him in the original will, although such primary legacy was revoked by the first codicil, and as to the jurisdiction of the superior court over the subject-matter of the suit, and as to whether the case was one of equitable cognizance. The decision of the supreme court of errors discussed and covered all those points, and it advised that the demurrer be overruled. The case in 33 Conn. is a report of the action of the supreme court of errors on the six questions reserved by the superior court for the advice of the former court on the facts found by the latter court, and the decision of the court assigns its reasons for its answers to the questions.

The bill in the present case is filed against Elizabeth H. Colt, widow and executrix, and as trustee for the children of Christopher Colt and guardian of Caldwell H. Colt, (a legatee, and claiming as heir of Samuel J. Colt and Elizabeth E. Colt, legatees,) and as claiming an interest under the will; Richard D. Hubbard, executor, and as such trustee, and as claiming an interest under the will; Richard W. H. Jarvis, executor, and as such trustee, and as claiming an interest under the will, and as administrator of Henrietta J. Colt; Caldwell H. Colt; Samuel C. Colt; the executors of E. K. Root; the executors of Luther P. Sargeant; Alice B. Colt, Norman Colt, and James Colt, children and heirs at law of James B. Colt; and Hugh Harbinson, administrator of James B. Colt. The bill sets forth the will and the codicils, and the proceedings thereon, and the qualifying of the executors. It alleges that, by the clause in the second codicil to the will, the four children of Christopher Colt were substituted for the children of James B. Colt, under the clause in the original will relating to the 500 shares given in trust for the issue of James B. Colt; that the plaintiff Theodora G. Colt became, on the 6th of June, 1870, the owner, by assignment from the administrator of Edward D. Colt, deceased, of all the right of his estate in the residuary estate and stock, and the accumulations thereon, formerly belonging to the estate of Samuel Colt; that 5,346 shares of said stock passed under the residuary clause of the will; that the said children of Christopher Colt have received under the will only 100 shares each of the stock legacies, and 469 (meaning 459 27-31) shares of the residuary stock, in respect of said 400 shares, and the accumulations thereon, the gross legacies to each and the residuum thereon, and the 500 shares of stock and dividends thereon, so given in trust for them, which 500 shares and the accumulations thereon were paid over to them on the 11th of January, 1873, deducting credits for education during their minority, according to the trust; that, in addition, they are entitled, under the will and codicils, to 574 26-31 "additional shares, and more, together with the dividends and accumulations thereon," for the following reasons: (1) In respect to the legacies of 100 shares each of stock to said children of Christopher, they were entitled each to more shares of the residuary stock than what they so received, and accumulations thereon. (2) The gift to trustees of 500 shares of stock in trust for the children of Christopher, in place of the children of James B., carried to the trustees, and entitled the said Isabella, Edward D., Le Baron B., and Samuel P., under the residuary clause of the will, to receive such proportion of the stock bequeathed by the residuary clause as said 500 shares bear to the whole amount of the other legacies of stock given in the will and codicils, and the dividends declared and accrued thereon since the death of the testator. (3) Said children of Christopher are also entitled, under the residuary clause of the will, to such proportion of the 574 26-31 shares of residuary stock now in the hands of the executors, in which said James B. claimed a life-estate, as said gift of 500 shares in trust and said legacies of 100 shares each to said children (making 900 shares in all) bears to the whole amount of legacies of stock given in the will. (4) As the

plaintiffs have hitherto received less than their lawful proportions of the residuary stock and of the accumulations thereon, they are now entitled to receive the whole of the 574 26-31 shares now in the hands of the executors, the income of which was paid to James B. during his life, in order to aid in making them equal with the other residuary legatees; and that, so far as any of said residuary stock and the accumulations thereon, rightfully appertaining to them, or to their said trustees in trust for them, have been transferred to said executors and trustees personally, and distributed and transferred to other parties, who, or whose legal representatives, are defendants herein, the equities between said defendants and the plaintiffs in the premises should now be adjusted by the court, so as to make good and restore to the plaintiffs the stock rightfully belonging to them under the will and codicils, and the accumulations thereon.

The bill also alleges that, when the testator died, the said Edward D., Le Baron B., and Samuel P. were minors; that the last two continued minors until after the termination of proceedings had in the superior court and the supreme court of errors with reference to the will and codicils; that the rights of said children under the will and codicils could be lawfully asserted only by a guardian *ad litem*, in the matter of their claims to residuary stock in respect of said legacy of 100 shares each, and by said executors in their capacity as trustees in the matter of their claim to residuary stock in respect of the 500 shares given to said executors in trust; that said children were not, in said proceedings, or in any proceedings with reference to their claims to residuary stock, in respect of said legacies of 100 shares each, represented by any guardian *ad litem*, or by any one in any capacity, and, in respect to their rights to residuary stock under said gift to said trustees for them of said 500 shares of stock, in place of the rights of said children being asserted by said trustees, the plaintiffs are informed, on the 27th of December, 1878, that said executors not only did not appear and urge the claims of said children in respect of said residuary stock, under said gift of 500 shares of stock, but waived the same, and by counsel and by written brief opposed the claims of said children in respect thereof, so that, in fact, the claims of said children under said will were at no time legally made, set up, heard, or passed upon in any of the proceedings with reference to said will and codicils; that, had said children been represented in said proceedings, and their claims presented and urged in respect to said legacies to them directly of said 100 shares each, and in respect of said legacy of 500 shares in trust, said additional shares of stock and accumulations thereon, as claimed in said bill, would have been delivered and paid over to them; that said executors and trustees pretend that said children of Christopher are not entitled, by reason of said legacy of 500 shares in trust, to any share in the original residuary stock, or to any share in the 574 26-31 shares of residuary stock in which said James B. has enjoyed a life-estate, or to any additional original residuary stock and dividends, in respect of said legacies of 100 shares each to said children, and, in support of such pretenses, allege said proceedings as affecting the

rights of the plaintiffs; that the plaintiffs are entitled to such additional shares and accumulations thereon, and are not barred from claiming them because of said proceedings, and for the following reasons: (1) The said Edward D. arrived at age pending said proceedings, and the said Le Baron B. and Samuel P. continued to be minors until after the termination of said proceedings, and neither of said minor children were represented in said proceedings by a guardian *ad litem*. The only guardian of them, pending said proceedings, was a general guardian of their persons and estates, to-wit, their mother, said Theodora G. Colt, appointed by said probate court, and she had no power to represent them in said proceedings on the questions of their rights and claims under said will and codicils, and did not in fact at any time appear in said proceedings. (2) The questions affecting the rights of said children in respect of said legacy of 500 shares in trust could not be passed upon in any proceedings until the youngest, said Samuel P., arrived at the age of 21 years. (3) The said trustees of said children were not summoned to appear in said proceedings in their capacity as said trustees, and entered no appearance therein in said capacity, on behalf of said children, and employed no counsel to appear before said courts in their behalf as said trustees, and in defense of the rights of said children, under said residuary clause of said will, in respect of said gift of 500 shares of stock in trust, and no issues were made up by said trustees before said courts in said proceedings, involving the rights of said children, under said will and codicil, to said residuary stock, in respect of said gift to said trustees, as so claimed. (4) If said Colt, Hubbard, and Jarvis, summoned to appear in said proceedings as executors, were deemed to be before said courts as trustees for said children, said proceedings cannot be held to affect or impair the rights of said children under said will and codicils, because said trustees, by their counsel, appeared before said courts, and actively opposed the claim of said children to said residuary stock, in respect of said gift of 500 shares in trust. (5) Said Theodora G. Colt, during the pendency of said proceedings, was unacquainted with legal business, and, owing thereto, did not apprehend it to be her duty, as guardian of said minor children, to appear, in response to the citation annexed to the bill in the superior court, in their behalf, or as such guardian, and did not in fact employ counsel to appear, or herself appear, to defend against, or to answer, or to become a party to, said bill, in either of said courts; and the said Isabella was at the time of said proceedings also unacquainted with legal business, and, owing thereto, employed no counsel to appear for her or to defend her interests, and supposed, as did also her husband, until about the 1st of January, 1879, that said executors had advocated her claims in her behalf, and had endeavored to present them properly to said courts in her behalf.

The bill further alleges that the executors, on the probate of the will, took upon themselves the execution of all the trusts therein contained, and from time to time thereafter assumed to act as trustees under said bequests to them in trust for the plaintiffs, and have continued so to act ever since, and are accountable as such to the plaintiffs, and now hold

in trust for the plaintiffs said 574 26-31 shares in which said James B. formerly claimed a life-estate; and that said Colt, Hubbard, and Jarvis sometimes further pretend that, on the 11th of January, 1873, on the strength of having transferred and paid over to the plaintiffs 500 shares bequeathed to them as trustees for the plaintiffs, and the accumulations thereon, they obtained from each of the plaintiffs a certain written instrument, purporting in each case to be a receipt to said respondents as trustees, and releasing and discharging said respondents, trustees as aforesaid, from all further accountings, actions, or causes of action for or on account of said trust thereof, and further pretend that, on the strength of having paid over and transferred to the plaintiffs the property coming to the plaintiffs from them as executors, under the terms of said will, they, at that time, as executors, obtained from the plaintiffs a certain other written instrument, acknowledging the receipt from them, as executors, of \$2,975.24, as the proportional share of the plaintiffs in the balance then in the hands of said executors, and also acknowledging the receipt of the various other property coming to the plaintiffs from said respondents as executors, and, in consideration thereof, releasing the said respondents as executors from all further accountings, actions, and causes of action therefor, except as to the question of their interest in the remainder of the said 574 26-31 shares claimed to have been bequeathed to said James B. for life. The receipts to the trustees were four in number, under seal, and in this form:

"Received of Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, trustees under the will of the late Samuel Colt, my proportional share of 500 shares of the capital stock of the Colt's Patent Fire-Arms Co., bequeathed in said will to said trustees, in trust for the children (except the oldest) of Christopher Colt, and of the accumulations thereof, viz., shares, 125, cash, \$31,759.01; in consideration whereof I hereby release, discharge, and acquit the said Colt, Hubbard, and Jarvis, trustees, as aforesaid, of and from any and all further accountings, actions, or causes of action for and on account of said trust. January 11, 1873."

There was one receipt to the executors, signed by the four, under seal, in this form:

"Received Hartford, January 11, 1873, of Mrs. Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, executors of the late Samuel Colt, deceased, the sum of two thousand nine hundred and seventy-five dollars and twenty-four one-hundredths, (\$2,975.24.) being our full proportional interest and share in the balance of said estate in hands of said executors, as per their final administration account this day rendered and accepted in the court of probate; and, having previously received in full the various other sums, legacies, annuities, devises, and distributions coming to us under said will and previous settlements and administrations, to our entire satisfaction, we hereby, in consideration thereof, release, discharge, and acquit said Colt, Hubbard, and Jarvis, executors, as aforesaid, of and from any and all further accountings, actions, and causes of action, excepting, however, the question of our interest in the remainder of the 574 26-31 shares of the capital stock of the Colt's Patent Fire-Arms Manufacturing Co., bequeathed in said will to James B. Colt for life, the title to said remainder being undetermined."

The bill alleges that the payments and transfers of stock aforesaid were not a full settlement and satisfaction with and to the plaintiffs of and for the amounts of stock, and the accumulations thereon, to which the plaintiffs and their said trustees are and were entitled under said will; that on the 10th of January, 1873, the said Samuel P. having attained his majority on that day, the said Frank E. De Wolf, Le Baron B., and Samuel P. arrived at Hartford from distant parts of the country; that on the next day they went to Colt's armory in Hartford, and there met the said Hubbard and Jarvis; that thereupon certain instruments were drawn, either by or at the dictation of said Hubbard and Jarvis, and the respondents, as trustees, paid over to the plaintiffs the said 500 shares, and the said balance of the accumulations thereon, and, as executors, paid over to the plaintiffs \$2,975.24, represented by them to be the balance in their hands, as executors, belonging to the plaintiffs; that said Hubbard and Jarvis made no explanations to the plaintiffs of their rights under said will and codicils, nor that the plaintiffs had any further rights thereunder other than to receive said amounts; that the plaintiffs had no previous notice or knowledge that the respondents would ask at that time for any receipts or instruments to be made by the plaintiffs; that said instruments were made without deliberation, and without time or opportunity therefor, on the part of the plaintiffs, and without full and competent knowledge on their part of their rights under said will and codicils, and in ignorance of the course pursued by said respondents in the said proceedings in said courts, in filing a brief in opposition to their own rights as trustees of the plaintiffs, and to the rights of the plaintiffs as their *cestuis que trustent*, and in ignorance of the manner in which the said decree had been obtained; that the plaintiffs had great confidence in said Hubbard and Jarvis in the matter of their rights in the premises, especially in view of their fiduciary relations, and were inclined to readily comply with any request from them in relation to the making of any instruments of receipt which said Hubbard and Jarvis might indicate as being necessary and proper, and no allusion was made to said residuary stock, nor was it suggested that said instruments would ever be claimed to be a release of any of the rights of the plaintiffs, or of their trustees, therein; that said residuary stock, or their proportion thereof, or their, or their trustees', interest therein, did not form a part of the transaction, and were not covered by either of said instruments, but the receipt to the trustees related only to the 500 shares, and the accumulations thereon, referred to therein, and the trust as to said amount of said stock, and cannot be held to extend further than that in its effect; and the receipt to the executors related only to the property coming to the plaintiffs from the respondents strictly as executors, on account of the property given by the will directly to the plaintiffs, and not to any stock or property bequeathed to trustees of the plaintiffs, and was not understood by any of said parties as referring to any property given by said will in trust; and that said instruments cover only the amounts of stock, property, and money actually transferred and paid over by the respondents, and were without any other or further consideration there-

for, and do not operate as a release for anything further than said amounts.

The bill further alleges that the said Colt, Hubbard, and Jarvis sometimes also pretend that, as executors, they have, from time to time, filed in the court of probate for the district of Hartford their accounts relative to said estate and its settlement, and that the same were passed upon by said court, and duly approved, and are a bar to the prosecution of said claims of the plaintiffs; that the plaintiffs removed from the state of Connecticut in April, 1866, and have never since resided in that state, and did not reside there when said accounts were filed; that they received no actual or sufficient notice of the filing of said accounts, or of any proposed action thereon; that the plaintiffs, or some of them, were minors at the time of the filing, except when the last one was filed, and on the day that one was filed the youngest attained his majority; that the said trustees of the plaintiffs were not legally cited to appear, and did not appear, and said minors were not legally represented in the proceedings before said court of probate, and were not present, and were not bound thereby; and that, in any event, whatever may have been the proceedings in said court of probate, they are not a bar to the prosecution of said rights of the plaintiffs. The bill prays that said stock claimed by the plaintiffs under said will and codicils, and the accumulations thereon, may be delivered and paid over to the plaintiffs by said executors and trustees, and that they may be decreed to account respecting the residuary stock and accumulations thereon coming into their hands as executors and trustees as aforesaid, and especially with reference to the residuary stock and the accumulations thereon in respect of and appertaining to said gift of 500 shares of stock to them in trust for said children.

It appears to be conceded by all parties that the stock distributable as residuary stock was 5,346 shares. The plaintiffs contend that, if it be held that James B. Colt was not entitled to any interest in the 5,346 shares, and that the executors, in trust for the children of Christopher, (except the oldest,) were entitled to some of the 5,346 shares, based on the primary legacy to the executors, in trust for said children, of 500 shares, then the distribution of the 5,346 shares would be as follows:

	SHARES.
Mrs. S. Colt, for life,	1,149 21-81
The two surviving children,	1,149 21-81
The two deceased children, (intestate estate,)	1,149 21-81
The executors, in trust for the children, (except the oldest,) on the 500 shares,	574 26-81
Samuel C. Colt,	574 26-81
The children of Christopher, (except the oldest,) on the 400 shares,	459 27-81
L. P. Sargeant,	57 15-81
E. K. Root,	57 15-81
The executors,	172 14-81
	<hr/>
	5,346

In the above event, the plaintiffs claim to be entitled to receive, as their 574 26-31 shares of the 5,346, the 574 26-31 shares now in the hands of the executors, and to be entitled to the dividends from the death of the testator on the 574 26-31 shares. The amount of those dividends they represent to be 226 per cent., being a total of over \$140,000.

The plaintiffs further contend that, if it be held that James B. Colt was entitled to a life-estate in some of the 5,346 shares, and also that the executors, in trust for the children of Christopher, (except the oldest,) were entitled to some of the 5,346 shares, based on the primary legacy to the executors, in trust for said children, of 500 shares, then the distribution of the 5,346 shares would be as follows:

	SHARES.	
Mrs. S. Colt, for life, - - - - -	1,038	6-103
The two surviving children, - - - - -	1,038	6-103
The two deceased children, (intestate estate,) - - - - -	1,038	6-103
The executors, in trust for the children of Christopher, (except the oldest,) on the 500 shares, - - - - -	519	3-103
James B. Colt, for life, - - - - -	519	3-103
Samuel C. Colt, - - - - -	519	3-103
The children of Christopher, (except the oldest,) on the 400 shares, - - - - -	415	23-103
L. P. Sargeant, - - - - -	51	93-103
E. K. Root, - - - - -	51	93-103
The executors, - - - - -	155	73-103
	<hr/> 5,346	

In the last above named event, the plaintiffs claim that the increase of shares given to each legatee by the exclusion of the executors, as trustees for the children of Christopher, (except the oldest,) from sharing in the residuary stock, in respect of the 500 shares, was as follows:

	SHARES.	
Mrs. S. Colt, for life, - - - - -	111.62	
The two surviving children, - - - - -	111.62	
The two deceased children, (intestate estate,) - - - - -	111.62	
James B. Colt, for life, - - - - -	55.81	
Samuel C. Colt, - - - - -	55.81	
The children of Christopher, (except the oldest,) on the 400 shares, - - - - -	44.65	
L. P. Sargeant, - - - - -	5.58	
E. K. Root, - - - - -	5.58	
The executors, - - - - -	16.74	
	<hr/> 519.03	

They also claim that, while the trustees are responsible to them for so many of said 519.03 shares as belong to said trustees, said trustees have a right to resort to each of the above recipients for the shares so received by said recipients, and which rightfully belonged to the trustees for the plaintiffs; that, taking out from the 574 26-31 shares now in the hands of the executors as the James B. Colt life-stock the 55.81 excessive shares he enjoyed the use of, and giving them to the plaintiffs, there remain

to be distributed among the legatees, including the plaintiffs, 519 3-103 shares, as follows:

	SHARES.
Mrs. S. Colt, - - - - -	111.62
The two surviving children, - - - - -	111.62
The two deceased children, (intestate estate,) - - - - -	111.62
The executors, in trust for the children of Christopher, (except the oldest,) on the 500 shares, - - - - -	55.81
Samuel C. Colt, - - - - -	55.81
The children of, Christopher, (except the oldest,) on the 400 shares, - - - - -	44.65
L. P. Sargeant, - - - - -	5.58
E. K. Root, - - - - -	5.58
The executors, - - - - -	16.74
	<hr/>
	519.03

They also claim that, under the right of the trustees so to resort or recoup, as the amounts of stock so to be recouped happen to correspond to the amount each legatee is entitled to in such distribution, the entire stock may be taken in recoupment; that the plaintiffs would thus have received, through their trustees, under a proper distribution, in the first place, 519 3-103 shares more than they received, with the accumulation thereon from the death of the testator; and that they are also thus entitled, by the death of James B. Colt, to 55.81 shares of the 574 26-31 shares which James B. had for his life, and which are now to be distributed, with the accumulations thereon since the death of James B., thus entitling them to all the 574 26-31 shares. In respect, however, to those accumulations, the plaintiffs, in either of the above two views of distribution, waive all claim against the trustees personally for any dividends which went to L. P. Sargeant, E. K. Root, or James B. Colt, and insist only on the dividends which went to Mrs. S. Colt and her children, and to Hubbard and Jarvis and to Samuel C. Colt, being the dividends on 407.41 shares, and which they represent to amount to over \$100,000. It is thus seen that the pecuniary amount involved in this suit is considerable. The stock claimed is within the control of the executors, but the dividends claimed have been received by the parties who are now called upon to refund them. It is contended by the plaintiffs that their trustees can resort for these dividends to the parties defendant to whom the stock was erroneously distributed.

Elizabeth H. Colt, Mr. Hubbard, and Mr. Jarvis have put in a full answer to the bill. Samuel C. Colt by answer adopts it, and so does Elizabeth H. Colt, as guardian of Caldwell H. Colt. Alice Colt, Norman Colt, and James Colt, the children of James B. Colt, answer, denying that the plaintiffs are entitled to any part of the 574 26-31 shares in which James B. enjoyed a life-estate, and alleging that James B. was entitled to a fee in said shares, and that they, as his only heirs at law, are entitled to a fee in said shares; also denying that their interest in the residuum of the stock, in respect to the legacy of 500 shares given to the executors in trust for the lawful issue of James B., was taken away by any codicil, and claiming that they are entitled to a share in said residuum

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in respect to said legacy of 500 shares, and claiming that there was no revocation of their interest in said residuum; and admitting all the other allegations in the bill not inconsistent with said denials. No other answers appear to have been put in to the bill, nor does it appear whether the other defendants have been served with process.

The answer of Elizabeth H. Colt, Hubbard, and Jarvis is joint. It admits that they have the 574 26-31 shares, the income of which they paid to James B. during his life, and that he is dead. It avers that the said Isabella, Le Baron B., and Samuel P., and also Edward D., were made parties to the petition of James B., and were duly served with process therein; that at that time the said Theodora D. was the mother of the said Edward, Le Baron, and Samuel, who were then minors, and was then their legal guardian, and, in her capacity as such guardian, was made a party to said proceedings, and served with process therein; that all the plaintiffs and defendants in the present bill, or those who then legally represented them, were also made parties to those proceedings; that said minors and their said guardian did in fact appear in said suit, by counsel employed for them, to-wit, Henry C. Robinson, of Hartford, at the term of the court to which said proceedings were made returnable, and did appear and become parties to said proceedings, and was duly heard therein by said counsel, who was so employed by them; that in the decree of said court it was found as a fact that the parties to said proceedings appeared by their respective counsel, and the said minors were duly represented by their guardians; that the said decree in said cause imports absolute verity, and is conclusive as to the matters so found, and is binding and conclusive on the plaintiffs; and that, according to the law and practice in the state of Connecticut, when minors are made defendants in an action at law or in equity, and they have a duly-appointed guardian, which guardian is cited to appear, and does appear, in the suit, it is not usual or necessary to have any special guardian *ad litem* appointed. The answer recites the said contents of the said decree or judgment of March term, 1866, and alleges that it is in full force; that, in pursuance of it, and in accordance with it, they did thereupon divide up and transfer, to and among the respective persons so held thereby to be entitled to the same; the whole of said residuum of stock, and thereupon filed in the court of probate for the district of Hartford their account, as executors, of the settlement of said estate, showing the disposition so made by them of the residuum of said stock, and also of that specifically devised, which said account was, on the 2d of July, 1866, legally allowed by said court, and said allowance is in full force; that afterwards the said court of probate duly appointed distributors to distribute all the testate estate not specifically devised, and they made such distribution, and the same was, on the 14th of July, 1866, returned to said court, and was by it approved, and is still in full force; that on the 5th of August, 1870, and the 10th of January, 1873, they filed further accounts of the settlement of said estate as such executors, by which said estate was finally settled, which accounts were, on said respective days, allowed by said court, and said allowance is in

full force; and that said decree of said superior court, and the orders of said court of probate, in the settlement of said estate, and the conveyances of said stock in accordance therewith, are final and conclusive as to all matters therein contained, as against the plaintiffs, and a bar to the further prosecution of this bill, so far as the rights of the plaintiffs to any part of the residuary stock are concerned. It denies that the plaintiffs are or were entitled to any more shares of said residuum than they have received, or any accumulations thereon. It sets up the said proceedings which took place on the 11th of January, 1873, the said receipts and discharges given to the trustees, and the said receipt and discharge given to the executors, the former as a settlement of all matters connected with the said trust stock, and the latter as a settlement of all claims of the plaintiffs against the estate, under the will or otherwise, and against the defendants as executors. As to so much of the bill as refers to their action in the suit of James B., the answer avers that they were cited to appear therein as executors of said will, and did appear therein; that they employed counsel in whom they had confidence, to-wit, Benjamin R. Curtis, Origen S. Seymour, and William W. McFarland, to appear in said cause, and present such questions for the consideration of said court, regarding the construction of said will, as to them should appear well founded in the law, which was so done by said counsel; and that the defendants, as such executors, "did not appear or act particularly as trustees for or on behalf" of the plaintiffs, because the plaintiffs were duly made parties to the proceedings, by themselves and by their guardian, and appeared therein by able counsel, and were fully heard. As to so much of the bill as asks for the whole or any part of said 574 26-31 shares of stock in which a life-estate was given to said James B., the answer says that the defendants hold the same as executors for the persons duly entitled thereto under the will, and are ready to dispose of the same in accordance with the orders of any proper court having jurisdiction thereof; and it submits to the court the question whether or not the distribution of said shares does not by law appertain to the probate court for the district of Hartford, in which such estate was settled.

It is important, in the first place, to see what was decided by the supreme court of errors, and the scope of the decisions, as to parties and subject-matter. It is evident that James B. Colt, the plaintiff in the suit, supposed that he was bringing before the court, and in the proper way to make the decree in the suit not only binding, but final, all the parties whose interests could be affected by the decree for which he asked. The petition avers that the respondents to it have or claim some interest in the residuary stock, (that alone being the subject-matter,) and that it is necessary that each of them should be made parties to the proceedings, "that their respective rights in said residuum may be so ascertained and fixed as to be binding on all said parties." This was the scope of the suit, and the petition accordingly prayed that the court would "ascertain and fix the amount of said residuum, and the parties entitled thereto, and their proportions under said will." It

was necessary that the court should do so, in order to enable it to comply with the further prayer of the petition, to ascertain and fix the number of shares in which the petitioner has an interest under said will. As the petition and the will and the codicils disclosed who were parties interested, and showed that the executors were trustees for the children of Christopher in respect of the 500 shares, and that some, and who, of such children were minors, and that the executors, as such, and said minors, and the guardian of said minors, were parties, and as it appeared that all of them, and all other parties to the suit, had been served with process in it, it is manifest that the two Connecticut courts and the parties defendant and their counsel must have believed that there was no defect of parties. No suggestion to such purport appears to have been made by any party or counsel or court; whereas, if there was any such defect of parties, such suggestion was as obvious, then, to the experienced counsel and the learned courts as it can now be to any one in this suit. It was the interest of all persons then before the superior court that all the proper parties should be before the court, as the residuary stock was to be adjudicated upon and disposed of, and it was distributed under the decree which was made. It would certainly be a most extraordinary result if Connecticut counsel and Connecticut courts could be held to have been so wanting in discernment as to have permitted the rights of minors to be adjudged without a proper representation before the court of the minors, and of those having the legal title to the property in which the minors were interested. Nor can it be supposed that this point passed *sub silentio*. The question of proper parties was one so important to be considered that it must have been considered; and the fact that no suggestion in regard to it was raised by parties or court proves quite as much that a suggestion as to defect of parties occurred, and was rejected as without foundation, as it does that it did not occur; while if, when it occurred, it appeared to have the semblance of soundness in it, it would have been formally raised. It appears in 32 Conn. that Mr. McFarland, in arguing in support of the demurrer, and urging that the proper forum for the suit was the court of probate, and making other objections to the bill, did not contend that the petition was demurrable for want of parties, but urged that the bill involved a settlement of the estate and of the rights of all parties in it.

The main question considered by the supreme court of errors in 32 Conn. was whether the revocation, in the first codicil, of the legacy of 500 shares, which the will had given to James B. for life, with remainder to his issue absolutely, applied to and canceled the bequest to James B. Colt in the will of his ratable proportion of the residuary stock. The court said that, but for the provision in said codicil, James B. would have had at least a life-estate in 500 shares, and at least a life-estate in his ratable proportion of the residue of stock not specifically bequeathed. Guided by the principle that it must be governed by the intention of the testator, to be determined by settled rules, which rules it distinctly lays down, it arrived at the conclusion that the bequest of a share of the

residuary stock to James B. had not been revoked. The rules, as it stated them, were these:

"(1) The construction is to be put upon the instrument as a whole, and not upon detached portions of it. (2) If there is a codicil, that is to be read in connection with the will, and the construction is to be put upon the whole, as one instrument. (3) The intention is to be inferred from the language used by the testator, explained, if necessary, by parol proof of such extrinsic circumstances as will throw light upon the meaning of the words used. (4) The court is not at liberty to indulge in conjecture as to what the testator would have done if a particular subject had been brought to his attention, or as to what he may have supposed he had done by the language used in his will. (5) The different parts of a will, or of a will and codicil, should be reconciled, if possible. (6) Where a bequest has been once made, it should not be considered as revoked, unless no other construction can be fairly put upon the language used by the testator."

Nowhere are the true rules for interpreting a will and a codicil, with a view to ascertain the intention of the testator, more appositely or more tersely stated. The court remarked that the revocation was only of the legacy of 500 shares, which was, plainly, the first 500 shares; that the bequest of the residuary shares was in a different clause of the will from the bequest of the first 500 shares to James B., and had no reference to the first clause, except for the purpose of describing the legatees; that James B. was as well specified to be a legatee of residuary stock by describing him as already a legatee as if the bequest had been of a given number of shares of residuary stock to him by name in the residuary clause; and that the revocation in regard to James B. was specific, and not in general terms, as in the second codicil, in respect to the children of James B., revoking all legacies before made to them, or for their use. The respondents in that case urged that the will and the codicil ought to be read as of the date of the codicil, and that, therefore, after the codicil was executed, James B. was no longer a legatee of the 500 shares, and so the bequest of the residuary shares would not apply to him. To this the court replied that reading the will as of the date of the codicil would not strike out of the will the clause containing the legacy of 500 shares, but would have the effect merely to insert the codicil as the last clause in the will, and the bequest of the residue, to be divided among those "to whom I have hereinbefore given legacies of stock," would still have the construction which the court had given to it. The respondents in that case also urged that the bequest of residuary stock was auxiliary to the previous bequest, and that with the revocation of the earlier one the later one fell. To this the court replied that the rule had no application to these bequests; that there was no connection between different shares of stock, and no common use of them, and they could be held with equal convenience separately or together; that no case could be found where it had been held that a revocation of one devise operates as a revocation of another devise of merely the same kind of property; that there would be no propriety in such a rule, and no reason for its adoption; and that the implication of a revocation of one legacy from the express specific revocation of another arises solely from the dependence of

the former on the latter. The court further observed that the statement in the codicil of the dissatisfaction of the testator with the conduct of James B. would alone be no ground for implying a revocation, though in the case of a doubtful construction it might, perhaps, turn the scale. The court then alluded to the argument that there was virtually but one legacy to James B., because the testator had determined to divide all of the stock among certain persons in certain proportions, and, not being certain how much there would be at his death, gave certain specified amounts to the legatees, in the proportion in which he intended to divide the whole, and then gave, as a part of the same bequest, the indefinite residue in the same proportions, adopting this course in lieu of bequeathing the whole at once, in proportion to certain numbers. To this argument the court replied that the most that could be said of it with any certainty was "that this may have been his intention;" that the claim was not corroborated by anything in the will or codicils, unless it might be the unfriendly feeling exhibited by the testator towards James B.; and that, on the other hand, the facts that the bequests are in form separate, that the bequest of stock to James B. is conditional, while the bequest of residuary stock is not, that the revocation names specifically the first bequest, and that it was improbable the testator would neglect to make any bequest to a brother, were particulars, all of which were calculated to favor a different construction. The court added that, it being settled that a second legacy will never be presumed to be a dependent legacy, but that, on the contrary, every legacy independent in its terms will be presumed to be independent, and to make it otherwise a clear intention must appear on the face of the will, or will and codicil, it followed that the second legacy to James B. must be regarded as an independent legacy, and, consequently, not affected by the revocation. On the point taken, that the remedy was not in the superior court, but was in the court of probate, the court said that, on the allegations of the petition, the time had arrived for the payment of the legacies; that they were payable by force of the will itself, and it required no action of the court of probate to give the legatees a right to recover them; that a suit would lie to recover the legacy; and that, the legacy being one of specific shares of stock, a suit in equity in the superior court would lie to enforce the transfer of the stock, and it would also lie for an accounting in regard to the dividends which had been received on the stock by the defendants in a fiduciary capacity.

It is true that this decision on the demurrer, establishing the right of James B., did not directly decide against the right of the children of Christopher. The clause in the original will, giving 500 shares in trust for the issue of James B., and the clauses in the second codicil, revoking all legacies to or for the use of said issue, and giving to the children of Christopher a bequest, were not under direct consideration, or involved, in the decision on the demurrer. But the supreme court of errors, having decided, on the demurrer, in 32 Conn., that the residuum of stock was given independently by the will to the persons and parties to whom stock had before in the will been given, and, so, that a share in

the residuum was given to James B., held, in 33 Conn., when called on to pass on the rights of the children of Christopher in the residuum, in respect of their 500 shares, the converse of the same proposition, and decided that it logically followed from their prior decision that persons and parties to whom stock had not before in the will been given could not take stock under the residuary clause, and, so, that a share in the residuum was not given to the children of Christopher in respect of their 500 shares. Acting on the view that the one decision may logically follow from the other, while at the same time contending that the one decision does not logically follow from the other, the plaintiffs' counsel have, in argument, addressed themselves to undertaking to show that the decision of the Connecticut court in favor of the right of James B. was erroneous, with a view of getting rid of the effects of the construction which was put on the will and the first codicil in the decision on the demurrer. This they have done, assuming that it is open to the plaintiffs to have the question considered anew in this suit, as if it had never been raised in the former suit, because of the before mentioned alleged defects as to parties in the former suit.

The view of the plaintiffs' counsel is that the proper construction of the will and codicils is such that, if James B. can have no right to a share in the residuary stock, the children of Christopher must, for the same reason, have a right to a share in it, in respect of the bequest given to them in the second codicil. It is proper, therefore, to consider such right of James B. in the light of the views now urged. The arguments of counsel against the right of James B. are set forth in the report in 32 Conn. The leading counsel for the defendants was Mr. B. R. Curtis, of Boston. He urged that on the three papers, taken as one testamentary act, the testator did not intend that the residuary stock should go to any persons who were not prior legatees of stock; that he meant that a class of persons should have the residuum divided among them; that the exclusion of a person from the class excludes him from sharing in the residuum; that the revocation of legacies of stock by the codicils had the effect to make the revocations increase the residuum; that this increase was intended for the benefit of the specific prior legatees, in the proportions of their legacies; that, in view of the confirming clause at the end of the second codicil, the will was to be construed as if the original had been rewritten as altered, omitting the revoked parts, and substituting new legacies in place of old ones revoked; that it was to be read as if written at the date of the last codicil, and with all the revoked legacies omitted and the substituted legacies inserted; that, under that rule, the will could no longer speak of James B. as the legatee of 500 shares, and, if it could not speak of him as such a legatee, it could not as a legatee under the residuary legacy, which gives the remaining stock to the prior legatees of stock; and that, under the opposite construction, the 500 shares originally given to James B. fall into the residuum, and James B., if taking a share of such residuum, takes a part of the very 500 shares which the testator had declared he should not take. In such references to substituted legacies, the legacy of stock

in the second codicil to the children of Christopher would come under observation as a legacy substituted in place of the legacy in the original will of stock in trust for the issue of James B. The views urged by Mr. Curtis received the attention of the court, as appears by the decision.

The principal contention of the plaintiffs' counsel on this branch of the case is that the legacy of the proportional part of the residuum of stock to each legatee of it is united with each primary legacy of stock, so that the revocation of the primary legacy to James B. revoked also the legacy united with it, or accompanying it, of the proportional part of the residuum of stock. Stress is laid on these words in the will—"meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock, and in precisely the same ratable proportions"—as having the effect, notwithstanding the prior words, "hereinbefore given," to cause every primary legacy of stock, whenever made, by the will or codicil, especially in view of the confirming clause in the second codicil, to carry with it its ratable proportion of residuary stock. This is referred to as establishing a union, binding up the two portions of the stock in one common disposition, and as enabling the testator to revoke or increase or diminish a primary legacy of stock, and so effect a similar change in the residuary stock, without ever mentioning the residuary stock. This view of the proper construction of the will does not appear to be the proper one. The reasons assigned by the Connecticut court for regarding the primary bequests and the residuary bequests as independent of each other, and not united, seem to be unanswerable. If independent, the conclusion arrived at as to James B. was inevitable. The rules laid down by the Connecticut court, as those which it followed, were based on authorities cited by the counsel for James B., and which are found in the report in 32 Conn. One of the most pertinent cases is that of *Roach v. Haynes*, 6 Ves. 153. One Haynes, having a power of appointment under the will of one Franco, in respect to certain annuities, gave them and certain specific articles by will to trustees, in trust for her residuary legatee, "hereinafter named." All her estate not thereinbefore disposed of she gave to her son David. Afterwards she made a codicil, reciting that she had, by her will, given to her son William £1,000, and the residue of her estate to her son David, and certain other legacies, and revoking "all the above bequests," and giving the residue of her estate and effects to her sons William and David, equally between them, and giving certain pecuniary and specific legacies; and adding that, with these alterations, she confirmed her will, revoking all other codicils, and declaring that to be the only codicil to her said will. David claimed to be solely entitled, William claimed to be entitled jointly with David, and residuary legatees of Franco claimed the fund as undisposed of. The case came before Sir WILLIAM GRANT, master of the rolls. For David it was contended that, although he was, by the codicil, deprived of the description of sole residuary legatee, the codicil had no reference to the execution of the power of appointment, the fund not being given as a part of the residue; and that, as the codicil was directed to operate as a revoca-

tion of distinct parts of the will, it could not operate beyond that. For William it was urged that by the will the fund was united to the general personal estate, and the gift of the whole, fund and residue, to David by the will showed an intention not to distinguish between the fund and the general personal estate, and that thus the revocation of the residuary bequest to David, and the gift of the residue to the two, carried the fund to the two. For the residuary legatees under the will of Franco it was contended that the codicil entirely revoked the residuary bequest in the will, and in giving "the residue" gave only the residuary personal estate, and had no reference to the fund. The court held that the will separated from the residue the annuities and the specific articles, and vested them in trustees, and then gave the residue directly, and without the interposition of trustee, to David; that this was an appointment for the benefit of the person to whom she should give the residue; who turned out to be David; that, as the annuities and the specified articles had been separated from the residue, the revocation of the residue did not extend to them, and did not affect the fund; that the claim of the residuary legatees of Franco must be rejected; and that David was solely entitled. The shares of stock in the present case, in the primary legacies and in the residuary legacies, were the same kind of property, as is said in *Colt v. Colt*, in 32 Conn., but so the general personal estate, given as the residue in *Roach v. Haynes*, was the same kind of property with the specific articles given to the trustees with the capital of the annuities. As Sir WILLIAM GRANT remarked, the revocation of the bequest of the residue did not extend to the specific articles, because the intention was manifest in the will not to include the specific articles in the residue, and, if David was to have the specific articles, notwithstanding the codicil, he must also have the capital of the annuities, which the will had separated, equally with the specific articles, from the residue. In the present case the shares of stock given by the primary legacies were no part of the residuary stock, and the legacy of them was as distinct from the legacy of the residuary shares as if the residuary stock had been shares in a different corporation.

In *Hall v. Severne*, 9 Sim. 515, a testator by will gave pecuniary individual legacies, and, among them, £100 to one Bannister. It then directed his executors and trustees to divide the residue of his stocks and funds among "all and every the before mentioned individual legatees," in the proportions that their several personal legacies "hereinbefore given and bequeathed to them" should bear to the produce of the residue. By a codicil, which he directed to be added to and taken as part of his will, he gave a legacy of £200 to the same Bannister, and pecuniary legacies to others, who were legatees under the will, and declared that the legacies in the codicil were given to the legatees therein mentioned, in addition to what he had given to them, or any of them, by his will. The question arose whether the legatees under the codicil were entitled to share in the residue with the legatees under the will. For Bannister it was contended that, as the testator had directed that the codicil should be taken as a part of the will, the will was to be read as if it contained

a gift of £300 to Bannister; and that, under the declaration in the codicil that the legacies given by it were to be in addition to those given by the will, the additional legacy to Bannister must partake of all the incidents of the prior one, and carry with it a share of the residue. The court (Sir LANCELOT SHADWELL, Vice-Chancellor) held that, under the will, the persons who were to take the residue were the legatees named in the will; that the proportions in which they were to take it were the proportions which the legacies thereinbefore given to them, respectively, bore to the amount of the residue; and that, under the codicil, the legacy of £200 to Bannister was a substantive gift of £200, declared to be in addition to the gift of £100 in the will, but did not carry a further share of the residue in proportion to itself. The principle of this decision would lead to the conclusion that, even if the codicil had revoked the legacy of £100 given to Bannister by the will, Bannister would have shared in the residue; and it is a direct authority for holding that the substantive gift of stock to the children of Christopher, in the second codicil, does not carry a share of the residuary stock in proportion to itself.

In *Wetmore v. Parker*, 52 N. Y. 450, the testatrix, by her will, gave \$10,000 to a church, to complete its edifice or pay any debt therefor, and, if not required for that purpose, then to be invested, and the income expended by the trustees of the church for its use and benefit. She also, by her will, gave to an academy \$10,000, to erect its edifice, or pay any debt therefor, or, if the building should be completed and paid for before the bequest should take effect, then to be expended by the trustees of the academy for certain specified objects. The will bequeathed the residue of the estate "to the several persons, corporations, and societies to whom I have hereinbefore made bequests, and who shall be living and existing, and able to take the same, in proportion to the amounts given and bequeathed to them, respectively." Afterwards she made a codicil, in which, after reciting the bequest to the academy, and that she had given \$3,000 to it, "intending the same to be part of, and to be paid in anticipation of, so much of said legacy, * * * therefore" she revoked "the bequest of \$3,000, part of the said sum of \$10,000," and bequeathed to the academy "the sum of \$7,000 instead of \$10,000, to be expended by the trustees thereof for the purposes of, and in the manner prescribed in and by," the will. Afterwards she made another codicil, in which, after reciting that she had by the will given \$10,000 to the church, for the purpose, principally, of aiding in erecting its edifice, and in paying any debt that might be thereby incurred, and that it now appeared probable that said purpose would soon be accomplished, and that she had concluded to give at that time \$3,000 towards extinguishing said debt, she revoked said bequest of \$10,000 to said church. The court of appeals, in deciding the case, remarked that the bequests were all of money, and that, by virtue of the directions in the will, the whole property was to be deemed converted into personalty at the death of the testatrix. The court considered the question whether it was the intention of the testatrix, by

the revocations, to deprive the church of all share in the residuary estate, and to restrict the academy to the proportion of the residue represented by \$7,000, instead of \$10,000. It referred to the rules that, in ascertaining and carrying out the intention of the testator, as the primary object in construing wills, a codicil will not be allowed to operate as a revocation, beyond the clear import of its language; that an expressed intention to make an alteration in a will in one particular negatives by implication an intention to alter it in any other respect; and that the language employed must be scrutinized with care, not only in the particular parts, but in every part, of the instrument, in order, as far as practicable, to ascertain the operation and intent of the mind using it. The conclusion of the court was that the two codicils did not operate to cut off or impair the right of the academy or of the church to share in the residue of the estate. It was held, as to the academy, that the two bequests were not dependent, although the reference to the first in the last designated the legatee and the amount; that the one legacy was for particular purposes, and the other for general purposes; that the legal effect of the will was to designate the academy as a residuary legatee for an amount made certain by mere arithmetical calculation, as effectually as if the name and amount were written out; that the testatrix paid \$3,000 upon the specific legacy in her life-time, and revoked \$3,000 of it, in language carefully confined to that alone; that, if she had intended to affect the other bequest, it must be presumed she would have said so; that the will and codicils bore evidence of particularity of expression as to every testamentary arrangement, and, within the rule referred to, the alteration of one bequest negated an intention to alter the other; that, if she had paid the whole \$10,000 while she lived, that would not tend to show an intent that the other should not take effect, but would evince a continued testamentary friendship; that the reasons for revocation applied only to the specific legacies, showing that the testatrix regarded the two as independent; and that the right of the church to the residuary legacy was substantially the same as that of the academy, and for the same reasons.

The court considered the argument that the will and the codicils must be construed together, speaking only from the death of the testatrix, and that, therefore, the whole will should be construed, for all purposes, as though the bequest to the church was not in the will at all, and that to the academy was \$7,000 at the time the will was made. It said that that proposition, as a whole, could not be sustained, being in conflict with the rule that it must be ascertained, from all the testator has said, what he intended; that a will is to speak from its date, when a fair construction of its language indicates such intention; that a reference to an actually existing state of things in a will refers to the date of the will; that that rule is applicable to both property bequeathed and to legatees entitled to take; that the general rule is that, if a bequest is made to one sustaining a particular relation, and there is such a person in being at the date of the will, it is descriptive of that person; that, whatever exceptions there are to the rule, the rule and exceptions are established, to reach the intent of the

testatory; that the revoked legacies, though out of the will as legacies, may be referred to if they throw light upon other portions of the will; that when the testatrix said, in the residuary clause, "I give to the persons to whom I have *hereinbefore* made bequests," she referred to an existing description, and the court must adopt the same description; that "*hereinbefore*" means "in this will as it *now* exists;" that the language of the will and codicils, the circumstances developed, and the rules of law concurred in not permitting the conclusion that the testatrix intended that her residuary estate should go to those only who had unpaid or unrevoked specific bequests at her death; and that no such intimation was contained either in the will or the codicils, nor had any reason been suggested for such an intention. The court then cited the case of *Colt v. Colt*, in 32 Conn., as deciding the precise question in accordance with the views it had so expressed, and in a case not as favorable to the legatee, having less elements of independence in the legacies, and having a change of friendly relations between the testator and the legatees stated in the revoking codicil. The court then referred to the case of *Hayes v. Hayes*, 21 N. J. Eq. 265, which is cited by the plaintiffs here, and distinguished it. The will made bequests to various persons. In the residuary clause it was stated that the specific bequests amounted to \$70,000, and that, if the estate amounted to more or less than that sum, they were to be increased or diminished in proportion, so as to absorb the whole estate. In a codicil the testator revoked, partially and entirely, bequests to the amount of \$7,000, and directed that this sum should be apportioned among certain remaining legatees. It was held that the residue must be divided among the legatees in proportion to the amount to each, after the addition or deduction of the \$7,000, according to the terms of the codicil. This was upon the ground that the specific and residuary legacies constituted but one legacy to each legatee, and were dependent.

The fact that the bequest of stock in this case to the executors was made to "my executors hereinafter appointed," and that, when the first codicil revoked the appointment of Deming as executor, and appointed Jarvis in his place, still, although there was no provision directly giving to Jarvis the legacies of primary and residuary stock, it was held that he was entitled to them, and Deming was not, is referred to by the plaintiffs as showing that such legacies passed to Jarvis, because the word "*hereinafter*" referred to the will and codicils combined, and that a similar construction should be given to the word "*hereinbefore*." But the court put its decision, not on that ground, but on the ground that the bequest to the executors was to them as parties, and as "*hereinafter appointed*," and not as persons, and was compensatory, and intended for those who should perform the trust. The plaintiffs also refer to the fact that the original will gave 25 shares of the stock to Alden, on certain conditions, and the first codicil gave him 50 shares of it, in lieu of the 25 shares, on the same conditions; and they contend that the testator intended he should share in the residuary stock in proportion to the 50 shares. But this is begging the question, and the views above laid down

show that Alden could have shared in the residuary stock only in respect to the 25 shares. The plaintiffs also refer to the revocation, in the first codicil, of "the legacy" given by the original will to the oldest son of Christopher, and say that the original will contained two legacies in respect to him,—primary and residuary,—yet both legacies must be regarded as having been revoked; and that this could be only on the view that "the legacy" was mentioned as the primary legacy, and as the representative of the whole, so that revoking the primary legacy revoked the gift of its corresponding residuary stock. There is nothing in the reasoning in *Colt v. Colt* which would justify the conclusion that the revocation could operate only on the primary legacy to the oldest son of Christopher. "The legacy" may well mean all that is given as a legacy, or by way of legacy, whether primary stock or residuary stock; but that is very different from revoking a legacy of 500 shares, or of any other specific number of shares. The same remarks apply to the revocation, in the second codicil, of "the legacy" given "by said original will and codicil" to trustees for founding the school. In that case there were legacies to such trustees, by the original will, of primary and residuary stock, and a legacy of primary stock to such trustees by the first codicil; yet, in the second codicil, all these legacies are grouped together in the revocation, as "the legacy" and as "said bequest."

Much stress is laid by the plaintiffs on the facts that the revocation in respect to James B. is because of "his late unbrotherly conduct;" that the children of James B. are cut off by the second codicil, which it is alleged shows further alienation from James B.; and that the revocation of the primary bequests for the school threw 3,000 shares of stock into the residuum, and left that quantity and its proportion of residuary stock to be divided among the other legatees, largely increasing the amount of each of the other residuary legacies. From this it is urged that it cannot be supposed the testator intended, while cutting off the primary legacy of stock to James B. and all the legacies to his children, to leave to James B. more than 574 shares of the residuum, while taking from him a primary legacy of only 500 shares, and thus give him a part of the very stock he was taking away. The complete answer to these suggestions is that, after the testator had, by the will, given a specific legacy of stock to James B. for life, remainder to his issue, and a specific legacy of other stock to trustees for said issue, and had made a residuary clause, such that James B. and his issue on the one legacy, and the trustees for his issue on the other legacy, would share in the residuary stock in proportion to such legacy, he, with these things fully before his mind, revokes, in the first codicil, the legacy of 500 shares "given in the aforesaid will to James B. Colt for life, remainder to his children," and does not revoke any share of James B. in the residuary stock, and afterwards, in the second codicil, which refers to the first codicil and its contents, gives to each child of James B. \$100, and revokes "any and all other legacies or devises by me heretofore at any time made to or for the use and benefit" of the children of James B., or any of them, and does not revoke all or any legacies theretofore at any time made to James B.

It is further urged by the plaintiffs that, as there was a division of some of the stock, made by the will and the codicils, in specific legacies, to precede a second division of the residue of the stock, to be made by the executors in the future, the word "hereinbefore" should be divided into two words, "herein" and "before," and "herein" should be held to mean in the will and the codicils, and "before" should be held to apply to all legacies which precede the distribution to be made of the residue, whether such legacies are found in the will or in a codicil, so as to make the residuary clause read: that the remaining stock shall be divided among the several persons and parties "to whom I have herein"—that is, in the will and codicils—"before"—that is, in the first division effected by the primary legacies in the will and codicils—"given legacies of stock, in the ratio and proportion in which said legacies of stock are herein"—that is, in the will and codicils—"before given,"—that is, in the primary division effected by the will and codicils, which division precedes the division to be made of the residue,— "meaning, that my residuary estate in said stock shall be shared by the same persons to whom I have"—that is, in the will and codicils—"given specified legacies in stock, and in precisely the same ratable proportions." This view is ingenious, but very unsound. It wrests the plain and straightforward meaning of the word "hereinbefore," and substitutes for it a fanciful division of the word into two words, to each of which is attributed a fanciful meaning, not in accordance with ordinary meaning, and having no basis except an inspiration from the result sought.

We come now to consider the bequest in the original will to trustees for the issue of James B., and the provisions of the second codicil as to the children of James B. and as to the children of Christopher. In so far as the views before announced in regard to the right of James B. to share in the residuary stock lead to the conclusion that he had such a right, they also lead to the conclusion that the children of Christopher have no such right in respect of their primary legacy of 500 shares. That conclusion follows logically from the conclusion in regard to James B., as was said by the court in 33 Conn. But the plaintiffs present another view, which they claim was not considered in *Colt v. Colt*. They contend that, without regard to what construction is put on the will and codicils, in respect to the questions actually considered in *Colt v. Colt*, the second codicil does not work a revocation of the legacy of 500 shares given to the executors in trust by the will, with a trust for the issue of James B., but merely effects a substitution of the children of Christopher, as *cestuis que trustent*, in place of the children of James B.; the gift of the stock to the executors in trust remaining undisturbed. It is contended that the Connecticut court left out of view the consideration that the gift by the will of the legal title in the 500 shares to the trustees was not revoked; that the will gave the stock, the legal title, to the trustees; that all it gave to the children of James B. was the use and benefit of the stock; that such use and benefit was withdrawn by the second codicil; and that the language of the gift to the children of Christopher, in place

of the children of James B., is such as to make the case one of a substitution of the former for the latter, and so one where the interest given to the latter by the will in the residuary stock was transferred by substitution by the second codicil to the former. The bequest in the original will was not to the children of James B., but was to the "executors, and their successors in said office," in trust for the issue of James B., the issue to have the stock when the youngest survivor should have reached the age of 21 years. By the second codicil, in the first place, a legacy of \$100 is given to "each of the children" of James B., and then the codicil cancels and wholly revokes "any and all other legacies or devises by me heretofore at any time made to or for the use and benefit of said children, or any of them." This disposes of the legacy. It is taken away from the executors as trustees of it for any purpose, because the only purpose of it was for the use of the children of James B., and, as a legacy for their use, it is revoked. It is not merely the use or benefit that is revoked, leaving the legacy to stand, with a substituted use. The codicil next takes up the subject of the children of Christopher, and, after giving a legacy of \$100 to the oldest son, and revoking all legacies before made in his favor, it proceeds:

"And I hereby give, bequeath, and devise to the other children of my said brother (said eldest son not being included herein) the property, to-wit, five hundred shares of the Colt's Patent Fire-Arms Manufacturing Company, which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt, to have and to hold to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children, and the property herein bequeathed is to be held by my executors for said children in the same manner, and subject to the same limitations, as are provided in said original will in the bequest to the children of said James B. Colt."

Here the legacy in respect to the children of James B. is referred to, first, as a legacy to the executors in trust for the use of said children, and then is referred to as a bequest to the children. It was clearly a bequest to the executors in trust for the children; but the form of words in the codicil shows that the testator drew no distinction between a legacy to a person and a legacy to his use. So the bequest to the children of Christopher is, first, a bequest to them, to have and to hold to them, and then is declared to be in trust for them, in the executors, on the same terms as provided in the original will in respect to the children of James B. Here, again, is no distinction between a legacy to a person and a legacy to his use. But the sum of all this is that the legacy is to the executors in trust. Still, it is as distinct a legacy from the legacy to the executors in trust for the children of James B. as that legacy was distinct from the devise of land to the executors in trust for the children of the testator, and from the bequest to the executors in trust for the school. The fact that the 500 shares covered by it are declared by the second codicil to be the 500 shares which had been given in trust for the children of James B., and the legacy of which had been before revoked in the same codicil, cannot make it a substituted legacy of such a character as to give to the children of Christopher

the same right to share in the residuary stock, in respect of it, which the children of James B. would have had in respect to the 500 shares given in trust for them by the original will. The reason for this conclusion is that the codicil revokes all the legacies to or for the use of the children of James B.,—the two legacies of stock, the primary and the residuary,—and then it does not give both of them to the children of Christopher, but only gives one of them, to-wit, 500 shares. That was the primary legacy in the original will. No other legacy of 500 shares was given to the children of James B. in the original will. The legacy to them in the residuary stock was not one of 500 shares. The case is no different from what it would have been if the original will had given two specific legacies of stock to the children of James B., one of 500 shares and one of 400 shares, and both had been revoked; and then the one of 500 given to the children of Christopher, without mentioning the other. They would not have been entitled to the other. As the codicil had just revoked all the legacies to or for the use of the children of James B., one of which was a legacy in the residuary stock, it was obvious and easy to have given a legacy of all the same stock to the children of Christopher, and not to have limited the legacy to 500 shares, in terms, if it had been intended to extend it beyond 500 shares. The subject must have been in the mind of the testator, in having just revoked all legacies to the children of James B., yet, when he saw that there was thus residuary stock revoked to the extent of more than the primary 500 shares, which would go into the residuum again, and, if not given to the children of Christopher, would go to the other persons entitled to share in it, he refrains from mentioning it, and limits the bequest to the children of Christopher, industriously, to 500 shares. There was nothing singular in augmenting the residuum of stock. The same codicil had just augmented it by the 3,000 shares previously devoted to the school trust, and by 25 shares before given to the oldest son of Christopher, the first codicil having also augmented it.

It is further contended for the plaintiffs that the bequest, in the second codicil, to the children of Christopher, is of all the property given by the original will to the executors in trust for the children of James B.; that the words "the property, to-wit, five hundred shares," etc., "which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt," must be read as if they were "the property which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt, to-wit, five hundred shares," etc.; that, in such case, the bequest would carry the property,—all of it, primary and residuary stock,—because that, and nothing less, is the property which the original will bequeathed, and the words following the words "to-wit" would be rejected as false description; and that, if the codicil does not give the residuary stock, it does not give "the property." It is by no means clear that in the present case, if the language were in the form so suggested, it would carry the residuary stock, because there was a specific legacy of 500 shares given by the original will to trustees for the children of James B., and

there was also a distinct legacy of residuary stock to such trustees, and the reference in the codicil to the legacy of 500 shares was not a false description. But, aside from this, the two distinct legacies existing, and one of them being of 500 shares, and properly so described, and in all respects otherwise properly recited, the gift of the subject of one of them as 500 shares must be held to control the words, "the property, to-wit." The case is not one where the testator had given, say, a legacy of 600 shares, and then referred to it as 500. Here were two distinct legacies, and his reference to 500 shares was needless surplusage if he meant to give all the shares, primary and residuary, he necessarily having both before his mind. The criticism that the language is "the property which is," and not "the 500 shares which are," has been observed, but is not considered of any weight. The words "the property, to-wit," are equivalent to no more than the words, "the property, consisting of 500 shares," etc., "which is," etc. This means no more than "the 500 shares," although the grammar of the sentence makes "is" proper. As has already been shown, it is a mistake to say that the original gift of the 500 shares to the executors in trust is not revoked, and that, therefore, they are "hereinbefore named" in the will, as respects the children of Christopher, in reference to the residuary stock. The second codicil does revoke the gift of the will to the executors in trust for one purpose, and does give to the executors in trust, for another purpose, a new gift of the 500 shares.

The case of *Lord Carrington v. Payne*, 5 Ves. 404, so much relied on by the plaintiffs, has no application to the facts of this case, even if it be regarded as good authority for any case. The case was decided in May, 1800, by Sir RICHARD PEPPER ARDEN, the master of the rolls, who in May, 1801, became Lord ALVANLEY. One Payne, by his will, devised real estate to trustees and their heirs, upon trust to convey upon certain trusts, and, subject thereto, to several natural sons successively, in strict settlement, and then directed that the residue of his personal estate should be laid out in land, "and that the estate so to be purchased should from time to time be settled to such uses, upon such trusts, and in such and the like manner, as I have hereinbefore directed respecting my real estate." He appointed the trustees named to be the executors. Afterwards he made a codicil, which recited that he had by his will directed his trustees to convey, settle, and assure certain real estates, and, on the settlement directed to be made of "my said estates," had directed that they should be limited in a certain specified manner, and then revoked so much of the will as directed the settlement, and, "instead thereof," directed "that in and by the settlement to be made of said estate, as aforesaid, the same estate be limited" in a manner specified. The change made in the limitation was to vary the order among the sons, and postpone William, an elder one, to younger ones. The question arose with respect to the fund directed to be laid out in real estate, whether the codicil postponing William to his younger brothers extended to that fund. The master of the rolls held that the real and personal estates were united by the will, and made into one settlement,

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by which the persons named were to take in the course of succession marked out. It was contended in that case that the codicil revoked the devise, so far as respected the real estates of which the testator was seised at his death, and made new limitations, but left the estates to be purchased with the personal estate to go to the same persons, and in the same order, directed by the will in regard to the real estate given thereby. On this subject the court said:

"It was said that, when one species of property is devised in a particular manner, and in the same will another species of property is declared to be annexed to it, as it was in the case of *Darley v. Darley*, Amb. 658, or, where it is given to the same persons as the other estates, and, by act of law or by codicil the disposition of the former is revoked or altered, the latter shall not be revoked or altered, unless it is manifest the testator intended to affect that. I am willing, for the sake of argument, to admit this; but it does not in any way affect this case. I admit the testator does not, by these words, include the lands to be purchased; and if, by the will, he had given to certain persons the lands he was seised of, and had by that will directed his personal estate to be laid out in land for the benefit of the same persons to whom the real estate was devised, and, by a codicil, he had given the estates of which he was seised to different persons, and in a different manner, and had used no words applicable to the personal estate, the codicil might, upon those two cases, have the effect of disuniting them, and the personal estate would have gone to the same persons as if the codicil had never been made. This is the effect of *Lord Sidney Beaucherk v. Mead*, 2 Atk. 167. It was argued that the codicil in this case does not include the personal property to be laid out in the land, and then, considering the codicil as a revocation of the devise of the real estate, as it is silent with respect to the personal estate, that must, upon the authority of those two cases, go exactly as if that codicil had not been executed." But none of these arguments apply to this case, for this codicil does not revoke the devise of the real estate. It leaves the devise of the real estate to the trustees in full force. It does not in any degree disunite the estates to be purchased upon the settlement to be made of the real estate. It is therefore fallacious to argue that it was a revocation of the devise of the real estate at all. It remains devised to the trustees, and the only alteration is in the mode of succession to be directed in the settlement to be made. The will directed a settlement to certain uses, and gave the personal estate to be laid out in land to be settled to the same uses. * * * The will is not revoked as to the union of the two species of estates. The codicil makes no alteration with regard to that union, and, though the testator makes use of the word 'revoke,' the will is not a revocation as to that union, but merely an alteration of the order of the limitations to be inserted in the settlement; and it is no more than if the deviser, with his own hand, had inserted the name of George and John before William, and then republished his will. The codicil leaves the will in full force with regard to everything not expressly, or by necessary implication, revoked or altered; and I am clearly of opinion that the settlement, as far as respected the union of the estates, remained in full force."

In 1 Jarm. Wills, Amer. notes, (Ed. 1880) p. 348, that case seems to be looked on as of doubtful authority. But the language of the court in that case, as quoted, seems to anticipate and except a case like the one at bar. The mistake in supposing that case to be like this one is the fundamental one of regarding this case as one of the non-revocation of the bequest to the executors, and a mere change of the beneficiaries.

of the trust. There is in this case a distinct revocation of the legacy to the trustees, while in that case the revocation was only of the direction as to the settlement and limitations.

But it may well be said that, for the purposes of the question in issue, the bequest in the will of the 500 shares was one to the children of James B., for the trust was to cease, and they were to have the shares as an absolute estate, and the trust for the children of Christopher was to cease, and they were to have the 500 shares as an absolute estate. Whether a legacy to the trustees or the children of James B., the second codicil absolutely revoked it. The mere fact that the same shares were afterwards given to the same trustees, on like trusts, for other persons, is not sufficient to make the transaction a mere substitution.

The case of *In re Gibson's Trusts*, 2 Johns. & H. 656, in 1861, before Vice-Chancellor Sir W. PAGE WOOD, afterwards Lord HATHERLEY, and lord chancellor, and a very eminent authority, was very like the present case. Gibson, by his will, gave several pecuniary legacies, including one of £500, to his sister, Mary Birkett. The will then said: "And all the residue of my personal estate whatsoever I give and bequeath to all the before mentioned pecuniary legatees," excepting certain ones, but not excepting Mary, "and to be divided among them in proportion to their respective pecuniary legacies." Mary died after the will was made, and the testator then made a codicil, reciting her death, and giving the sum of £500 to John Birkett, in trust to pay the same to such of the children of Mary as should attain the age of 21 years, and as they should severally attain that age, and, if more than one, in equal shares. The executors paid the £500 to John Birkett. Of the residue of the personal estate, some £365 would appertain to the £500 legacy, and the question arose whether John Birkett or the surviving pecuniary legatees under the original will were entitled to that money, or whether there was an intestacy in regard to it. The court held, in the first place, that the residuary legacy was not to a class, but to individuals, and that, therefore, the survivors of the pecuniary legatees in the will were not entitled to the money. The counsel for John Birkett relied on the decision in *Lord Carrington v. Payne*, and his arguments were the same as those of the plaintiffs' counsel in this case; and it was strongly pressed that the testator intended that the children of Mary should have all that she would have had under the will, and that the court would not hold that there was intestacy. It was urged that the effect of the codicil was the same as if the name of John Birkett had been substituted for that of Mary in the bequest in the will. The court says:

"The testator, being aware of the death of Mary Birkett, and having, in consequence, given the £500 to John Birkett, upon trust for the children of Mary Birkett, does not go on to say a word as to the share of residue which had also been given to Mary Birkett, not, (as I have already held,) as one of a class, but as an individual, *nominatim*. Mr. Kay ingeniously argued the case as if it were governed by the authority of *Lord Carrington v. Payne*, but the decision in that case turned upon special circumstances, and Lord ALVANLEY expressly guarded himself against deciding a point very like that which I have now to determine."

The court then reviews the facts and the decision in *Lord Carrington v. Payne*, and quotes from the decision the foregoing remarks of Lord ALVANLEY, and says that the hypothetical case put by him is exactly the *Case of Gibson's Trusts*, and that the case of *Lord Sidney Beauclerk v. Mead* is very similar to the hypothetical case put by Lord ALVANLEY, and to the *Gibson Case*. In *Lord Sidney Beauclerk v. Mead* the testator devised his freehold lands to Reeve for life, with remainder over, and directed the surplus of his personal estate to be laid out in the purchase of lands, to be settled to the same uses as his freehold lands. By a codicil he directed certain lands so given by the will to Reeve for life to be equally divided between Reeve and Beauclerk during their joint lives. After the death of Reeve, Beauclerk sought to recover one-half of the interests and profits of the surplus of the personal estate which had accrued during the life of Reeve. Lord HARDWICKE held that, neither on the language of the codicil nor on the presumed intention of the testator, could there be any ground for holding that the codicil affected the disposition in the will of the surplus of the personal estate. Recurring to the *Gibson Case*, Mr. Key, for John Birkett, cited *Johnstone v. Earl of Harrowby*, 1 De Gex, F. & J. 183, and other cases, as showing that substituted legacies are subject to the same conditions, and carry with them the same incidents, as those for which they are substituted. On this point the court said:

"I am not aware that the rule which those cases established has ever been extended to that length; and it was decided in *Re More's Trust*, 10 Hare, 171, 176, by Lord Justice TURNER, when vice-chancellor, that it cannot be applied to a case where, as here, its application would alter the limitations of the property."

On the contention that the court would not allow intestacy, as here it is urged that the court will not allow the residuary stock to go elsewhere than with the primary, the observations made by the vice-chancellor are very pertinent to this case. He says:

"Though the court presumes that a testator did not intend to die intestate, it may be driven to the conclusion that he has done so, in spite of the presumed intention to the contrary. In the present case I am driven to that conclusion. In making the codicil in question, the testator had his will present to his mind. He had before him not only the legacies bequeathed by his will to the several pecuniary legatees *nominatim*, but also the bequest in his will to the same legatees of his residuary personal estate. Yet, in the codicil, he refers exclusively to the pecuniary legacies, and takes no notice of the residue. Under such circumstances, I cannot hold that the codicil had the effect of passing to the legatee under the codicil not only the legacy given to him by the codicil, but also a share of the residue, as to which it is totally silent."

In *Bridges v. Strachan*, 8 Ch. Div. 558, in 1878, before Vice-Chancellor MALINS, one Page by his will gave certain freehold lands in Dorset to trustees, to the use of his daughter, Elizabeth, for life, with remainders over. He also gave to his trustees £3,000, in trust to lay out the same in the purchase of lands in Dorset, and to settle the estates so to be purchased to the same uses as were declared by his will concerning his lands in Dorset. By a codicil he revoked the devise of the freehold lands in Dorset, and, in lieu thereof, gave the same to the use of

his trustees until the oldest son of said Elizabeth should attain the age of 21 years, with remainders over to the use of other persons than said Elizabeth. The question arose whether, the devise of the Dorset estates having been revoked by the codicil, the gift of the £3,000 to be laid out in the purchase of lands in Dorset, to be held upon the same trusts, was revoked by implication. The court said:

"It may be that the testator intended to revoke the latter gift of £3,000, and I think, in all probability, his object was to extend the Dorsetshire estate; but he has omitted any reference to the £3,000 in his codicil. Therefore, on principle, there is no implied revocation. I think that, notwithstanding the case of *Lord Carrington v. Payne*, no revocation takes place unless a clear intention is expressed. *Darley v. Langworthy*, 8 Brown, Parl. Cas. 359, supports that view, and the case of *Francis v. Collier*, 4 Russ. 331, is in conformity with that principle. I think, therefore, that the rights of the parties are the same with regard to the £3,000 as if the codicil had never been made, and that Elizabeth Strachan is entitled for life under the bequest in the will."

That case is directly in point in support of the decision made on the demurrer in *Colt v. Colt*, and against the positions of the plaintiffs in this case. The question of the proper construction of the will and codicils in reference to the points raised in *Colt v. Colt* and to those now raised has been considered very much at length and with great care, and in reference to all the views urged for the plaintiffs, because of the large amount involved, and of the thoroughness and ability with which the case was presented by the counsel for the plaintiffs, and of the fact that the decision of the highest judicial tribunal of the state of Connecticut, in 33 Conn., was impugned as rendered without much consideration; and without a full and fair hearing of the matter in question. The result is that, on principle and authority, the claim of the plaintiffs must, on the merits, be rejected.

But, even if it were otherwise, the Connecticut suit is set up as a bar to the present one. To this the plaintiffs reply that the Connecticut suit was one against the three executors, as such, and certain legatees; that the present suit is one against the three executors as trustees, and asks for an account, the other legatees and the executors, as such, being added as defendants; that the defendants Colt, Hubbard, and Jarvis had three capacities,—(1) executors; (2) a personal interest each as a legatee; (3) trustees of the children of Christopher; that they were parties to the Connecticut suit only in the first two of those capacities; that only in their capacity as trustees could they receive the trust property from the estate; that there was no decree against them as trustees, and, as trustees, they are not bound by the decree; that, because they were not parties as trustees, they are not responsible as trustees to the plaintiffs for their conduct in the case; that they denied, in the Connecticut case, the title of their *cestuis que trustent*; that they defended only as executors; that they aver, in their answer in this suit, that as executors "they did not appear or act particularly as trustees for or on behalf of" the plaintiffs; that as executors and as trustees they are different parties, though the same persons, and are to be regarded as if the executors and the trustees were different persons; that they did not appear in the Connecticut suit

in the same right in which they are sued in this suit; that they had no right to speak as trustees in that suit, any more than if other persons had been the trustees; that their rights as trustees could not be adjudicated in that suit without their first being made parties to it as trustees; that they ought to have set up, in that case, that, as trustees, they were not parties to it; and that the question passed on in 33 Conn. was not whether the trustees took a share in the residuum in respect to the 500 shares, but whether the children of Christopher took a share. In addition to this, the plaintiffs call attention to the brief put in in the Connecticut suit by the counsel for the executors, on the hearing of the case in 33 Conn. That brief contended that James B. took only a life-estate in his share of the residuary stock, it having been decided on the demurrer that he had a share; that the stock, primary and residuary, given to the two children who died before the testator, was to be disposed of as though there was no will; and that Jarvis took a legacy of stock and Deming did not. These were questions 1, 3, and 5, and were decided in accordance with the views of the brief. The remaining point considered in the brief (question 4) was as to the children of Christopher. The brief urged that those children were not entitled to share in the residuum of stock in respect to the 500 shares, (1) because the residuary clause excluded them, by using the word "hereinbefore," citing *Hall v. Severne*; and (2) because there was nothing in the second codicil which, expressly or by implication, gave a share to them in the residuum. These views were sustained by the court. The opposite views were presented by Mr. Henry C. Robinson, claiming to represent the children, as stated in 33 Conn., and as appears by the proofs. He argued the case orally, in the interest of said children, and filed a brief. He maintained the right of the children to share in the residuary stock in respect to the 500 shares, and urged that, even under the word "hereinbefore," the primary legacy to the trustees remained, with a mere change of beneficiaries. He cited five of the cases now cited by the plaintiffs, including *Lord Carrington v. Payne*, and cases not now cited, as appears by the minutes of argument taken by the reporter of the court.

The objection that the executors were not made parties as trustees seems to be very technical, and entirely without merit. The will and codicils were before the court, with the fact that the children of Christopher were also before it, by themselves and by the guardian of those of them who were minors, and that all the defendants in the suit were brought in as having or claiming an interest, "either legal or beneficial," as the petition said, in the residuary stock, and as being the parties whose rights it was necessary to ascertain and fix in such manner as to bind those claiming an interest in such stock. If the legal interest in the 500 shares was not in the children, it was in the executors. The fact that it was in the executors in trust did not make it any the less in the executors. It was in the executors, as such, in trust. All testamentary property the title to which is in executors is in them in trust. The three trustees, being parties as executors, were really parties as trustees. The answer does not say that as executors they did not represent the

trust for the plaintiffs. It says that, being cited to appear as executors, and appearing as executors, they did not appear or act "particularly as trustees for or on behalf of" the plaintiffs, because the plaintiffs "were duly made parties to the proceeding by themselves and by their guardian, and appeared therein by able counsel, and were fully heard." The trust was given to them as executors, and as being executors; and so, when they were made parties as executors, they became parties as representing the trust and its subject-matter and its beneficiaries.

One of the contentions of the plaintiffs is that, when the same person is by a will appointed executor and trustee, his probate of the will is an acceptance of the trust, and by becoming executor he becomes trustee. This being so, when the executors were made parties as executors, that was all that was necessary. The second codicil directed that the executors, as executors, should hold the stock in trust for the children of Christopher, and when the suit was brought against them as executors, their *cestuis que trustent* also being parties, and the subject of the suit involved the rights of the trust and of the beneficiaries *nominatim*, it is only technical criticism to insist that they should have been cited as trustees as well as executors.

The executors, by their counsel, Mr. McFarland and Mr. Curtis, on the argument on the demurrer presented the case in favor of these plaintiffs by resisting fully and thoroughly the claim of James B. When that was decided in favor of James B., the decision against the claim of the children of Christopher followed logically, as the court said in 33 Conn. They had a large interest in resisting the claim of James B., and the principle of that claim, and in maintaining the construction of the will and codicils, urged by the executors in opposition to the claim of James B. If James B. were to be defeated, they could expect to share in the residuary stock in respect of their 500 shares; but not if James B. should succeed. In opposing James B., the executors were maintaining the claim of the plaintiffs. The evidence of Mr. Hubbard shows that Mrs. Theodora G. Colt, the mother of the children of Christopher, and the guardian of the three minors, was warned by him that a decision in favor of James B. would be damaging to the interests of her children, and endeavored in vain to induce her to oppose the claim of James B. He also says that after the decision on the demurrer he saw Mrs. Colt, and "explained to her the situation," and told her that there might be serious damage to the interests of her children, and asked her what course she desired should be taken to protect their rights; that she said that Mr. Henry C. Robinson was the counsel for herself and the children, and would act for them as their independent counsel, for the maintenance of their rights; and that Mr. Robinson did act in the matter of the findings made by the superior court preparatory to the reservation of the six questions for the supreme court of errors, and also in the argument of the questions for the children in that court. Mrs. Colt admits that, before the argument of the demurrer, Mr. Hubbard asked her if she did not intend, in behalf of her minor children, to oppose the claim of James B., and she said she did not, because the in-

terests of her children were identical with those of the other legatees, and the interests of her children would be sufficiently protected by the opposition which the executors intended to make to the claim of James B. She says that he said that her opposing it personally would strengthen the case against James B., and her children's interests were involved in the suit; that she said, "How?" and he said, "By decreasing the general residuum;" that she declined to oppose the claim of James B. personally; and that Mr. Hubbard never hinted to her "that her children's interests were further endangered, or that there was any possibility of their being endangered, in any way that they would not be protected by the executors and trustees."

It is not important to determine whether the recollection of Mr. Hubbard or of Mrs. Colt is the more accurate as to what transpired after the lapse of 15 years. It is not probable that any party or counsel comprehended fully in advance the scope of the decision in favor of James B., as it appeared afterwards. His claim was looked upon not only as untenable, but as foolish, wild, and crazy; and so what all the effects of his success might be were not likely to be fully appreciated beforehand. But, however this may be, the executors faithfully maintained the interests of the children of Christopher, by faithfully opposing the claim of James B. As to the conversation with Mrs. Colt after the decision of the demurrer, so testified to by Mr. Hubbard, Mrs. Colt denies having had any conversation with Mr. Hubbard after the decision on the demurrer, in relation to her taking any action to protect the rights of her children, and denies specifically what Mr. Hubbard testified to on that subject, as before recited. She also denies that she ever employed Mr. Robinson as counsel, although she admits that she was informed by her son Edward, before he died, which was in October, 1868, that Mr. Robinson had appeared and argued for herself and her children in the James B. Colt suit. Mr. Robinson testifies that he was retained by Edward for the interests of the minor children of Christopher, (Edward D., Le Baron B., and Samuel P.,) and that he entered an appearance for them in the suit just before the demurrer was argued in the superior court. Mr. Hubbard says that, having been informed that Mr. Robinson was the counsel for Mrs. Colt and her children in respect to their interest under the will, he applied to Mr. Robinson to act in their behalf in the argument of the demurrer; and that Mr. Robinson said that he was their counsel, but was not authorized to oppose the claim of James B. Mr. Robinson testifies that Mr. McFarland, the counsel for the executors, expressed to him the opinion that the children of Christopher had an interest in the suit larger than their share in James B.'s interest in the residuary stock, and that the amount coming to them under the codicil was very likely to be unfavorably affected by the overruling of the demurrer; and that he communicated this to Edward D., who refused to allow him to act for the minors against James B. Mr. Robinson also testifies distinctly to the ratification to him personally by Mrs. Colt of his employment for her minor children in the James B. suit. Mrs. Colt as distinctly denies that she ever employed Mr. Robinson, or

caused him to be employed, in behalf of her children or herself, in the James B. suit. The plaintiffs contend that all that is shown is that Edward D., who became of age in May, 1865, shortly after the decision of the demurrer, retained Mr. Robinson, in February, 1864, for himself alone; and that Mr. Robinson went on under a mistake, supposing that he was to appear for all the minors and for their guardian, while she and all but Edward regarded him as counsel only for Edward. The weight of the evidence is, largely, that Mr. Robinson appeared for the minors and for their guardian by the authority of the guardian. He presented what were the merits of their case faithfully. The real decision against them was made when the decision was made in favor of James B. What followed was "a logical necessity," as Mr. Hubbard said in his letter to Mrs. Colt of May 11, 1866. The executors fully defended the interests of the children against the claim of James B. They say, in their answer in this suit, that they employed counsel to appear in the cause, and present for the consideration of the court such questions regarding the construction of the will as should appear to them well founded in the law, and that that was done by the counsel. The counsel, Mr. McFarland and Mr. O. S. Seymour, saw that the court must come to the conclusion it reached, notwithstanding the positions taken by Mr. Robinson. The executors represented all parties interested in the stock, and did not hold any stock any more in trust for the plaintiffs than for any other legatee, so far as regarded their duty as executors, summoned in the suit to present to the court views well founded in law, and just and right in respect of all the legatees interested, in regard to the construction of the will and codicils and the distribution of the residuary stock. The views they presented prevailed, not because they presented them, but in spite of Mr. Robinson's argument and of the argument for the executors on the demurrer, on the other side, and there is no ground for the suggestion that if those views, which sustained the claims of the other legatees against those of the children of Christopher, had been presented by those other legatees through some counsel who were not counsel for the executors, the result would have been different. The executors represented all the legatees, and were entitled, and it was their duty, to present to the court what they regarded as the true view of the law as to all the legatees. It was open to any legatee to present different views. The executors themselves were legatees, individually interested in the residuary stock, and in increasing it by what the plaintiffs claimed. This is made a ground of impeachment of their action. But they were interested as executors and as individuals, and were summoned in both capacities, and could not divest themselves of their individual interest or of their interest as representing those who had an adverse interest to the plaintiffs, and were not called upon to assume a position hostile to their own individual interests or to the interest of all except these plaintiffs. There was nothing deserving of animadversion or out of the way, legally or morally, in what they did. They violated no duty, and committed no fraud. They took care that the minors and the guardian should be represented by special counsel. Isabella was of age, and was served with process.

The only answer appearing on file in the case is an answer purporting to be the answer of "the respondents," by Hubbard & McFarland, attorneys. It merely says that the respondents deny the truth of the allegations "in the petitioner's bill of complaint contained, and therefore put themselves on the court for trial." The answer bears date of December term, 1866, but this must be taken to be an error, as the order of September term, 1865, states that the court had overruled the demurrer, "and ordered the respondents to answer over," and that, "by legal removes and continuances, the petition comes to the present term of this court, when the parties again appear, and are at issue upon a general denial of the allegations in the plaintiffs' bill, as on file." "The parties" means "the respondents." In the prior part of the order, the court had named the respondents, nineteen in number, being all there were, including the four children of Christopher and their guardian, and set forth that three of them, by name, were minors, and that Theodora D. was their guardian, and that the respondents were interested in the estate as persons to whom bequests and devises were made by the will and codicils, and then the order went on to find that the petition was duly served and returned to the court at its July term, 1864, "when the parties appeared by their respective counsel, and the said minors were duly represented by their guardians," (referring also to Caldwell H. Colt and his guardian,) and that the cause was continued to a time when "the respondents" filed a demurrer to the petition, and "the parties" were at issue thereon, and the court, "having heard them by their respective counsel, adjudged said demurrer was insufficient; and overruled the same," and then the order proceeded, as before recited, in respect to the answer. It is repeated in the decree of March term, 1866, that "the respondents" appeared at the July term, 1864, and demurred; that the demurrer was overruled; and that, by legal continuances, the action came to the September term, 1865, "when and where the respondents filed their answer, as on file." Then the decree goes on to state that the court, on a hearing, found, as facts proved in the case, that "the petition was duly served and returned" to the court at the July term, 1864, "when the parties appeared by their respective counsel, and the said minors were duly represented by their guardians, and the said cause was continued" to a time "when the respondent filed a demurrer to said petition, and the parties were at issue thereon, and this court, having heard them by their respective counsel, adjudged said demurrer insufficient, and overruled the same, and ordered the respondents to answer over, and, by legal removes and continuances, the petition comes to the present term of this court, when the parties again appear, and are at issue upon a general denial of the allegations in the plaintiffs' bill, as on file." So long as these orders and findings of a court which had jurisdiction of the subject-matter and of the parties stand, this court cannot, in this collateral suit, take any cognizance of the point that the executors, even if they were before the superior court as trustees, opposed the claim of the plaintiffs, if there were otherwise any force in that point. This is not an appellate court. Any error in the decree of the superior court must be corrected by it on a direct application. Nor has this suit any

such object. This same view applies to the point that Isabella did not employ counsel or appear. The decree finds that she appeared, and that, as a respondent, she answered. If she did not, she was of age, and was served with process, and so the decree went against her by default. The same view applies to the three minors and their guardian. They were all served with process. Each of the two decrees finds that they all appeared, and that "the said minors were duly represented by their guardians," (which includes Caldwell H. Colt, as well as these minors,) and that these minors and their guardian answered by the general answer of all the respondents. This must stand as verity till abrogated by the state court.

There is no force in the suggestion that the rights of the minors could not be adjudged till the youngest should become of age. If there was anything in this point, it was one for the state court. At most there was only error, not want of jurisdiction. The point could have been raised before the state court. If it was not, it cannot be taken here. As the state court did adjudge the rights of the minors, it manifestly was of opinion that they could be adjudged, and, if it erred in that opinion, it alone can correct the error. But, aside from this, there was nothing which required the determination of the rights of other parties or of the rights of these minors to await the arrival of the youngest of them at age.

The point is taken for such of the children of Christopher as were minors that no guardian *ad litem* was appointed to represent them in the James B. suit; that their general guardian had no power to represent them; and that she did not in fact appear in the suit. The last suggestion has already been considered. The findings of the two decrees, that "the said minors were duly represented by their guardian," must stand till set aside. This court cannot set them aside in this collateral suit. This is the law in Connecticut, (*Colt v. Haven*, 30 Conn. 190,) and the law everywhere. The question is one of regularity, not of jurisdiction; the guardian and minors having admittedly been served with process. Whether the guardian could represent the minors, or whether a guardian *ad litem* was necessary, was a question of local practice, and is settled for this court by the words "duly represented." *Thompson v. Whitman*, 18 Wall. 457; *Christmas v. Russell*, 5 Wall. 290. Irrespective of this, it seems quite clear that by the Connecticut practice, where the general guardian is made a party, and summoned and served for the minor, it is not necessary to have a guardian *ad litem*. *Reeve*, Dom. Rel. p. 267; 1 Swift, Syst. p. 217; 1 Swift, Dig. p. 61; *Wilford v. Grant*, Kirby, 114.

In the brief of the plaintiffs there is strong criticism on the facts that the executors each had a legacy of 50 shares of stock and its consequent residuary stock; that Mrs. S. Colt, one of them, had a legacy of 1,000 shares of stock and its consequent residuary stock; that she was also heir at law of one-third of 1,000 shares given to the two children who died before the testator, and which was held to be intestate estate, and of one-third of the corresponding residuary shares; that she was also

guardian of Caldwell H. Colt, who had a legacy of 500 shares and its consequent residuary stock, and was entitled to one-third of the said intestate estate and its consequent residuary shares; that Jarvis, as administrator of Henrietta J., was entitled to the same number of shares, as legacies and as intestate estate, as Caldwell H. Colt; and that the residuary stock claimed by the plaintiffs, if not going to them, would go in large part to the executors individually and in the aforesaid capacities. It is also commented on in the brief that, while the executors opposed the rights of the plaintiffs, "they were not slow, or wanting in zeal and energy, in supporting their own claims under the will," and particularly those of Mrs. S. Colt and her family; that they maintained before the court that the legacies of stock to the children of the testator who died before him were not lapsed legacies, so that such stock would go into the residuum, to increase the proportionate share of each legatee therein, but were intestate estate, and so would go to Mrs. S. Colt and the two children who survived the testator; and that they maintained the right of Mr. Jarvis to share in the primary and the residuary stock. It is urged as "a significant fact that the court acceded to the grounds taken by the executors upon each and every question," including that as to the rights of these plaintiffs; and that "the record and the conduct of the defense show" that the case of these plaintiffs "was allowed to suffer, and all advantage of position before the court was sacrificed." The observations hereinbefore made constitute a full answer to these suggestions, and show that legally, actually, and morally there is no valid ground of complaint against the action of the executors.

It is deemed unnecessary to consider any questions as to the effect of the decrees of the court of probate in settling the accounts of the executors, or the distribution, or as to the effect of the releases and discharges given by the plaintiffs, or as to the effect of the alleged laches of the plaintiffs. The case has been considered on the merits, and on the effect of the suit in the Connecticut court, because the questions arising on those points have been deemed to be controlling and decisive against the claims made in this suit by the plaintiffs.

The children of James B. claim in their answer (1) that their father was entitled to a fee, and not a life-estate, in the 574 26-31 shares, and that they, as his only heirs at law, are entitled to a fee in said shares; (2) that their interest, as the lawful issue of James B., in the residuary stock, in respect to the legacy of 500 shares which the original will gave to the executors in trust for the issue of James B., they to have such shares absolutely, with the accumulations thereof, when the youngest of them should have reached the age of 21 years, was not taken away by any codicil to the will; that they are entitled to a share in the residuum of stock in respect to said legacy of 500 shares; and that there was no revocation of their interest in said residuum. They do not claim that the remainder to them, in respect to the primary legacy of 500 shares given to their father for life by the original will, which were to go as an absolute estate to his lawful issue after his death, was not revoked by the first codicil. They were not made parties to the James B. suit,

nor did any one represent them therein, unless it was their father, as plaintiff, or the executors, as defendants. A brief is now presented on their behalf by Mr. George G. Sill. Of course, the most they can claim in this suit is the 574 26-31 shares, and the accumulations thereon since the death of their father. For anything beyond that they must bring their own suit.

The petition of James B. in his suit claimed so much of the residuary stock as appertained to the 500 shares which the will gave to him for life, or a life-estate in it. The Connecticut courts decided that he took only a life-estate in the residuum, and not an estate in fee, or, as the decree says, "a life-estate only." So far as the children claim an interest in the 574 26-31 shares as heirs at law of their father, they are, as they claim through him, bound by the adjudication as to his interest, in the suit which he brought, and in which he claimed that his interest was a fee, and in which that point was expressly raised and passed upon, adversely to him, and so adversely to them. It was not necessary, in that respect, that they should have been parties to the suit. Aside from this the decision was correct. The ground on which it was put by the supreme court of errors (33 Conn.) was that such was the clear intention of the testator; that the residuary clause gave a ratable proportion of the residuary stock to the persons and parties to whom the 500 shares were given, namely, James B. and his children, to be enjoyed by a life-estate in one and a remainder in the others; that, without the revocation, it would have been plain that, as they were all parties to the original legacy, they must all take in like manner in the residuum; that the revocation was not sufficiently broad to take away the interest of James B. in the residuum, while it was broad enough to take away that of the children; and that there was nothing in the revocation to show an intention to enlarge the interest of James B., and such could not be the legal effect of a mere revocation of the interest of the children. These views are sound. His children urge, as reasons why he took in fee all the stock which he took under the residuary clause, that, as a person before named in the will, to whom a legacy of stock was before given by the will, he was to have a share in the residuum, nothing being said about the nature of the estate; that the expressions "ratio and proportion" and "ratable proportions" refer solely to the number of shares, and not to the character of interest; and that the remainder either went to James B., or falls into the residuum, or becomes intestate estate. They argue that it does not go into the residuum; that the other legatees are given a share only in the other shares than this remainder because they are not given any share in any remainder; that, if it goes into the residuum, it must be divided among all the primary legatees, and, as James B. was one, his children must, as representing him, have a share of it; that it does not become intestate estate; and that it must go to the children of James B., as his heirs. There does not appear to be any force in any of these suggestions sufficient to give to the children of James B. any share in such remainder, as representing their father. His interest in the shares was a life-interest, and died with him.

It is plain that the second codicil revoked the legacy made by the will of 500 shares to the executors in trust for the issue of James B. The brief of their counsel does not claim that it did not, though their answer does.

There remains the question as to the disposition to be made of the 574 26-31 shares of stock which are in the hands of the executors by the termination of the life-estate of James B. They are to be distributed as residuary stock in like manner as if James B. had never had any interest in them, save as respects the dividends which belonged to them up to his death. They carry with them the dividends on them since his death, either with or without interest on those dividends. It is submitted by the executors that this part of the estate should, like the rest, be settled in the court of probate; that, as the special claims of the plaintiffs are rejected, the case stands as if it were a bill brought solely to determine the distributive share of each of the plaintiffs in the 574 26-31 shares, as assets of the testator, there being now no litigated question, and the distribution being purely a matter of arithmetic; that the rest of the stock was distributed by the executors under the will, and their accounts of the distribution were rendered to the probate court; that these 574 26-31 shares are all the assets which the estate now has, and the only funds for the payment of the fees and expenses of the executors, and of the fees of counsel and other expenses in this suit, and in any other suit, past or future; that it properly belongs to the court of probate to determine the amount of such fees and expenses; and that it may become necessary to sell the shares, or some of them, and the probate court is the proper court to direct such sale. In analogy to the jurisdiction which the superior court exercised in declaring what the amount of the residuum of stock was, and who of the parties to the James B. suit were entitled to it, and in what proportions, it seems proper that this court, all the parties interested being before it, and the pleadings being such as to allow such a course, should, by its decree, declare the proportions in which the several parties are entitled to the 574 26-31 shares. This question has not been presented, and the parties are entitled to be heard as to the figures, unless they shall agree. The decree should then remit the matter to the executors, to carry out the decree on the basis established by it as to proportions, subject to the ordinary jurisdiction of the court of probate as to allowances of said fees and expenses out of the fund, and as to turning the shares into money by a sale of some or all of them, if and as they may find necessary, but without varying the relative rights of the parties in the shares as established by the decree. This course is proper, in order to protect the executors and the other parties from any further litigation by other suits, or other proceedings in the James B. suit, in respect to the matter adjudged in this suit, which protection a decree in this suit might not afford if it were only a decree dismissing the bill. The decree should contain distinct adjudications, in accordance with the foregoing conclusions, as to the claims made by the plaintiffs in the bill, and as to the claims of the children of James B., and should charge the plaintiffs with the costs of the suit.

RENWICK v. WHEELER.

(Circuit Court, D. Iowa. October, 1880.)

1. JUDGMENT—EVIDENCE OF SATISFACTION—DELAY IN ENFORCEMENT.

In a suit to cancel a judgment rendered for the balance of a debt after foreclosure of a mortgage, the mortgagor alleged an agreement that he should turn over the land to the mortgagee in full payment, but that, being unable to make a good title because of pending suits against him, an amicable foreclosure was had, and the judgment for the excess was left unsatisfied, by neglect or oversight. *Held* that, the evidence being doubtful on this point, the fact that no attempt to enforce the judgment was made for 17 years would turn the scale in the mortgagor's favor.

2. POWERS OF ATTORNEY—CONSTRUCTION—GENERAL AND SPECIAL TERMS.

A power of attorney expressly authorizing the agent to sell, convey, or mortgage the principal's lands in Iowa, and collect the price thereof, and constituting him "our general attorney in fact to transact any or all business for us, * * * of any kind whatsoever, in the state of Iowa; to rent houses, * * * and satisfy any mortgages made or to be made to us," etc.,—confers power to agree to take certain lands, covered by a mortgage, in full satisfaction of the debt secured thereby.

3. MORTGAGES—AGREEMENT TO SATISFY—CONSIDERATION.

An agreement to give up all the land covered by a mortgage, by an amicable foreclosure suit, is a sufficient consideration for an agreement to accept the land in full satisfaction of the debt, including any deficiency that might remain after the foreclosure sale.

In Equity. Bill to cancel judgment.

John N. Rogers, for complainant.

L. M. Fisher, for defendant.

MCCRARY, J. This is a bill in equity praying the cancellation of a certain judgment appearing upon the records of the district court of Scott county, Iowa, in favor of the defendant and against the plaintiff, on the ground that the same has been settled and satisfied. The judgment was rendered on the 18th day of February, 1861, in a suit for the foreclosure of a mortgage upon certain real estate. The mortgaged property was sold under the judgment in 1861, and bought in by Wheeler, for \$700, and the sheriff's deed was immediately made to him. This left a balance unsatisfied on the record which now amounts, including interest at 10 per cent., to something over \$2,000. No attempt was ever made to collect this balance until December, 1878, about 17 years after the date of the judgment, when a general execution was issued, and attempts were made to enforce its payment, which led to the filing of this bill, and the allowance of a temporary injunction to restrain, until further order, the collection of the judgment. The note and mortgage on which said judgment of foreclosure was rendered were made by complainant, James Renwick, to defendant, Wheeler, April 8, 1857, for the purchase money of a piece of land in Davenport, then purchased by Renwick from Wheeler through Wheeler's agent and attorney in fact, Erastus Ripley. Wheeler resided in Pennsylvania, and Ripley in Davenport, Iowa. Renwick, who also resided in Davenport, made certain payments on the mortgage debt, amounting in the aggregate to \$565. The sum secured by the mortgage was \$1,400, with interest, and the mortgage covered, besides the land purchased from Wheeler, another adjoining tract, for which

Renwick had paid \$600. Before the commencement of the foreclosure suit, Renwick had become financially embarrassed, and was unable to pay the balance of the debt; and he alleges in the present bill that he entered into an agreement with Wheeler, through his agent, Ripley, that Wheeler should take the entire mortgaged property in satisfaction of the balance due, and that to carry out this agreement (Renwick being unable to make a good title by deed on account of judgments against him) an amicable foreclosure was had, in which the judgment in question was rendered by default, and was left unsatisfied, after the sale, by negligence or oversight. The controversy here is (1) as to the truth of this allegation; and (2) as to its sufficiency as a matter of law to entitle the complainant to the relief sought.

Without going here into a discussion of the question of fact, it is sufficient to state that, upon the whole case, the court is of the opinion that the weight of evidence is with the complainant; but if, upon the direct testimony of witnesses, this were doubtful, the long lapse of time between the rendition of the judgment and the issuing of the general execution is a circumstance of sufficient significance to turn the scale in the complainant's favor. It is well settled that satisfaction of a judgment may be presumed in a shorter period than 20 years, if other circumstances are shown which render satisfaction probable. *Hendricks v. Wallis*, 7 Iowa, 224; *Ang. & A. Lim.* §§ 171, 172. It is insisted on behalf of defendant that it does not appear that Ripley, the agent of Wheeler, had authority to make the contract relied upon. This depends upon the construction of the power of attorney under which Ripley acted. That instrument, which is before us, after authorizing the agent to sell, convey, or mortgage any real estate belonging to Wheeler within the state of Iowa, and to collect all sums due on that account, provides as follows:

"And we do further constitute the said Erastus Ripley our general attorney in fact to transact any or all business for us, or either of us, of any kind whatsoever, in the state of Iowa; to rent houses and sign leases, and to collect money, execute receipts for the same, and to satisfy any mortgages made or to be made to us, or either of us, upon any lands in the state of Iowa; it being the true intent and meaning of this instrument to confer upon the said Erastus Ripley full and unrestricted power and authority to act for us in all matters of every kind whatsoever arising, or that may arise, in the said state of Iowa."

It is said that the general language in this power of attorney is restrained by the special and specific authority elsewhere in the same instrument conferred. The general rule is that general terms following, in the same instrument, words which confer a specific authority, are to be held subordinate to, and as limited by, the specific authority. Instruments of this character are strictly construed; and the authority is never extended beyond that which is given in terms, or which is necessary or proper for carrying the authority so given into full effect. *Story, Ag.* § 68. And language, however general in its form, when used in connection with a particular subject-matter, will be presumed to be used in

subordination to that matter, and therefore is to be construed and limited accordingly. Id. § 62. Applying these rules to the power of attorney under consideration, it appears that the particular subject-matter was the business of Wheeler in the state of Iowa, relating to his real estate, including selling, mortgaging, leasing, collecting moneys due for rents or as purchase money, and including the satisfaction of mortgages. With respect to all business of this general nature within the state of Iowa, Ripley, as Wheeler's agent, had "unrestricted power and authority," and was to act as his "general attorney in fact." The settlement in question was a transaction relating to the particular subject-matter of the agency; and therefore the agent had discretionary power to accept the mortgaged premises in full for the debt.

It is also insisted that no sufficient consideration for the contract relied upon has been shown. This point is not well taken. The agreement to give up without contest all the land covered by the mortgage in satisfaction of the debt was a good and sufficient consideration for the agreement to release. The value of the land does not appear, nor is it material. It may have been more than the mortgage debt, or it may have been regarded as equal to it. The time of obtaining title and possession may have been regarded of great importance. There is some evidence tending to show that there was a defense of usury to part of the claim, which was waived. But, independently of this, we are of opinion that there was a sufficient consideration. Decree for complainant.

FIRST NAT. BANK OF OMAHA v. MASTIN BANK *et al.*

(Circuit Court, W. D. Missouri, W. D. October, 1880.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHAT PASSES—MISTAKE.

The First National Bank was directed by the Mastin Bank, with which it had a running account, to deposit what was due the latter with a third bank. Through a mistake in its accounts, the National Bank placed more money to the Mastin Bank's credit than was actually due it. The Mastin Bank made a general assignment, and its assignee demanded and received from the third bank all of said money. *Held*, that the excess could be recovered from him, as he possessed only the equities of his assignor.

In Equity. Suit by the First National Bank of Omaha against the Mastin Bank and Kersey Coates, assignee thereof, to recover \$1,816.22.

The facts as agreed upon are substantially as follows: August 27, 1878, the Mastin Bank requested the First National Bank of Omaha, with which it had a running account, to deposit to its credit such an amount as was due it, in even hundreds of dollars, with the Metropolitan National Bank of New York, and \$8,800 was accordingly remitted to said bank; the books of the First National Bank of Omaha showing somewhat over that amount to be due at the time. The First National Bank of Omaha had sent to the Mastin Bank for collection a draft drawn by one Faut, which was collected July 17, 1878; the proceeds thereof

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being placed by the last-named bank to the credit of the other. But the First National Bank of Omaha had failed to charge said item, and the amount forwarded to the Metropolitan National Bank of New York was consequently \$1,816.22 in excess of the sum due the Mastin Bank. A few days thereafter the Mastin Bank failed, and made an assignment to Kersey Coates, and transferred to him all its assets. He demanded and received from the Metropolitan National Bank the entire amount so placed to the Mastin Bank's credit. As soon as the First National Bank of Omaha became aware of its mistake, it demanded said \$1,816.22 from the Mastin Bank, the Metropolitan National Bank of New York, and Coates, assignee; and this suit is brought to recover that sum.

J. M. Woolworth, for complainant.

Pratt, Brumback & Ferry, for respondent.

MCCRARY, J. The fact is admitted by the agreed statement that plaintiff sent to the Metropolitan National Bank in New York, to be placed to the credit of the Mastin Bank, the money now in controversy, in consequence of a mistake of fact. When plaintiff stated the account, in order to ascertain the sum to be sent to the New York bank, one item thereof was omitted by reason of an error of the accountant, or because the bank had not received notice at that time of the collection by the Mastin Bank of the Faut draft. The result of the transaction was that the plaintiff sent to the Metropolitan National Bank, to be credited to the Mastin Bank, more money than was due to the latter; or, in other words, there was placed in the hands of said Metropolitan National Bank, \$1,816.22, which did not, in equity, belong to the Mastin Bank. It was, however, placed to the credit of that bank, and after the assignment it passed into the hands of the assignee. As between the original parties to this transaction, it cannot be claimed that the Mastin Bank acquired any interest in, or right to, the money now in dispute. It is a principle of equity, too plain to require a citation of authorities to support it, that where one person, by mistake, delivers to another money or property without consideration, he may recover it back; and, where the identical property cannot be found and recovered, equity permits him to pursue and recover the proceeds wherever he can find them, unless they have passed into the hands of an innocent holder. Where both parties intended the delivery of a particular sum of money, and where, by the mistake of both, a larger sum was delivered, the party receiving the excess becomes, in equity, a trustee for the real owner thereof, and bound to deliver it upon demand to him. The ground upon which this rule proceeds is, that mistake or ignorance of facts is a proper subject of relief when it constitutes a material ingredient in the contract or acts of the parties, and disappoints their intention by a mutual error, or where it is inconsistent with good faith, and proceeds from the violation of the obligations which are imposed by law upon the conscience of either party. Story, Eq. Jur. § 151.

It is equally clear that the plaintiff has a right to relief against the assignee, who claims by a general assignment under the laws of Missouri,

for the reason that the assignee is deemed to possess the same equities only as the debtor himself would possess." *Id.* § 1228.

It is my opinion that upon the principles of equity the plaintiff is entitled to recover the sum of money in controversy in this suit; and decree will be entered accordingly.

Ex parte BROWN.

(District Court, E. D. North Carolina. August 7, 1891.)

1. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—MERCHANTS' LICENSE TAX.

Revenue Act N. C. § 22, requiring all merchants to pay "as a license tax one-tenth of one per centum on the total amount of purchases in or out of the state, (except purchases of farm products from the producer,) for cash or on credit," is not a tax on the privilege of purchasing goods, but on the goods themselves, as part of the general mass of property in the state, and does not, in its application to purchases outside the state, operate as an interference with interstate commerce. *Robbins v. Taxing Dist.*, 7 Sup. Ct. Rep. 592; *Letsy v. Hardin*, 10 Sup. Ct. Rep. 681; and *Fertilizing Co. v. Board of Agriculture*, 43 Fed. Rep. 609,—distinguished.

2. SAME—TAX ON IMPORTS.

Nor does such tax operate as a tax upon imports or exports, within the prohibition of Const. U. S. art. 1, § 10, cl. 2.

3. SAME—DISCRIMINATION.

The fact that purchases of farm products from the producer are excepted from the tax cannot be said to operate as a discrimination against farmers residing outside the state, merely because it is probable that merchants will buy more products from resident than from non-resident farmers.

At Law. Application by Alexander H. Brown for a writ of *habeas corpus* to release him from imprisonment, because of a failure to comply with the requirements of the revenue act of North Carolina. Heard at chambers. Writ refused.

George Rountree, for petitioner.

Thomas Strange, for the State.

SEYMOUR, J. This petition for a writ of *habeas corpus* has been presented with the purpose of testing the merchants' license tax of the state of North Carolina. Mr. Strange was, by consent, heard in opposition to the petition in behalf of the state, and the facts set forth therein were admitted, for the purposes of this application, to be true. The material parts of the revenue act are found in section 22 of the act, and are in these words:

"Every merchant, jeweler, grocer, druggist, or other dealer who shall buy and sell goods, wares, and merchandise, of whatsoever description, not specially taxed elsewhere in this act, shall, in addition to his *ad valorem* tax on his stock, pay as a license tax one-tenth of one per centum on the total amount of purchases in or out of the state, (except purchases of farm products from the producer,) for cash or on credit, whether such persons herein mentioned shall purchase as principal or through an agent or commission merchant. Every person mentioned in this section shall, within ten days after the first days of January and July in each year, deliver to the clerk of the board of county commissioners a sworn statement of the amount of his purchases for

the preceding six months. * * * Every merchant or dealer failing to render such list * * * shall be guilty of a misdemeanor. * * *

Petitioner is a merchant in Wilmington, who is engaged in the business of buying in other states, and bringing into North Carolina, and there selling, large quantities of merchandise, including farm products not purchased from the producer, as well as in the business of buying and selling such articles in North Carolina. Having been so advised by counsel, he has refused to deliver a sworn statement of purchases out of the state, but has delivered to the clerk of the board of county commissioners such a statement of purchases within the state, and paid tax accordingly. Thereupon he has been arrested, and held in custody by the sheriff of his county, on a warrant charging him with a violation of the statute above cited. He claims that his arrest is illegal, and that he is restrained of his liberty in violation of the constitution of the United States. So the question is whether the tax imposed upon merchants of one-tenth of 1 per centum on purchases out of the state is unconstitutional, and, if so, whether petitioner's imprisonment for failing to deliver a sworn statement of such purchases, with a view to the listing of such tax, is in violation of the constitution of the United States. Section 3 of the revenue act imposes an *ad valorem* tax of 25 cents on \$100 value of all real and personal property within the state. The tax under discussion is in addition to the *ad valorem* tax, and, in view of the provision of the constitution of North Carolina requiring equal taxation on all real and personal property, would be illegal, but that it is a license tax, and therefore within the authority given to the legislature by article 5, § 3, of that instrument. Besides being a license tax, it is, however, an *ad valorem* tax on property. *Brown v. Maryland*, 12 Wheat. 419. As a license tax, it is imposed on a person residing and engaged in business in North Carolina. Considered as a tax on property, it is imposed, or, for the purposes of this proceeding, and under petitioner's application for a writ of *habeas corpus*, must be considered as imposed, on merchandise being, at the time when, under the law, it should have been listed, within the state of North Carolina. The requirement of the statute is that within 10 days after the 30th of last June petitioner should have delivered a sworn statement of his purchases for the 6 months ending on such 30th of June. I do not at all pass upon the question of the possible construction of this provision with respect to whether the statement required does or does not include any merchandise purchased before the last of June, but on that day not yet within the state. If it could be in any way material, no such question is raised by the petitioner. On the contrary, petitioner refuses to deliver any statement of purchases out of the state.

As some stress seems to have been laid upon the phrase used in the description of the tax, it may be well to say, although the proposition seems to be an obvious one, that the words "purchases in or out of the state" do not refer to the act of purchasing, but to the goods purchased. It seems not at all material to the characterization of the tax whether it be laid upon the amount of sales, upon the average amount kept on hand,

or, as is the case here, upon the amount of purchases; in either case, the tax is upon the goods, and it is of no moment whether they be valued by their purchase or sale price, or by some other standard. Either as a license tax imposed upon a resident, or as a property tax laid upon property, within the state, the imposition in section 22 is legal, unless it is in conflict with some one of the provisions of the constitution of the United States. Petitioner claims that it does so conflict with article 1, § 8, cl. 3, which provided that "congress shall have power to regulate commerce with foreign nations, and among the several states;" and with article 1, § 10, cl. 2, which provided that "no state shall * * * lay any imposts or duties on imports or exports."

Before proceeding to the graver question at issue, which involves an important part of the state's powers to raise revenue, I will dispose of a position taken in the outset of his argument by counsel for petitioner, which only attacks the form of the tax, but not the taxing power itself, but which, if decided in his favor, would be fatal to the state's right to ultimately collect the tax *sub lite*, if not decisive of the present application. Section 22 excepts from taxation purchases of farm products from the producer. This, it is claimed, is in reality, although not ostensibly, a discrimination in favor of inhabitants of the state as against non-residents. The argument made is that, by reason of locality, a merchant naturally will buy a much greater quantity of farm products in his own state than out of it. Therefore, it is said the law, being in this respect in its effect more to the advantage of farmers in North Carolina than out of it, discriminates in favor of the former and against the latter. It may be said with equal truth that it discriminates also in favor of farmers within 10 miles of the merchant as against those 100 miles from him, and in the case of petitioner in favor of farmers in Marion county, in South Carolina, as against those in Craven county, North Carolina. But, indeed, I can see no force in the position in any point of view, and no applicability in the authorities cited to sustain it. It is conceded that a law that professes to be non-discriminating, and is so, as far as its words upon its face go, may, when the circumstances are applied to it, be shown to discriminate, and may for that reason be unconstitutional. Such was the fact in the Virginia case of *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. Rep. 213, and of *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 862. Laws professing to be enacted for the purpose of preventing the sale of unwholesome meat, and in one case taxing all dressed meat slaughtered more than 100 miles from the place of sale, and in the other prohibiting the sale of fresh meat from animals not inspected by a Minnesota inspector before being slaughtered, were found to be really laws prohibiting the sale of all such commodities imported from other states, and were held to be violations of the right of interstate commerce. But these were cases of taxation or prohibition. The revenue act of North Carolina contains, on the contrary, only an exemption from taxation. I know of no provision of the constitution violated by the exemption. It does not deprive any farmer in any other state of the privilege of selling his products in North Carolina, or tax him for

the right to do so. If he is at a disadvantage in so selling by reason of his distance from a market like the one of Wilmington, in that state, it is a disadvantage not caused by any statute, and is doubtless compensated by nearness to some market more accessible to him than to his rival in the market of Wilmington, the farmer residing in that locality. Nor does it in any way interfere with commerce. Only a tax or a prohibition could have that effect.

I come to the main point in the case. The law in question imposes a non-discriminating tax upon all merchandise in North Carolina, with the exception above mentioned, whether the product of that or some other state, whether in the hands of a second purchaser or of the importer, and whether it be or not in the condition in which it was imported; that is, as it is usually termed, in the original package. It is contended that, as far as it affects goods brought from another state in the possession of the first purchaser, in an unchanged form, it is unconstitutional. This is not the case of a tax upon a citizen of another state, imposed upon him for the privilege of bringing his merchandise into North Carolina, and there offering it for sale, but a tax upon goods in the state, imposed upon them in common with all other goods. A moment's consideration will be enough to show that, if it is unconstitutional, no tax upon the business of a merchant can be imposed and collected in any state. The great mass of merchants' sales consists either of commodities exclusively brought from outside of the state, and which are not produced within its limits, or of commodities in regard to which the manufactories and farms of the state compete with those of other parts of the world. If petitioner's contention is sustained, the first class cannot be taxed at all in the hands of the original purchaser. As for the second, a state has the power to tax such of them as have been in part manufactured or produced in its limits, but not those brought from other states. The effect, were such a tax imposed, would be protection, to the extent of the tax, to extra-state productions. Of course no state could afford to impose such a tax. The result would be that all merchants engaged in the exclusive business of selling goods in the original package, wherever purchased, would be exempted from any license tax whatever. The next result would be that such merchants would drive out of business, to a very great extent, all taxed merchants. The ultimate result would be that no tax on the business of selling commodities would be imposed. It is true that article 1, § 10, of the constitution forbids duties on imports from foreign countries, and, as interpreted by Chief Justice MARS ALL in *Brown v. Maryland*, 12 Wheat. 419, prohibits all state taxation of either imported goods in the original packages or of the business of selling such goods; and, without much consideration, it might be thought that the same results as those above stated might flow from the absence of power in the states to tax foreign importations. But the conditions attending the sale of such commodities, and of goods brought into one state from the others, are widely different. It would be impossible for a merchant dealing only in foreign imports in the original package to compete in general business with one who kept both for-

eign and domestic articles for sale. He would be limited to a few lines of goods, and, with regard to those, cost of transportation, and, above all, duties on imports, would reduce him to an equality with the merchant buying his goods nearer at home, and paying no tax on importation, if they did not put him at a disadvantage in the cost of his commodities. But the merchant dealing only in goods imported from other states would have a practically unlimited range of untaxed merchandise with which to compete with the taxed merchant dealing in the productions of his own state. There is an additional advantage to those already mentioned, that the dealer in goods brought from other states would have were the courts to hold taxation like that under consideration illegal. If commodities from other states in their original form cannot be taxed under the guise of a license tax, they cannot be taxed under the name of an *ad valorem* tax, and would, as long as they remained in their original condition in his possession, be non-taxable. That part of every merchant's stock of goods which he had brought from another state would remain, as long as it might be unsold, free, not only from merchant's tax, but from the general state property tax.

Certainly, since *Woodruff v. Parham*, 8 Wall. 123, until very recently, no such contention as that made in behalf of petitioner would have been advanced. *Woodruff v. Parham* was a case in which it appeared that the city of Mobile had imposed a tax on sales at auction and other subjects of taxation. Woodruff, the plaintiff, in the course of his business sold goods and merchandise, the products of states other than Alabama, to purchasers in the original packages, and refused to pay the city tax on such sales. MILLER, J., delivering the opinion of the court, said:

"The case before us is a simple tax on sales of merchandise imposed alike on all sales made in Mobile, whether * * * by a citizen of Alabama or of another state, and whether the goods sold are the produce of that state or some other. There is no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and there is therefore not an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama."

In *Machine Co. v. Gage*, 100 U. S. 676, it was decided that a state law imposing an annual tax on all peddlers of sewing-machines, without regard to the place of manufacture, was not in violation of the constitution. SWAYNE, J., after review of all the cases, says:

"In all cases of this class it is a test question whether there is any discrimination in favor of the state or of the citizens of the state which enacted the law. When there is such discrimination is fatal. In the case before us the statute in question makes no such discrimination. It applies alike to sewing-machines manufactured in the state and out of it. The exaction is not an unusual or unreasonable one. The state, putting all such machines upon the same footing, had an unquestionable right to impose the burden."

In *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091, (1884,) it appears that a state tax of six mills had been levied on all property situated in the state of Louisiana. Plaintiffs mined coal in Pennsylvania, and shipped it in flats to Louisiana. At the time of the assessment it

had just arrived from Pittsburgh, and was in the hands of plaintiffs' agents, afloat in the Mississippi river in the same boats in which it had arrived, and was held for sale by the boat-load. The court, by BRADLEY, J., after stating, on the authority of *Woodruff v. Parham*, *supra*, that the term "import" did not apply, because article 1, § 10, affected only foreign importations, and not articles carried from one state into another, says:

"It was not a tax imposed on coal as a foreign product, or as the product of another state than Louisiana, nor a tax imposed while it was in a state of transit through that state to some other place of destination. It was imposed after the coal had arrived at its destination, and was put up for sale. The coal had come to its place of rest for final disposal or use, and was a commodity in the market of New Orleans. * * * It had become a part of the general mass of property in the state, and as such it was taxed for the current year, as all other property in the city of New Orleans was taxed." "With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may not [a state assessor of taxes] assess all property, provided the assessment be a general one, without discrimination between the goods of different states?"

The three cases of *Woodruff v. Parham*, *Machine Co. v. Gage*, and *Brown v. Houston*, *supra*, are all recent, and are all cases in which the merchandise taxed by the respective state authorities was, at the time the tax was imposed, in the hands of the importer into the state, in a condition which had not been changed since its importation. *Woodruff v. Parham* and *Machine Co. v. Gage* were license taxes. *Brown v. Houston* was a general property tax, which fell, as is noted by GRAY, J., in the dissenting opinion in *Leisy v. Hardin*, 135 U. S. 151, 10 Sup. Ct. Rep. 681, on the property, the right of the state to tax which was in dispute, "in its original condition and original package." They are therefore authorities in point upon petitioner's contention, and, if unreversed, are conclusive of the matter *sub lite*. It is contended by counsel that they have been reversed by *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, and *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681; and that under the present rulings of the supreme court there is practically no difference in effect upon the state's taxing power between the provision in the constitution prohibiting duties on imports and that giving to congress the power to regulate commerce among the several states. This argument is drawn from the opinion of Justice BRADLEY in the first of the two last-mentioned cases and that of the chief justice in second. "It is strongly urged," says BRADLEY, J., "that no discrimination is made between domestic and foreign drummers; but that does not meet the difficulty. Interstate commerce cannot be taxed at all." 120 U. S. 489, 7 Sup. Ct. Rep. 592. "Under our decision in *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, they had the right to import this beer into the state, and, in the view we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property in the state. Up to that point of time we hold that, in the absence of congressional permission to do so, the state had no power to interfere, by seizure or any other action, in prohibition

of importation and sale by the foreign or non-resident importer." FULLER, C. J., in *Leisy v. Hardin*, 135 U. S. 124, 10 Sup. Ct. Rep. 689.

The argument for petitioner is this: Under the decision of the supreme court in *Bowman v. Railway Co.*, 125 U. S. 507, 8 Sup. Ct. Rep. 689, cited by the chief justice, federal control of interstate commerce does not stop at the state line, but goes with the goods which are its subjects to its place of destination within the state. Under *Leisy v. Hardin*, *supra*, which goes a step further, interstate commerce includes the right to sell such merchandise within the state, and the state cannot interfere with such sale in any way. The transportation into and sale within a state being thus held, as petitioner contends, to be interstate commerce, neither of these acts can be taxed, for, as is decided in *Robbins v. Taxing Dist.*, *supra*, interstate commerce cannot be taxed at all.

The case of *Robbins v. Taxing Dist.* is so recent a one, and is so well known to the profession, that its facts may be very briefly stated. The plaintiff, a citizen of Ohio, was arrested for the act of soliciting trade by the use of samples for the Ohio firm of Rose, Robbins & Co., of which he was an agent, without taking out the state drummer's license. It was held by the supreme court, the chief justice and two associate justices dissenting, that a state could not levy a tax or impose any other restriction upon the inhabitants of other states for selling or seeking to sell their goods in such state before they were introduced therein, even though an equal tax should be imposed upon inhabitants of the taxing state. In his dissenting opinion WAITE, C. J., says:

"I am unable to see any difference in principle between a tax on a seller by sample and a tax on a peddler; and yet I can hardly believe it would be contended that the provision of the statute now in question, which fixed a license fee for all peddlers in the district, would be held unconstitutional in its application to peddlers who came with their goods from another state, and expected to go back again."

I quote from the dissenting opinion to show the limits of what was actually decided. The court did not hold that a merchant bringing his goods from another state into Tennessee, for sale there, could not be taxed, but only that he could offer them for sale there, without being compelled to pay for that privilege, and that he might do so by an agent and by the use of samples. To guard against any misconception of the extent of the decision, the judge rendering the prevailing opinion expressly states that if the goods were in the state, and part of its general mass of property, they would be liable to taxation in the same manner as other property of similar character. "When goods are sent from one state to another for sale, or in consequence of a sale, they become a part of the general property, and amenable to its laws, provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. But to tax the sale of such goods, or the offer to sell them, before they come into the state is a very different thing, and seems to us clearly a tax on inter-

state commerce." *Robbins v. Taxing Dist.*, 120 U. S. 497, 7 Sup. Ct. Rep. 598. It is in the next paragraph, in answer to the argument that Tennessee drummers and those of other states were taxed alike, that Justice BRADLEY says: "But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce." It needs no argument to show that the interstate commerce referred to in the last sentence did not include the selling by the original importer of goods brought into the state by him, or that Justice BRADLEY adhered in the drummer's case to the opinion rendered by him in *Brown v. Houston*, that such goods are taxable by a state.

In deciding *Leisy v. Hardin* the supreme court put its decision on the interstate commerce provision of the constitution, and held that any interference, by seizure or by any other action, in prohibition of the sale of goods by their non-resident importer was a regulation of interstate commerce, but did not decide that a tax was such an interference. The fair inference from the one case is that a non-discriminating tax on commodities brought into a state by a non-resident is not a tax on interstate commerce, and from the other that the power to sell is an adjunct of, and necessarily involved in, interstate commerce, which may not be interfered with in the way in which the state legislature of Iowa has attempted to do. The reasoning in the two cases does not conflict.

Counsel for petitioner strongly urged the decision given in this circuit in *Fertilizing Co. v. Board of Agriculture*, 43 Fed. Rep. 609, as conclusive in his favor. That was a case in which the state of North Carolina had provided that no commercial fertilizers should be sold or offered for sale until the manufacturer or importer should obtain a license from the treasurer of the state, for which he should pay a privilege tax of \$500 per annum for each separate brand. The opinion of the court was rested, not upon article 1, § 10, of the constitution, but upon article 1, § 8, the court saying that it was immaterial whether or not it was within the meaning of the constitution an import tax, as it was clearly a tax on interstate commerce. To the opinion given in that decision I still adhere, and for the reasons given in it. The point involved was to a considerable extent a new one, and it was necessary to resort for its elucidation to general principles drawn from what appeared to the court to be the necessary effect of such taxations as that under consideration upon commerce between the states. Speaking to this point the court said:

"If the power were given to a state to tax all imports from other states without control, provided equal taxation were laid upon the same articles if produced or made in the state, a state would practically have the power to prohibit the importation of any article not made in it. North Carolina might tax the importation of manufactured cloths and Massachusetts that of cotton or tobacco. If this tax can be sustained, it is certain that a license tax in these words would be constitutional: 'No manufactured cloth shall be sold or offered for sale in this state until the manufacturer or person importing the same shall first obtain a license therefor, and pay a tax of five hundred dollars.' A similar tax upon the different brands of tobacco might be levied

in any state that does not manufacture tobacco. * * * It must be evident that a requirement of equality of taxation on the imported and home article would be no protection against such taxation as would seriously check if it did not destroy commerce between the states." 43 Fed. Rep. 613.

The fertilizer tax being levied upon the selling or offering for sale of fertilizers, was, as far as it affected non-residents selling or offering to sell such commodities without bringing them into the state, precisely within the decision of the drummer's case. It was further in effect, as above stated, one of a class of discriminating taxes, and to uphold it would be to admit a principle of state taxation allowing each state to protect its own manufactures from the competition of non-state manufactures. The court, in considering it, was not limited to the act itself, but could avail itself of the knowledge which was accessible to it, in common with all the world, of the state of trade and manufacture within and without North Carolina; or, in other words, take judicial notice of the facts bearing upon the taxation in question, and could from these facts ascertain the character of the impost in question.

Leaving out of consideration all taxes directly or indirectly imposed upon acts of trade between the states, (which are in every case inadmissible,) and considering only taxation upon merchandise or business not laid upon it as interstate or foreign to the taxing state, but yet objected to as obnoxious to the constitution because it, in effect, affects commerce between the states, we find that the test of constitutionality is the absence or existence of discrimination. *Machine Co. v. Gage*, *Brown v. Houston*, and other cases already cited. But the mere fact that an equal tax is laid upon the commodities or business of the home and foreign state is not conclusive of absence of discrimination. *Robbins v. Taxing Dist.*, *supra*. Whenever the effect of a state tax upon a particular commodity is to protect the productions of the taxing state from competition with such commodity, or to evidently impose the burden of the state revenue on goods produced outside the taxing state, and to favor home productions generally, it may be well contended that it is an interference with interstate commerce. Should a tax be imposed upon a commodity for the purpose of preventing its sale at all within the state,—for instance, should a state impose such a prohibitive tax on spirituous liquors as should stop their sale,—the case would appear to come within the mischief and reason of *Leisy v. Hardin*, and to be unconstitutional. A strong argument might be made against all state taxation of special objects of merchandise, on the ground that the power of taxation, being in its nature unlimited, the power to tax involved the power to prohibit; and also for the reasons urged by NELSON, J., in the dissenting opinion in *Woodruff v. Parham*, that such taxation involved generally the power to discriminate in favor of home manufactures. But no argument of that kind applies to the case of the application for a writ of *habeas corpus* now under consideration. In no manner can a general tax upon all merchandise, which this tax in effect is, be made discriminating. I do not regard the single exception in the statute as material. Such taxation cannot be used to favor the manufacture of particular ar-

ticles, or of home articles in general, or to in any way check the business of the purchase and sale of goods brought from other states excepting in the degree that all taxation checks trade. It is not laid upon foreign goods as such. It simply lays an equal tax upon all North Carolina merchants, affecting alike their home and foreign trade. The imposition of the tax is one within the power of the state, and violates no provision of the constitution of the United States.

I have not inquired into the question of whether or not this application is prematurely brought. The petitioner is imprisoned, not for refusing to pay a tax, but for the preliminary matter of refusal to make a sworn statement of his purchases. I simply note the fact. The decision is placed on the constitutionality of the law, the matter upon which I understand both parties (the state and petitioner) desire an opinion. The petition, showing upon its face that applicant is not entitled to a writ of *habeas corpus*, has been denied.

WHITNEY v. BOSTON & ALBANY R. Co. *et al.*

(Circuit Court, D. Massachusetts. December 14, 1891.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—WOOD-WORKING MACHINERY.

Letters patent No. 259,958, granted June 20, 1882, to Baxter D. Whitney for improvements in wood-planing machines, were for a pressure-bar supported and guided by curved levers projecting from its ends, and working in curved grooves concentric with the journals of the cutter cylinder, with an elastic plate or pad, forming a supplemental flexible foot and distributive pressure regulator; the pressure-bar being arranged on the rear or incoming side of the cutter cylinder for the purpose of bearing upon the lumber and holding it firmly to the bed-plate. *Held*, that this is infringed by a machine which has a pressure-bar with curved guides engaging with grooves formed concentrically round the journal boxes of the cutter cylinder; a yielding presser-foot consisting of an elastic plate, having a bearing surface adapted to regulate the pressure to correspond with the varying thicknesses of the wood; and the combination of a flexible pad with auxiliary support to prevent undue deflection.

2. SAME—SUIT FOR INFRINGEMENT—INTERLOCUTORY DECREE.

Where a suit for the infringement of a patent is brought against the users of a single machine who purchased it from the manufacturers, and who have nothing to do with its construction, the interlocutory decree for plaintiff will be for an account only.

In Equity. Suit by Baxter D. Whitney against Boston & Albany Railroad Company and others for the infringement of a patent.

David Hall Rice, for complainant.

Parkinson & Parkinson, for defendants.

NELSON, J. On the 20th of June, 1882, the plaintiff, a manufacturer of wood-working machinery, took out a patent (No. 259,958) for improvements in wood-planing machines. The invention, so far as it is covered by the second and third claims of the patent,—the only claims which are in controversy in this suit,—consists of a presser-bar supported and guided by curved levers projecting from its ends, and working in

curved grooves concentric with the journals of the cutter-cylinder, with an elastic plate or pad, forming a supplemental flexible foot and distributive pressure regulator, the section of the bar being curved above and upright below. The presser-bar is arranged on the rear or incoming side of the cutter cylinder for the purpose of bearing upon the lumber and holding it firmly to the bed-plate. The defenses are want of novelty, non-infringement, anticipation, and public use and sale more than two years prior to the application.

The utility of the invention is apparent. It serves to prevent the lumber from binding, adapts itself to the inequalities of the wood, and prevents the chips from being thrown back upon the cutters, and the machine can be run with less power. The superiority of its work is shown by the exhibits in the case. The planing-machine in use in the railroad company's shop is provided with projections which, in function and effect, are practically the same as the plaintiff's levers. It has curved guides engaging with curved grooves, formed concentrically round the journal boxes of the cutter cylinder. It has a yielding presser-foot, consisting of an elastic plate, having a bearing surface adapted to regulate the pressure to correspond with the varying thickness of the wood. It has a combination of a flexible pad, with auxiliary support to prevent undue deflection. The whole construction and arrangement of the presser-bar is a manifest imitation of Whitney's device, and is a plain infringement of the second and third claims of the patent, unless the remaining defenses are good.

For the purpose of showing anticipation, the manufacturers of the infringing machine, who are the parties defending this suit, have referred to a number of patents granted prior to that of the plaintiff. It is enough to say that in none of them can be found the perfectly working combinations of the plaintiff's second and third claims. The same may be said of the machines manufactured by J. A. Fay & Co. as early as 1874. It is incredible that this valuable improvement should have been known so many years, and yet put to no practicable use until the plaintiff introduced it into his machines.

It is claimed that the device covered by the second and third claims of the patent is to be found in machines manufactured and sold by the plaintiff more than two years before the filing of his application in the patent-office. The evidence, however, proves that at this time the plaintiff was engaged in experimenting upon improvements in presser-bars, that the machines were sold under guaranties for experimental purposes, and that they all lacked the auxiliary support, which is an important element in the invention, its function being to relieve the flexible foot, and prevent its breaking when it comes in contact with inequalities in the wood. As the railroad company are the users of a single machine purchased of the manufacturers, and had nothing to do with its construction, the interlocutory decree for the plaintiff will be for an account only, and no injunction is to issue against the defendant until the further order of the court; and it is so ordered.

A. JOHNSTON & Co., Limited, v. AMERICAN HEAT INSULATING Co., Limited, et al.

(Circuit Court, W. D. Pennsylvania. December 3, 1891.)

1. PATENTS FOR INVENTIONS—REISSUE—ENLARGEMENT OF CLAIM.

The claim of the original patent was: "As a new article of manufacture, a non-conducting covering composed of layers or wrappings of paper saturated with adhesive material, and compressed while being formed into tubular sections of a thickness of one-half inch or more, substantially as shown and described." In the reissue, the words, "of a thickness of one-half inch or more," were omitted; but it appeared that a covering for the designated purpose, of less thickness than one-half inch, would lack the non-conducting property, and would be inoperative and useless; that, in the practice of the invention, the covering is always of greater thickness, and must be; and the infringing article exceeded that thickness. *Held* that, as the omission did not really enlarge the patentee's rights, the change was immaterial, and did not avoid the patent.

2. SAME.

In the claim of the reissue, the words "or coated" were inserted after the word "saturated." *Held*, that the two words were used evidently as alternative expressions, to denote the same thing, and the claim was not broadened.

In Equity. Suit for infringement of a patent. Decree for plaintiff.

James I. Kay and W. Bakewell, for complainant.

W. L. Pierce, for defendant.

Before *ACHESON* and *REED*, JJ.

ACHESON, J. The plaintiff, the assignee of reissued letters patent No. 8,752, dated June 10, 1879, issued to the inventor, John C. Reed, assignor, etc., sues the defendant for the infringement thereof. The invention, which is an improvement in coverings for steam-boilers and pipes, consists of a non-conducting covering, composed of layers or wrappings of paper saturated or coated with suitable adhesive material, and compressed while being formed into tubular sections, and capable of being divided longitudinally, so as to be placed around the pipes or other surfaces to be covered. The specification thus describes the method of making the covering:

"I prepare the non-conducting covering from paper, for which purpose I prefer, and generally employ, what is termed 'roofing paper,' though other kinds of paper may be used. Upon a revolving mandrel of suitable size, regulated for the purpose for which the covering is intended, and generally a section of pipe of the same diameter as the pipe to which the covering is to be applied, I wind or wrap the roofing or other paper, at the same time applying some adhesive mixture to the layers to cause adhesion, and making traction on the free end of the paper, so as to lay the wrappings firmly and smoothly. In addition to the traction, which will compact the covering, I make use of pressure by means of weighted friction bar or plate, or in other suitable manner, so as to insure a dense, firm structure throughout. This operation is continued until a covering of sufficient thickness has been applied to the pipe, when, if the covering has been formed on this pipe, (taking the place of a mandrel,) upon which it is to remain, the covering may be finished by applying a suitable coat of paint, which can be readily and rapidly done by revolving the pipe before its removal; but, if the covering has been formed on a mandrel or pipe with which it is not intended to use it, it may be coated with paint at the time, and then withdrawn from the mandrel, to be afterwards

slipped upon the tubing upon which it is to remain, or it can be cut longitudinally into sections, and applied as illustrated in the drawings, and coated with paint afterwards."

The proved advantages of this covering are that it is tough and strong, composed of a fibrous material compressed so as to form a dense, firm structure throughout; is a thorough non-conductor; can be made at one place, and transported without packing or boxing to the place where it is to be used; is not liable to breakage by falling or any ordinary blows; can be cut by tools in common use by mechanics; can be easily applied by persons of little or no mechanical skill; can be removed and replaced at will for the examination and repair of the tubing; is neat in appearance, and will not soil or damage the finest machinery or tubing to which it may be applied; and can be produced at much less cost than other coverings for the like purposes.

The claims of the reissue are two, namely:

"(1) A non-conducting covering for boilers, pipes, and other surfaces, composed of layers or wrappings of paper saturated or coated with suitable adhesive material, and compressed while being formed into tubular sections, substantially as described. (2) As a new article of manufacture, a non-conducting covering for boilers, pipes, and other surfaces, composed of layers or wrappings of paper saturated or coated with suitable adhesive material, and compressed while being formed into tubular sections divided longitudinally, so as to be placed around the pipes or other surfaces to be covered, substantially as set forth."

Defense is made that Reed's improvement was destitute of patentable novelty. To sustain this position, a great number of prior patents were introduced, which we have carefully examined. To discuss them in detail would unduly extend this opinion and subserve no good purpose. The previous state of the art is fairly disclosed in the specification of the reissued patent. We content ourselves, then, with saying that, in our judgment, none of the prior patents contains or suggests the Reed invention. The proofs entirely satisfy us that Reed's improvement was novel in a patentable sense, and of great utility. It was, indeed, a meritorious invention, and the patent should be dealt with in a liberal spirit.

Upon the question of infringement, the case is free from any doubt whatever. The defendants make and sell the identical covering described in the reissue, and made by the described method. The only difference in the methods practiced by the parties is that, whereas the plaintiff applies the liquid flour-paste to one side only of the paper, the defendant applies it to both sides; but the result is the same, and the difference in the manner of applying the adhesive mixture is wholly immaterial. Furthermore, it is perfectly clear that the defendant's covering would have infringed the original patent equally as it infringes the reissue.

But the validity of the reissued patent is contested, the defendant insisting that its claims are broader than the claim of the original patent, and that the reissue was applied for too late to warrant such an expansion, the original letters patent, No. 171,425, having been granted December 21, 1875, and the application for the reissue not filed until April 5, 1879. The original patent had one claim, as follows:

"As a new article of manufacture, a non-conducting covering composed of layers of wrappings of paper saturated with adhesive material, and compressed while being formed into tubular sections of a thickness of one-half inch or more, substantially as shown and described."

The alleged undue broadening of the patent consists in two particulars, namely—*First*, in that the words, "of a thickness of one-half inch or more," which were in the original claim, are omitted from the reissue; and, *second*, by the insertion of the new words "or coated" after the words, "layers of wrappings of paper saturated." Under the rule as now firmly settled, it must be conceded that the reissue of a patent for the sole purpose of enlarging the original claim must be applied for promptly, and that an unexplained delay of three years and three months would be unreasonable and indefensible. *Miller v. Brass Co.*, 104 U. S. 350. The open question here is whether, in fact, the effect of the reissue was to broaden the original claim; for, if this was not so, then the reissue is valid. *Gage v. Herring*, 107 U. S. 640; 2 Sup. Ct. Rep. 819; *Reed v. Chase*, 25 Fed. Rep. 94; *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073.

Now, if we were shut up to a comparison of what merely appears on the face of the original patent and on the face of the reissue, it might seem that the omission from the latter of the words, "of a thickness of one-half inch or more," was a material change, and one prejudicial to the public. But the proofs bring us to a different conclusion. It is most clearly shown that a covering for the desired purpose, of less thickness than one-half inch, would lack the necessary non-conducting property, and would be useless, and that in the actual practice of the invention the covering is always of greater thickness. The defendant's coverings, as well as the plaintiff's, exceed that thickness, and must do so for any beneficial use. A one-half inch covering is too thin to retain the heat and prevent radiation. The thickness actually employed ranges from one inch to one and a half inches, in rare cases exceeding the latter thickness. When, therefore, we consider the art to which the invention relates, and the requirements of that art, we find that the mention in the original patent of "a thickness of one-half inch or more" was merely of a feature essential to a non-conducting covering. In the nature of the case, it would have been implied, in the absence of express statement. Observe, the original specification spoke of the covering as a "thorough non-conductor;" described the method of manufacture "to insure a firm, dense structure throughout;" and directed that the winding operation be continued until a covering "of sufficient thickness" has been obtained. Manifestly, this meant a sufficient thickness to obtain the non-conducting property, and to any one skilled in the art it would be obvious that for this a thickness of at least one-half inch was necessary. A change in the form of expression which possibly might be interpreted as extending the scope of a patent to inoperative and useless things could scarcely be deemed a broadening of the claim. But such a construction is rather to be avoided. The equity of the case requires the court to regard practical results, and, if these are to control, then plainly the omission

from the reissue of the words, "of a thickness of one-half inch or more," did not really enlarge the rights of the patentee, or abridge the rights of the public. Hence the case is without the reason of the rule which prevailed in *Miller v. Brass Co.*, *supra*, and other like cases. Undoubtedly the invention described in the reissue is the same invention described in the original patent, and we think the claim of the original and the first claim of the reissue are substantially identical, notwithstanding the omission in the latter of any reference to the thickness of the tubular sections. This view, it seems to us, is fully warranted by the reasoning and conclusion of the supreme court upon the subject of reissues, as expressed in *Eames v. Andrews*, *supra*.

With respect to the introduction into the claims of the words "or coated," we have no difficulty. Evidently "saturated" and "coated" are used as alternative expressions, to designate the same thing. To understand the meaning which the patentee attached to the word "saturated," we are to look into the specification, which, both in the original and the reissue, directs the "applying some adhesive mixture to the layers to cause adhesion." Beyond any question, it is to this application or coating the patentee refers by the term "saturated." "Saturated with adhesive material" is the exact language. Possibly he might have chosen a more apt word; but, if he made a wrong selection, the slip is not fatal. No one reading the specification can fail to discern his meaning. However, it is satisfactorily shown that while the gluten and starch of the paste, applied as directed by the patent, do not penetrate through the paper, the moisture does permeate it. So that there is saturation resulting from the application of the adhesive mixture and the compression which follows.

As to the second claim of the reissue, little need be said. If no expansion of the original claim is to be found in the first claim of the reissue, surely there is none in the second claim, for it contains a limitation not in the original claim, by reason of the introduction of the words "divided longitudinally" after the words "tubular sections." Let a decree be drawn in favor of the plaintiff.

NORTHROP'S EX'RS v. RASNER *et al.*

(Circuit Court, W. D. Pennsylvania. December 10, 1891.)

1. PATENTS FOR INVENTIONS—INVENTION—METALLIC CEILINGS.

Letters patent No. 330,916, issued November 24, 1885, to Albert Northrop, is for a metallic ceiling, composed of panels having curved mouldings on the sides which interlock with each other, the mouldings at the corners being cut away, leaving an opening which is filled with a rosette, the panels being secured to the furring strips by fastenings passed through the curved mouldings, and these mouldings also forming channels for discharging any water which may leak through from above. *Held*, that the device shows patentable invention.

2. SAME—EXTENT OF CLAIMS—PRIOR ART.

But, in view of the prior state of the art, the claims covering this invention must be strictly construed.

8. SAME—INFRINGEMENT.

These claims are not infringed by a ceiling composed of panels having flat edges designed to overlap each other, and to be secured to the furring strips by nails, and having mouldings situated inside the edges, and rosettes at the corners of the panels.

In Equity. Suit by the executors of Albert Northrop against Rasner and Dinger for infringement of a patent. Bill dismissed.

W. Bakewell & Sons, for complainants.

D. F. Patterson, for defendants.

REED, J. The bill alleges infringement of letters patent No. 330,916, being for an improvement in metallic ceilings, issued November 24, 1885, to Albert Northrop, the complainants' testator. The ceiling constructed under this patent is composed of panels, each panel having a moulding on each of its sides. As stated in the specification:

"Each moulding is curved so as to form a channel, and, as the mouldings are counterparts of each other, the moulding on the edge of one panel will fit within the moulding on the adjacent edge of an adjoining panel, and hence any number of the panels may be interlocked with one another. The mouldings at the corners of the panels are cut away, and hence when the panels are put together an opening is formed at the junction of the corners of four panels."

At the corners rosettes are fastened to conceal the openings, and the panels are secured to the ceiling or to furring strips by fastenings passing through the curved channels. When put in place there is formed between the panels, by the curved mouldings, gutters or channels into which any water leaking from above will gather, running off at the openings at the corners of the panels without injury to the ceiling. Another form of panel is also described in the specification, having curved mouldings on two edges, and upon the opposite edges straight flanges, so that, when put together, the flange of one panel rests in the curved moulding of the adjoining panel. There is thus formed a gutter for the collection of leaking water, which runs off at the panel corners, and at the same time, as stated in the specification, provision is made for expansion and contraction of the panels, the flange resting loosely in the curved moulding. Defense is made that the patent is invalid for lack of invention, in view of the prior state of the art, and reference has been made to certain patents for metallic roofing. Without discussing this defense at length, I need only say that my conclusion is that the patent shows invention, and that the presumption of validity has not been overcome by the defendants.

The 1st, 5th, and 6th claims of the patent are alleged to be infringed by defendants' ceiling. They are:

"(1) A metallic ceiling, consisting of panels, each having a curved or channeled moulding on its four sides, the mouldings being cut away at the corners of the panels, substantially as set forth." "(5) A metallic ceiling, consisting of panels having their sides (two or more) provided with channeled mouldings, the corners of the panels being cut away, substantially as set forth. (6) A metallic ceiling consisting of panels, each having a curved or channeled moulding on two or more of its sides, the panels being cut away at the corners, and rosettes for covering and concealing said cut-away portions, substantially as set forth."

In view of the prior state of the art, and of the patents referred to, improvements in the kindred art of metallic roofing, these claims must be strictly construed. The defendants' ceiling, which it is alleged infringes, is constructed of panels. These panels are stamped into the shape desired for use, and, in the exhibits presented on argument, have an ornamental center surrounded by moulding, outside of which is a flat edge, called by defendants' witnesses a "stile." In putting up the ceiling, furring strips are first nailed to the joists, and the panels are nailed to the furring strips, the flat edges or stiles overlapping in such manner that the joinder of the panels is concealed. At each corner is inserted a rosette, which serves no other purpose, apparently, than that of ornamentation. No channel is formed by the edges of the panels for the purpose of carrying leaking water from above to any place to discharge, although, doubtless, the edges of the panels and the corner openings, where the rosettes are inserted, being lower than the main body of the panel, water would run to these points and leak through. The edges of the panels, however, fit closely to the furring strip, so that no open channel is formed by the edges. In its construction the ceiling is more like the construction of the roof under the patent issued to Robert Sanderson, No. 120,900, in evidence, than like that under complainants' patent. To hold the defendants' ceiling an infringement of the claims of complainants' patent would seem to require the finding that the latter patent is anticipated by the Sanderson patent, at least to the extent that no invention was involved in the complainants' ceiling. But I think they are not alike, and do not think the defendants' ceiling an infringement upon the complainants' claims. The defendants' ceiling can be constructed quite as well with flat panels, overlapping at the edges, and nailed to the furring strips, as it can with panels containing the ornamental stamping. The curved mouldings used by defendants are within the panel, and not on its four sides, nor are the mouldings cut away at the corners of the panels, as set forth in the claims. It may be, as argued by complainants' counsel, that the word "mouldings," as ordinarily used, is broad enough in meaning to include what the defendants term a "stile;" but as used in complainants' patent it refers to a specific thing, namely, the curved or flanged edge of the panel, which interlocks with that of the adjoining panel, and which is the peculiarity of construction of a ceiling under complainants' patent. This I do not find in defendants' ceiling. In my judgment, there has been no infringement, and the bill must be dismissed, with costs. Let a decree be drawn accordingly.

LALANCE & GROSJEAN MANUF'G Co. v. MOSHEIM.

(Circuit Court, S. D. New York. December 26, 1891.)

PATENTS FOR INVENTIONS—INFRINGEMENT—DEMURRER TO BILL—JUDICIAL NOTICE.

When a bill for infringement is demurred to on the ground that the patent on its face is void for want of patentable invention, in view of old and well-known devices, the court will not take judicial notice that certain similar articles exhibited at the argument were in use before the date of the patent, when it has the slightest doubt that such was the fact.

In Equity. Bill by Lalance & Grosjean Manufacturing Company against Julius E. Mosheim for infringing a patent. Heard on demurrer to the bill. Overruled.

Arthur v. Briesen, for complainant.

Robert N. Kenyon, for defendant.

COXE, J. The defendant demurs on the ground that complainant's patent is, on its face, void for want of patentable novelty in view of old and well-known devices of which the court will take judicial notice. The patent No. 285,645 was granted September 25, 1883, to Milligan and Chaumont for an improvement in enameled iron wash-basins. At the argument various structures alleged to have been in use long prior to 1883 were produced, which, if properly proved, would strongly tend to support the defendant's contention. Though many of these, certainly, had a familiar appearance, the court could hardly say with absolute certainty that such structures were in existence prior to 1883. The authority of a judge to substitute his knowledge for legal proof should be exercised with the utmost caution and only in the plainest cases. If there be the slightest doubt it is by far the safer way to permit the cause to proceed in the usual manner. *Blessing v. Copper Works*, 34 Fed. Rep. 753; *Eclipse Co. v. Adkins*, 36 Fed. Rep. 554; *Standard Oil Co. v. Southern Pac. Co.*, 42 Fed. Rep. 295. In *New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co.*, 137 U. S. 445, 11 Sup. Ct. Rep. 193, the question of patentability was presented by a demurrer. The supreme court say:

"We think that the demurrer should have been overruled, and that the defendants should have been put to answer the bill. Whether or not the design is new is a question of fact, which, whatever our impressions may be, we do not think it proper to determine by taking judicial notice of the various designs which may have come under our observation. It is a question which may and should be raised by answer and settled by proper proofs."

The other point—that the claims are void in view of the state of the art disclosed by the patent itself—involves a construction of the patent which it would be unsafe to undertake in the absence of explanatory proofs.

For these reasons the demurrer must be overruled.

ENTERPRISE MANUF'G CO. OF PENNSYLVANIA v. SARGENT *et al.*

(Circuit Court, D. Connecticut December 23, 1891.)

PATENTS FOR INVENTIONS—INFRINGEMENT—VIOLATION OF INJUNCTION—CONTEMPT.

Defendants, having been enjoined from infringing the 1st, 2d, and 6th claims of letters patent No. 271,398, issued January 30, 1883, to John G. Baker, for a machine for mincing meat, etc., constructed a machine in exact accordance with those claims, but having in addition thereto a detachable frame containing three stationary blades through which the meat is pressed by the forcing screw, thus cutting it to some extent before it reaches the rotating knives. Plaintiff moved for an attachment for contempt, on the ground that the detachable frame was of no practical value, but defendants filed affidavits alleging that with the attachment from 21 to 38 per cent. more meat was cut than without it. *Held*, that this presented a new question, which could not be tried in a contempt proceeding.

In Equity. Motion to attach for a contempt in violating an injunction.

Charles Howson and Charles E. Mitchell, for plaintiff.

John K. Beach and Edmund Wetmore, for defendants.

SHIPMAN, J. This is a motion for attachment of the defendants for contempt for the alleged violation of an injunction against the infringement of the 1st, 2d, and 6th claims of letters patent No. 271,398, dated January 30, 1883, to John G. Baker, assignor to the plaintiff, for a machine for mincing meat and other plastic substances. The construction of the machines which were the subject of the controversy upon the previous hearings, the principle and characteristics of the patent, and the nature of the difference between the patentee's device and its predecessors, were explained in 28 Fed. Rep. 185, and 34 Fed. Rep. 134. The new machine of the defendants, which is the subject of the present motion, is the Baker machine, made in exact accordance with the patent, so far as the 1st, 2d, and 6th claims are concerned, with the following addition: The forward edge of the end of the forcing screw is enlarged into a lip having a sharp edge. Between the outer end of the forcing screw and the rotating knife is a stationary, but detachable, frame, in which are three stationary blades. As the forcing screw revolves and delivers meat, the meat is, before it reaches the rotating knife, cut, to a certain extent, between the sharp edge of the lip of the screw and the three stationary blades within the frame. The theory of the plaintiff, when it brought the motion, was that the three-bladed detachable frame was a thing of no practical value or importance, and was not expected, by its makers, to be of assistance in cutting; and, furthermore, that it could be taken out of the machine and laid aside without affecting the usefulness of the structure. The affidavits of the defendants strongly tend to the conclusion that it aids in the cutting of meat. The tests which the defendants made were, if accurate, to the effect that the new machine delivered, with the same number of revolutions and under the same circumstances, from 21 to 38 per cent. more cut meat than the unaltered Baker machine, and, for the purpose of the decision of this motion, I must assume that the addition of the three-bladed frame en-

abled the machine to cut a substantially greater amount of meat in the same time, and without known increase of power.

It thus appears that the question has shifted from the one which was presented upon the plaintiff's affidavits, and is now, as to the *status* of the modified Sargent machine, upon the theory that the defendants' affidavits are true. The principle of the Baker machine was a different one from that of its predecessors. Whereas the Miles machines relied upon cutting by knives before the meat reached the perforated plate, and permitted that plate and its cutter to perform only a minor part in the operation, the Baker machine relied entirely upon the knife and perforated plate at the end of the case, the screw acting merely as a forcing device, and the new territory which the invention occupied was pointed out with great distinctness in the Baker patent. In the preceding hearings in the case the patentable novelty of the Baker machine, and whether the Sargent machine, as then constructed, was a Baker or a Miles machine, were the questions before the court, which was not considering unknown modifications of either device. The defendants now insist that a new question, involving an heretofore undecided construction of the patent, is presented by the motion, and that until that question has been decided there can be no ground for a suggestion that they have been guilty of contempt. On the other hand, the plaintiff says that the question is, can the defendants escape the charge of infringement, and of willful disregard of the injunction order, by adding to an exact copy of the Baker machine, so far as the 1st, 2d, and 6th claims are concerned, a cutting device, at the end of the forcing screw, which is not needed, and which is not the means by which the cutting of meat for domestic purposes is substantially accomplished, or upon which reliance is placed for the success of the machine? The plaintiff says, in brief, that the new Sargent machine is simply an addition to the Baker machine of an unnecessary cutter.

Notwithstanding the character of the plaintiff's suggestions, it is true that this is a motion for contempt for violation of an injunction order, and that the former opinions of the court were not directed to the structure as now modified, and that, to a certain extent, a new question has arisen which requires the court to re-examine the self-imposed limitations of the patent. A motion for attachment for contempt is not adapted to the trial of a question of this kind. I am therefore of opinion that the motion should be denied, but without prejudice to the plaintiff's right to file a supplemental bill in the original suit, which is still pending, or to file an original bill, as it may be advised. *Allis v. Stowell*, 15 Fed. Rep. 242; 3 Rob. Pat. 649.

NORTHROP *et al.* v. KEIGHLEY *et al.*

(Circuit Court, W. D. Pennsylvania. December 10, 1891.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—METALLIC CEILINGS.

Letters patent No. 158,881, issued January 19, 1875, to Henry Adler, are for a metallic ceiling composed of panels of cold-rolled sheet-iron with turned-up edges, fitted into squares formed of furring strips nailed to the joists, and resting loosely upon fastenings attached to these strips, the edges being covered by a broad cap fastened to the strips. The specifications state that it is the object of the invention to provide for the expansion and contraction of the panels, and that, theretofore, metallic panels had been fastened rigidly to the furring strips. *Held*, that the patent was not infringed by a ceiling composed of panels with flat edges, which were nailed rigidly to the strips, and covered by a cap-piece secured by nails passing between the edges of the panels.

2. SAME—PATENTABLE INVENTION—MECHANICAL ADAPTATION.

Letters patent No. 330,915, issued November 24, 1885, to Albert Northrop, claim: "In a metallic ceiling, the combination, with corrugated sheet-metal panels arranged to form an intervening space between their adjacent sides, and thereby allow of their expansion and contraction in all directions, of a moulding strip overlapping the adjacent edges of the panels, and devices passing through the moulding strip between the edges of the panels for securing the strip and panels to the ceiling." *Held*, that this was a mere mechanical adaptation of the Adler invention to the use of corrugated panels, and the patent is therefore void.

In Equity. Suit for infringement of a patent. Bill dismissed.

W. Bakewell & Sons, for complainants.

D. F. Patterson, for defendants.

REED, J. The bill alleges infringement of letters patent No. 158,881, issued to Henry Adler, January 19, 1875, and now held by complainants, being for an improvement in metallic ceilings. The specification states that it relates to that class of ceilings known as metallic ceilings, "and consists in constructing ceilings in panels, and from black cold-rolled sheet-iron, and in securing the panels in position by means of secreted cleats and caps, or ornamental side and corner pieces, so that the means employed for attaching the metal ceiling to the under side of the rafters are completely hidden from view." The inventor further says:

"Heretofore ceilings of this class have been made from galvanized sheet-iron screwed directly to the girders by screws and similar attachments, which were apparent in the finished panels, and which held the panels rigidly, without allowing for expansion or contraction. The object of my invention is therefore to provide a fastening that will admit of the necessary expansion and contraction of the panel, that will be entirely hidden when the ceiling is finished, and that can be readily and cheaply applied."

And again says:

"Furthermore, the method of attachment, which has been by screwing the panels to the joists direct, did not leave room for the expansion or contraction of the panel, and was such that the fastenings showed in the completed ceilings."

As described by the inventor, the ceiling is constructed by fastening to the joists cleats or furring strips, forming a square or other pattern similar to the panel proposed to be used. The panel, formed of sheet-iron with the edges turned up to form flanges, is then inserted between

the furring strips, and supported in place by small fastenings attached to the cleats, and extending under the flanges of the panels. A cap-piece, broader than the furring strips, and thus extending under the flanges of adjacent panels, is fastened to the furring strip, and conceals it, as well as the edges of the flanges and the small supporting fastenings. At each corner of the panel, where the several cap-pieces surrounding it come together, rosettes or corner pieces are fastened to conceal the joining ends of the cap-piece. If the panel is small and light, the supporting fastenings may be dispensed with, and the flanges of the panels rested directly upon the cap-piece. The panel thus has free play in case of expansion or contraction. The claim alleged to be infringed is as follows: "In combination with the panel, c, the cap-pieces, D, and the corner pieces, E, substantially as and for the purpose specified."

The defendants' ceilings were constructed by fastening to the joists cleats or furring strips in the form desired for the panel. To these strips the panel of sheet-iron (without flanged or turned edges) was nailed securely. Over the adjoining edges of the panels were nailed metal strips or cap-pieces, for the purpose of concealing the joiner of the edges, and at the several corners of the panels were placed rosettes or ornamental corner pieces. It appeared that the purpose of these cap-pieces and corner pieces was simply for ornament, and not support. When the ceiling was completed, the panels were held rigidly in place, no allowance being made for expansion and contraction. Assuming this to be a valid patent, its claims must, in my judgment, be narrowly construed, both in view of the prior state of the art, and the restrictions put upon them by the inventor himself, and it will hence be seen that the essential value of the patent lay in the provision made for expansion and contraction. The combination, "substantially as and for the purpose described," of the panel, the cap-piece, and the corner piece, does not exist in defendants' ceiling. Their ceiling, as put up, fastened rigidly in place, is constructed in the manner stated by the inventor as in use before he invented the improvement described, and which he condemns, with the addition of the cap-piece and rosette for the purpose of concealment of the panel edges and of ornamentation. Such a concealing strip, however, was not new, and had been used prior to the invention in question, and has been in common use in constructions of wood, of which an illustration is the strip used to cover the adjoining pieces of weather-boarding on frame houses, and only in this respect does the defendants' construction resemble the construction described in the patent. There being no infringement, the bill cannot be sustained upon this ground.

It is also alleged, however, that the defendants' ceiling infringes a later patent, being No. 330,915, issued November 24, 1885, to Albert Northrop, the complainants' testator, for a new and useful improvement in metallic ceilings. The ceiling constructed in accordance with the specification of this patent consists of panels—

"Preferably made of corrugated sheet-iron, in order to stiffen the sheets and provide for their expansion and contraction in one direction, that is, in

a direction transverse to the length of the corrugations, and to form channels to direct the flow of any water that may find its way upon the upper surface of the panels of the ceiling. These panels are applied to the furring strips in such manner that spaces will be left between their adjacent side edges to allow of the expansion and contraction of the panels, and also to form intervening passages or openings for the escape of water."

These panels are loosely held in place by supporting strips or cap-pieces of metal, made with a central gutter running lengthwise, and which are nailed to the furring strips by nails passing between the adjoining edges of the panels. At the ends of the cap-pieces are placed rosettes to conceal their ends. The specification states:

"From the foregoing it will be observed that the panels are supported in position by the moulding strips, and are allowed free and independent expansion and contraction, and hence will not buckle or wrinkle in use. The corrugations operate to stiffen the panels, and also to form channels to direct the flow of water into the moulding strips, should any leakage occur in the roof or water-pipe. The rosettes serve to conceal the fastening nails, and also serve as receptacles to catch the dripping of water from the upper surface of the ceiling."

It further states:

"I am aware that it is not new to employ ranged panels, and secure them to cleats located between the adjacent edge or by cap-pieces; hence I make no claim to such combination."

The claim alleged to be infringed is:

"In a metallic ceiling, the combination, with corrugated sheet-metal panels, arranged to form an intervening space between their adjacent sides, and thereby allow of their expansion and contraction in all directions, of a moulding strip overlapping the adjacent side edges of the panels, and devices passing through the moulding strip between the edges of the panels for securing the strip and panels to the ceiling."

For substantially the same reasons as stated above, I do not think the defendants' ceiling infringes this patent; but it is unnecessary in the view I take of the patent to speak of the question of infringement at length, or to discuss the testimony in reference to other ceilings, constructed prior to the applications for either of the patents in question. In my judgment the later patent is invalid for lack of invention. The changes made in the construction of ceilings under the Adler patent, in order to construct a ceiling in accordance with the Northrop patent, were such as would suggest themselves to any ordinary mechanic. Corrugated sheet-metal was in common use, and any advantage that it had over flat sheet-metal was well understood. It required no exercise of inventive ability to substitute a panel with flat edges for that with turned edges described in the Adler patent, and the moulding strip and devices passing through it, between the edges of the panels, to secure the panel and the strip to the furring strip or ceiling, as stated in the claim, are those of the Adler ceiling. Plainly, therefore, there is nothing which will sustain the patent. The bill must be dismissed, with costs. Let a decree be prepared accordingly.

NATIONAL FERTILIZER CO. v. LAMBERT *et al.*

(Circuit Court, N. D. California. December 7, 1891.)

1. CONSTITUTIONAL LAW—POLICE POWER—MONOPOLIES.

The ordinance of San Francisco granting to Charles Alpers the exclusive right to remove from the city limits all such dead animals, not slain for human food, as shall not be removed by the owner in person, or by his immediate servant or employe, within 12 hours after the death thereof, and requiring the owner, if not intending to so remove it himself, to immediately deposit a notice of the death in a box provided for that purpose by Alpers, is a valid exercise of the police power, and is not open to objection as creating a monopoly, or as depriving persons of their property without due process of law.

2. SAME.

Although the ordinance in terms gives the right to remove the carcasses "from the city limits," the fact that the licensee's factory, where the bodies are converted into commercial products, is situated in "Butchertown," within the city limits, is no objection to his exclusive right, as the purpose of the ordinance is substantially effected by disposing of the carcasses so as to prevent the creation of a nuisance.

3. SAME.

The licensee's right, as against every person but the owner, attaches immediately on the death of the animal, and is not postponed until the expiration of the 12 hours.

In Equity. Suit by the National Fertilizer Company to restrain W. P. Lambert and others from interfering with its rights under the "dead animal contract" of San Francisco. Injunction granted.

Langhorne & Miller, for complainant.

R. C. Harrison and Lloyd & Wood, for respondents.

HAWLEY, J., (*orally*.) This is a suit in equity to restrain respondents from infringing upon the exclusive rights and privileges of complainant under what is commonly known and designated as the "dead animal contract." The board of supervisors of the city and county of San Francisco, on December 11, 1882, passed the following resolution, viz.:

"Resolved, that for the period of twenty years from and after the 1st day of December, A. D. 1882, Charles Alpers, the assignee of Gustav Wetzlar of the contract with the city and county for the removal of dead animals from the city limits, bearing date May 29, 1866, or the assigns of said Alpers, shall have and enjoy the exclusive right and privilege of removing from the city limits all carcasses of such dead animals, not slain for human food, as shall not be removed and so disposed of as not in any manner to become a nuisance, within twelve hours next after the death of the same, by the owner thereof, or the person in whose possession such animal may be at the time of its death, or by the immediate servant or employe of such owner or person.

"Resolved, that for the purposes hereof the said Charles Alpers or his assigns shall keep up and maintain order boxes for the receipt of notices for the removal of such carcasses of dead animals in conspicuous places at the new city hall and health office, in said city and county; and the same shall be labeled, 'Orders for the Removal of Dead Animals.'

"Resolved, that the owners of any animal that shall die within the city limits within the said period of twenty years from and after the 1st day of December, A. D. 1882, save such as shall be killed for human food, or the person in whose possession such animal shall be at the time of its death, shall, immediately upon such death, notify the said Charles Alpers or his as-

signs of such death, and of the place where such carcass may be found, by depositing written notice thereof in one of the boxes above provided for, or by personal notification, unless such owner or person shall himself, or by his immediate servant or employe, and not otherwise, remove and dispose of the same, in such manner as not to become a nuisance, within twelve hours next after such death shall occur: provided, that the term 'servant or employe,' herein employed, shall in no manner be construed so as to include a contractor or other person not actually employed by and under the direct supervision and control of such owner or person.

"Resolved, that said Charles Alpers or his assigns shall receive no compensation whatever from the city and county for any such removals; but said city and county, in full consideration thereof, shall protect the said Charles Alpers and his assigns in the exclusive rights and privileges to make all such removals by all such orders and resolutions as may be lawfully made in that behalf.

"Resolved, that it shall be the duty of all health and police officers of said city and county, upon being informed of any such death, to immediately notify said Charles Alpers or his assigns personally, or by depositing a notice thereof, as herein provided."

And on December 26, 1882, in pursuance of said resolution, enacted the following order, viz.:

"Concerning the removal of dead animals from the city limits.

"Whereas, on the 11th day of December, A. D. 1882, the board of supervisors of the city and county of San Francisco passed resolution No. 16,018 $\frac{1}{2}$, (New Series,) giving to Charles Alpers and his assigns the exclusive privilege of removing the carcasses of dead animals from the city limits, so that the same may not become a nuisance, for the period of twenty years from and after the 1st day of December, A. D. 1882, which resolution was duly approved on the 15th day of December, 1882: Now, therefore, the people of the city and county of San Francisco do ordain as follows:

"Section 1. Whenever any horse, ass, or mule, swine, sheep, goat, or cattle of any kind, save such as shall be killed for human food, shall die within the limits of the city and county of San Francisco, the owner thereof, in person or by his immediate servant or employe, and not otherwise, or the person in whose possession such animal shall be at the time of its death, shall remove and dispose of the same, in such manner as not to become a nuisance, within twelve hours next after such death shall occur, or immediately upon such death shall notify said Charles Alpers or his assigns, in person, thereof, and the place where such carcasses may be found, or by depositing a written notice thereof in one of the boxes labeled, 'Orders for the Removal of Dead Animals,' set up by the said Charles Alpers or his assigns at the new city hall or health office, in said city and county. Any person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten dollars, nor more than fifty dollars.

"Sec. 2. Any person other than the said Charles Alpers or his assigns, or the owner, by himself or his immediate servant or employe, or the person having possession of any animal mentioned in the preceding section at the time of its death, who shall remove or dispose of the carcass of such animal, unless the said Alpers or his assigns shall fail to do so within twenty-four hours after notice thereof, as hereinbefore provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than fifty dollars: provided, the term 'servant or employe,' whenever herein expressed, shall in no manner be construed

so as to include a contractor or other person not actually employed by and under the direct supervision, control, and direction of such owner or person.

"Sec. 3. Any person who shall obstruct, hinder, or in any manner interfere with the said Charles Alpers or his assigns in the removal or disposition of the carcass of any animal mentioned in section 1 of this order, by intercepting any notice herein mentioned, or by putting up or maintaining any box for the receipt of any notices for the removal of such carcasses, or by soliciting in person, by agent, or by advertising, or by maintaining any stands or trucks or drays used for the purpose of such removal, or otherwise, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty dollars, nor more than one hundred dollars, or by imprisonment in the county jail not more than three months, or by both fine and imprisonment.

"Sec. 4. It shall be the duty of the keeper of the public pounds of said city and county to notify Alpers or his assigns to remove the carcasses of all dead animals destroyed by him, and of all the health and police officers of said city and county to give the notices provided for in section 1 hereof, whenever the death of any animal therein named shall come to their knowledge.

"Sec. 5. The said Charles Alpers or his assigns shall give to the people of the city and county of San Francisco a good and sufficient bond, in the sum of one thousand dollars, with two or more sufficient securities, for the due and faithful performance by him or them, without compensation from or expense to said city and county, of all the conditions imposed upon him or them by this order, and the resolution abovesaid.

"Sec. 6. This order shall take effect immediately upon its approval.

"In Board of Supervisors, San Francisco, December 26, 1882. After having been published for five successive days, according to law, taken up and passed by the following vote."

Alpers accepted the said resolution and order, executed the bond, and entered upon the performance of the duties required of him, and thereby acquired all the rights and privileges granted thereunder. The rights of Alpers have been assigned to complainant. A provisional injunction was issued against all the respondents. The respondents, other than Lambert, made default, and a decree has been regularly entered against them. The case is now presented, upon final hearing, upon its merits, as against the respondent Lambert. As thus presented, it involves the question of the constitutionality of the resolution and ordinance, and a construction of the contract created by their passage and acceptance. It may be admitted, as claimed by respondents' counsel, that there are several features of the contract that do not commend themselves to public favor; but they are such as relate to the wisdom, policy, or expediency of making such contracts. The court, however, has only to deal with the question as to the power of the board of supervisors to pass the resolution and ordinance, and determine whether they are valid, and, if valid, to construe their provisions. The constitutionality of the contract is assailed upon three grounds: (1) That said contract attempts to create a monopoly, and is for that reason in violation of section 21 of article 1 of the constitution of the state of California; (2) that the contract attempts to deprive persons of their property without due process of law; (3) that the contract is in restraint of trade.

It is the duty of every government, whether state or municipal, to pass laws or ordinances for preserving the public health, protecting the good order and peace of society, and providing for the abatement of nuisances. Such laws, if they contain nothing more than the necessary restrictions and limitations for the accomplishment of such purposes, are not unconstitutional on the ground that they deprive persons of their property without due process of law. Quarantine regulations, for instance, materially interfere with the free and unobstructed use of private property, and for the time being restrain, to a certain extent, the liberty of individuals. Yet the health, safety, and welfare of the community often demand their enforcement; and such laws have always been upheld as necessary police regulations. Several other instances might be cited where laws of a similar character are sustained; but the authorities are too numerous, and the general principles of law too well settled, to require any extended reference or review. No person has an inalienable right to produce disease, or trade in that which is noxious; and in every community, large or small, some minor rights of individuals must be surrendered for the benefit, protection, health, and general good of all. In *Alpers v. City and County of San Francisco*, 32 Fed. Rep. 503, the constitutionality of this "dead animal contract" was involved; and it was sustained and declared valid as a legitimate exercise of the police power of the state. FIELD, J., in delivering the opinion of the court, said:

"There is no doubt that the contract between the plaintiff and the city and county of San Francisco is one within the competency of the municipality to make. It is within the power of all such bodies to provide for the health of their inhabitants by causing the removal from their limits of all dead animals not slain for human food, which otherwise would soon decay, and, by corrupting the air, engender disease. And provisions for such removal may be made by contract, as well as the performance of any other duty touching the health and comfort of the city; its authorities always preserving such control over the matter as to secure an observance of proper sanitary regulations. In addition to this general power, the constitution of the state of California which was in force when the contract with the plaintiff was renewed, declares that 'any county, city, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws.' Article 11, § 11. And the consolidation act of 1863, still in force, provides that the board of supervisors shall have power 'to authorize the summary abatement of nuisances; to make all regulations which may be necessary or expedient for the preservation of the public health, and the prevention of contagious diseases; to provide by regulation for the prevention and summary removal of all nuisances and obstructions in the streets, alleys, highways, and public grounds of said city and county; and to prevent the running at large of dogs, and to authorize the destruction of the same when at large, contrary to ordinance.'"

The reasoning of the court in that case, and of the supreme court of the United States in the *Slaughter-House Cases*, 16 Wall. 86, and of the state courts in *Weible v. Struss*, (Ky.) 1 S. W. Rep. 606; *State v. Fisher*, 52 Mo. 177; and many other cases cited in the complainant's brief,—is decisive of the question under review. The contract does not deprive

the owners of their property, as was the case of *Rendering Co. v. Behr*, 77 Mo. 91. It simply provides for the removal of all dead animals, not slain for human food, from within the city limits, in such manner as not to become nuisances. All the provisions of the resolution and ordinance are framed for the sole purpose of carrying out this object. The contract is not, in my opinion, subject to any of the constitutional objections urged against it.

What is the proper construction of the contract? Respondent contends that the only exclusive right granted to Alpers is—*First*, to remove the carcasses beyond or outside of the city limits; and, *second*, that such exclusive right does not attach until the expiration of 12 hours after the death of any animal, and that any person is authorized to make removals within said 12 hours. It appears from the evidence that complainant has been engaged in removing the carcasses of dead animals, under the contract, from within the limits of the city and county of San Francisco, and transporting the same to Butchertown, (South San Francisco,) which is within said limits, where its factory is located, and there converting the same into useful and profitable commercial products, such as leather, oils, bones, and fertilizers. The respondent Lambert, as an independent contractor, has also been engaged in removing all carcasses which he could obtain, and conveying the same to his factory, also situated at Butchertown. He claims that all the carcasses transported by him were removed within 12 hours after the death of the animals, and that he has never removed any carcass beyond or outside of the city limits. After a careful examination of the resolution and ordinance in their entirety, my conclusion is that the object, intent, and purpose of the contract was, as before stated, to prevent and abate nuisances within the limits of the city and county of San Francisco; that this could be done, under the contract, by the removal and disposal of the carcasses of all dead animals at a point within the city limits, as well as if they were conveyed to points outside of and beyond the city limits, providing such disposition could be made without committing a nuisance; the essential essence of the contract being that all the carcasses should be removed and disposed of in such a manner as would avoid and prevent the commission of any nuisance. Respondents' first contention cannot, therefore, be sustained. The second point is equally untenable. The resolution permits the owner, within 12 hours after the death of any animal, to remove and dispose of the carcass. It also provides that such removal may be made by any person in whose possession the animal may be at the time of its death, within 12 hours thereafter. The removal may also be made within that time by the immediate servant or employe of such owner or person; but it is expressly provided that the term "servant or employe" "shall in no manner be construed so as to include a contractor or other person not actually employed by, and under the direction, supervision, and control of, such owner or person." If the owner does not desire to remove the carcass himself, he must, under other provisions, give Alpers notice immediately after the death of the animal; and

Alpers' right to remove such carcasses attaches in all such cases within 12 hours after the death of the animal. All removals must be made either by the owner or person in whose possession the animal is at the time of its death, or by their immediate servants and employes, or by Alpers. If made by the owner or person in possession, it must be done within 12 hours after death. In no event can such removals be made by independent contractors. Complainant is entitled to a decree enjoining respondent Lambert from infringing upon its exclusive rights under the contract.

THE GILES LORING.

SWANZY *et al.* v. WEBSTER *et al.*

WEBSTER *et al.* v. SWANZY *et al.*

(District Court, D. Maine. April 10, 1890.)

1. **LIBEL—LOSS OF CARGO—CROSS-LIBEL—VALUE OF VESSEL—WHEN MAINTAINABLE.**

In a suit by the charterers of a vessel to recover under the charter-party for damages and loss in respect to the cargo the owners may maintain a cross-libel for the value of the vessel and for freight, demurrage, etc., upon the ground that she was lost through the fault of the charterers.

2. **SEAWORTHINESS—EVIDENCE.**

A brig built in 1865, and extensively repaired in 1884, was chartered for a voyage to the coast of Africa. She encountered no severe weather on the outward voyage, or during the four months she remained on the coast, but before leaving there she was found to be leaking badly, and to be considerably wormed, and was imperfectly repaired by tacking on lead sheets. She sailed for Marseilles with a cargo not excessive for a seaworthy vessel, and shortly after encountered a squall of no great severity. Almost immediately afterwards she was found to be leaking badly, and at once returned to the coast, where, after a survey, she was condemned, and sold. She was shortly afterwards broken up, and found to be weak, rotten, and wormed, and with seams and butts open. *Held*, sufficient to show that she was unseaworthy when she left the coast.

3. **SAME—PERILS OF THE SEA.**

Injury to a vessel by worms is not a peril of the sea.

4. **SAME—MASTER AND CREW.**

Seaworthiness includes a competent master and crew, and upon chartering a vessel for a voyage to the gold coast of Africa it is the duty of the owners, not only to furnish a competent master, but also a mate competent to succeed him in case of his death or disability.

5. **DUTY OF MASTER—EXCESSIVE CARGO.**

Although a charter-party provides that the whole of a vessel shall be at the charterer's disposal, with the right to put on board a full cargo, it is still the master's duty to determine when the limit of safe loading is reached, and, if an excessive cargo is put on board, the fault is that of the owners, and not of the charterers.

6. **SAME—EXPOSURE TO WORMS.**

If a full cargo will submerge the copper on a vessel so as to expose the hull to worms, it is the master's duty to put on additional copper if it can be procured.

7. **SAME—DEATH OF MASTER—APPOINTMENT BY AMERICAN CONSUL.**

The master of a vessel, being about to die on the gold coast of Africa, and having no mate competent to succeed him, requested the master of another vessel, belonging to the same owners, to supply some one to take charge. This was done,

and the person furnished was appointed master by the American consul. *Held*, that this gave him authority to act as such, and the owners were liable for his management.

8. **SHIPPING—LIMITATION OF LIABILITY—SALE OF CARGO BY MASTER.**

The ship-owners' limited liability act (Rev. St. U. S. § 4283) applies to an unjustifiable sale of cargo by the master on the coast of Africa after his vessel has been condemned as unseaworthy.

9. **SAME—EXTENT OF LIABILITY.**

The extent of the liability being restricted by the act to the amount of the owner's interest in the vessel and the freight then pending, this amount must be determined by taking the values at the termination of the voyage; and when a vessel is condemned and sold before reaching her final destination, the extent of such liability is measured by her value at the time of the sale and the freight then due under the terms of the charter.

10. **SAME—FREIGHT AND DEMURRAGE.**

The words "freight pending," as used in the act, include demurrage due at the termination of the voyage.

11. **SAME—PRIORITY OF LIENS—RIGHTS OF OWNERS.**

The owners of a vessel cannot determine for themselves the priority of liens upon the fund representing their liability under the limited liability act, (Rev. St. U. S. § 4283;) and the fact that they have voluntarily paid out part of the fund in discharge of liens supposed to be superior to the claims provided for in the statute does not reduce their liability to discharge those claims to the full extent of the fund as it originally existed.

12. **SAME—INDIVIDUAL LIABILITY.**

Act Cong. June 26, 1884, c. 121, § 18, (23 St. p. 57,) providing that "the individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole," applies to the liability of owners under the limited liability act, (Rev. St. U. S. § 4283;) and to the extent of the fund representing their liability thereunder they are bound, not *in solido*, but only in proportion to their respective interests in the vessel.

13. **SAME—SUITS TO ENFORCE—COSTS.**

When, in a suit to enforce the limited liability of the owners, the decree is against them, they are liable *in solido* for the costs.

In Admiralty. Libel by the charterers of the brig Giles Loring against her owner, and cross-libel by the latter. Decree for libelants, and dismissing the cross-libel.

Charles Theodore Russell, Jr., and Clarence Hale, for libelants.

Benjamin Thompson, for respondents.

WEBB, J. These controversies arise from a charter-party executed by *Swanzy et al.* as charterers and Benjamin Webster, agent and managing owner of the brig Giles Loring, June 9, 1885. The brig, then lying at Boston, was chartered—

"For a voyage from Boston to ports on the west coast of Africa, between Grand Bassam and Whydah, both included, vessel at all times to lie afloat in safe anchorage, and to enter no rivers and cross no bars for discharging outward cargo, and loading a return cargo from a final port, either to Boston, united kingdom, or continent, at charterers' option; and it is understood that, during vessel's stay on the coast, charterers or their agents shall have the right to order the vessel at any time from one port on the coast to another, at such times and in such manner as they may see fit, on the terms following, that is to say:

"*First.* The said party of the first part doth engage that the said vessel in and during the said voyage shall be kept tight, staunch, well fitted, tackled, and provided with every requisite, and with men and provisions necessary for said voyage. *Second.* Puts whole vessel at sole disposal of charterers for the voyage, except necessary room for crew, sails, cables, and provision.

Third. The said [owners] further engage to take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as said party of the second part, or their agents, may think proper to ship.

"And the charterers covenant and agree to hire the vessel on the terms following:

First. They engage to provide and furnish to the said vessel a full and complete cargo of lawful merchandise under and on deck, or at all times sufficient ballast to continue the voyage; and it is understood that one-half of this charter is earned and payable on proper delivery of outward cargo, and that the charterers shall accept the captain's sight draft on London at \$4.86 to the pound sterling for the said half; and it is understood that the charterers shall furnish the captain, while on the coast and other foreign ports, free of charge or commissions, any money needed for vessel's disbursements.

Second. To pay for the charter or freight of said vessel during the voyage aforesaid in manner following, that is to say: \$5,300 lump sum for the round voyage, if vessel returns to Boston direct; but, if vessel is ordered to Queens-town or Falmouth, for orders to discharge at a port in united kingdom, or on the continent between La Rochelle and Hamburg, \$6,400; if to Gibraltar or Lisbon, for orders to discharge there, or at a port in the Mediterranean, not east of Marseilles, \$6,800,—charterers to have the privilege of one port of call and one port of discharge only, port of call or discharge to be named on signing bill of lading, and forty-eight hours allowed charterers at port of call. Charterers to pay all vessel's foreign port charges, such as pilotages, lighterages, custom-house and consul's fees; balance of freight payable in U. S. currency, or equivalent, on proper delivery of homeward cargo.

"It is further agreed between the parties that there shall be allowed for the loading and discharging of the vessel at the respective ports aforesaid lay days as follows, that is to say: Ten (10) running lay days, Sundays excepted, for loading at Boston, seventy-five running lay days, Sundays excepted, for discharging and loading on the coast, commencing twenty-four hours after captain reports his vessel ready to discharge cargo; time used changing ports on the coast to count as lay days; homeward cargo to be discharged according to the custom of the port, vessel's crew to help discharging and loading on the coast, but not to go in boats for the purpose of landing or shipping cargo; and, in case vessel is longer detained, to pay demurrage at the rate of thirty-eight dollars and fifty cents per day, day by day, for every day so detained, provided such detention shall happen by default of party of the second part, or their agent.

"It is further agreed that, in going up and down the coast, vessel shall at any time charterers or their agents may desire take on board and deliver any lawful merchandise, free of charge at any factory, and in such manner as may be desired by charterers or their agents."

The vessel was loaded at Boston, with a cargo suitable for the voyage she was to make, including a deck-load of lumber, and sailed from that port June 24, 1885, with a captain, first and second mate, cook, and four seamen,—eight in all,—and arrived on the west coast August 24, making Grand Bassam as her first African port. Before the outward cargo was discharged,—indeed, while more than half still remained on board,—some small portion of the homeward cargo having been taken in, Evans, the captain, died, October 8, 1885. Before his death, knowing that his mate, though an experienced sailor, was wholly incompetent to take command of the vessel, the captain communicated with Capt.

Smith, of the brig Emma, owned largely, if not entirely, by the owners of the Giles Loring, and requested him to look after the interests of the vessel, and supply some one to take charge of her. At the time of her captain's death, the Giles Loring was lying at Cape Coast, about 18 miles from Salt Pond, where the Emma then was. Capt. Smith at once proceeded to Cape Coast, and, finding by personal examination that no one of the Loring's officers or crew was suitable for the position of captain, himself brought her to Salt Pond, that he might the better look after her. There he finally put one George Klose, who had been acting as his own second mate, in temporary command, and the brig proceeded under this officer on her business of discharging outward, and taking in homeward, cargo. Capt. Smith promptly advised the owners of the death of Capt. Evans, as did also the charterers from London, immediately upon receiving, from their agents on the coast, information of the fact. There was no communication by telegraph between the coast and England. The shortest possible communication was by steamer to Grand Cusang, a passage that was made usually in about a fortnight, and thence by telegraph to England. By mail, there were weekly steamers, and the passage was made in 23 to 25 days,—usually in 24. The dispatch communicating the captain's death was dated London, October 27, 1885, viz.: "Capt. Evans died eight. Ship lying Cape Coast, one anchor lost. Mate says cannot take ship home. Men refuse sail under him. Shall we cable engage master from steamers?" Reply, (date not given:) "Put competent man on board Giles Loring as master, and look out for vessel's business in every way. B. WEBSTER." The charterers thereupon sent out Capt. Williams to assume the position of captain, but, before he arrived on the coast, the American consular agent at Elmina, a port some seven miles from Cape Coast, had appointed Klose master. Being informed on his reaching Cape Coast of this appointment, Capt. Williams did nothing towards assuming command, or to gain control of the vessel, but at once returned to England. He was advised of the state of things by the charterers' agent at Cape Coast. Under the command of Klose, so constituted master, the brig proceeded from port to port on the coast, taking in and discharging cargo, and completed loading January 4th, and cleared and sailed for Marseilles from Quittah January 13, 1886. The cargo at this date consisted of 492 tons of palm kernels, according to the bills of lading; but as to the amount the bills of lading cannot be considered conclusive, for they were qualified by the marginal entry "quantity unknown." On the 18th or 19th of January the vessel encountered a squall or tornado, of short duration, after which she was found to be leaking badly, and she returned to Elmina, where she arrived February 4th. Here a survey was had, and the brig was reported unseaworthy. She could not be repaired at Elmina, and was finally beached and sold for £57 sterling. Before she was beached, about one-half of her cargo was transshipped by steamer calling at the port where she lay. The remainder, excepting about 40 tons, was landed. What became of the 40 tons is not plain from the evidence. The captain sold

all the cargo that was not transshipped, though he appears to testify that 40 tons were so damaged it was not salable. Some was sold at auction at sundry times, and some at various private sales. The proceeds of the sales were all received by Capt. Klose, and used to pay crew, and various expenses, or for his own necessities. This is a general outline of this most unfortunate business.

The charterers libel for damages for breach of the charter, and the owners promote a cross-libel for freight and demurrage for 45 days, for wages of laborers hired by ship, the charterers failing to furnish the men, as provided by the charter, and for the value of the vessel, alleged to have been lost by the fault, misconduct, and wrongful acts of the charterers and their agents on the coast.

It was contended on the part of the charterers that the libel of the owners is not properly a cross-libel, but, upon a ruling adverse to this claim, they entered into a stipulation to answer to any decree against them, and put in an answer. I have no doubt of the correctness of the ruling on this point, as both parties assert their claims under the charter, and on its observance or violation their respective rights depend.

The specific breaches of contract asserted by the charterers are—(1) Failure to deliver cargo, by reason of unseaworthiness when the brig sailed from Boston, in the condition of the vessel herself, and in not having competent and sufficient officers and crew. (2) Failure to keep the vessel in a seaworthy condition during the voyage, and sailing for Marseilles when it was known that the brig was unseaworthy. (3) Failure to forward the cargo from Elmina after the brig had been condemned, though vessels could have been easily and readily procured to carry it. (4) The unjustifiable sale of the cargo by the master after the voyage was broken up.

The owners contend that the brig was seaworthy when she sailed from Boston in every respect, save the want of a competent mate, and that this failure did not contribute to the subsequent loss; that if the vessel afterwards became unseaworthy, it was because of the wrongful acts of the charterers in overloading for the outward passage, and in unduly detaining the vessel on the coast, and keeping on board of her the outward cargo; that the want of a suitable master after the death of Capt. Evans was through the fault of charterers in not providing a proper person, as they are alleged to have undertaken to do; that the vessel was seaworthy when she set out from Quittah for Marseilles; that the failure to perform the charter was caused by perils of the sea after sailing for Marseilles; that they had never authorized Klose to act as captain, nor recognized him as such, or as in any way their agent; and that his possession of the vessel was through the fault of the charterers or their agents, and that for his wrongful acts and omissions they are in no wise responsible.

The Giles Loring was built in 1865, and in 1884 received extensive repairs, after which she was given a class of A 1½. On her outward passage the evidence shows she leaked some, but not enough, without

other facts, to show that the vessel herself was unseaworthy at the date of the charter, or when she sailed from Boston. Neither does the evidence seem to be sufficient to justify any conclusion that there had been any material injury to the vessel by worms up to that time. The evidence as to the weather on the outward passage is slight and somewhat vague. The log-book has not been produced, and the only witness is the mate, Grant. From his testimony it is to be inferred that the passage out was with favorable weather, and that neither winds nor seas to test the strength and sufficiency of the vessel were encountered. But after she had been for a time on the coast, without, so far as appears, any more severe weather, the leaking greatly increased, and before she set sail for Marseilles she was found to be wormed and in part rotten. Grant testifies that in his judgment she was not seaworthy for the passage to Marseilles. He says he so told Klose, then in command. Klose does not deny that Grant so told him, but only says he has no remembrance of it. It is certain that some repairs were made by caulking, and by tacking on sheet-lead above the copper. Nothing very thorough appears to have been attempted. Better material than sheet-lead could have been procured; indeed, Capt. Klose at one time ordered copper or metal, but, finding the leak diminished by the use of the lead and the caulking that had been done, did not use it. Though the presumption is in favor of seaworthiness, and the burden is on the party denying it by some sufficient evidence to remove it, this may be done by proving the existence of defects amounting to unseaworthiness before she sailed, or that she broke down during the voyage, not having encountered any extraordinary action of the winds and the waves, or any other peril of the sea, sufficient to produce such an effect upon a seaworthy vessel, or by showing that an examination during the voyage disclosed such a state of decay and weakness as amounted to unseaworthiness, for which the lapse of time, and the occurrences of the voyage, would not account. *Bullard v. Insurance Co.*, 1 Curt. 155. The evidence of this character is that the brig sailed from Boston June 23d, arrived on the coast August 23d, without experiencing heavy weather; that she remained on the coast, going from port to port, and at no time taking ground, till January 4th following; that before this last date she was found to be leaking badly, and to be considerably wormed; that she was imperfectly repaired; that while on the coast she had no severe trials of wind or sea; that she sailed with a cargo not excessive for a seaworthy vessel of her capacity; that in about 14 days after sailing she met a squall of short duration, and of no great severity, and almost immediately was found to have three feet of water in her hold, and almost constant pumping was necessary; that she reached Elmina in about 16 days of moderate weather, and there, upon a survey, was condemned and sold; that not long after her sale she was broken up and found to be weak, rotten, wormed, and seams and butts open. This, taken in connection with her age, leads me inevitably to the conclusion that, notwithstanding the efforts of the owners in 1884 to repair and make her strong, she was un-

seaworthy before she had finished loading on the coast of Africa. I do not deem it important to determine whether she was seaworthy when she sailed from Boston, for, by an amendment of the libel, all claim for damage on the outward cargo has been abandoned, and there is no pretense that any damage was suffered by the homeward cargo, as long as it remained in the ship. Indeed, the libelants constantly maintain that palm kernels, of which that cargo consisted, are not injured by exposure to salt water, unless very long continued.

The condition of the vessel is claimed to have been occasioned by overloading at Boston, and by subsequent improper treatment on the coast, where it is said such proportion of the outward cargo was kept on board while the homeward cargo was being laden as to overload her, and that in this way beams were broken, strains were produced, and the hull kept submerged below the copper, and exposed to worms, all by the fault of the charterers and their agents. This argument practically concedes the insufficient condition of the vessel, but, admitting that the particular method of loading and unloading were as claimed, it does not exonerate the owners. The charter obliged them to take a full cargo, and entitled the charterers to put such cargo on board, and for breach by either in this respect an action could be maintained. It gave no right to overload, nor compelled the receipt of so much as would endanger the safety, or exceed the proper carrying capacity, of the brig. But it was for the master to determine when the limit of safe loading was reached. The quantity and storage of cargo was subject to his control. If more was offered than was consistent with safety, he should have declined to accept it. The charterers were not responsible for the captain's management. "If the master or sailors ship a larger cargo than is proper, they are considered in fault, and are liable for damages. Even if shipwreck ensue in consequence of the ship being too heavily laden, they are responsible." *Ingersoll's Roccus on Ships and Freight*, note, XXX.; *Moll. De Jur. Mar.* bk. 2, c. 2, § 5; *Weston v. Minot*, 3 Woodb. & M. 436, 446-448; *Hunter v. Fry*, 2 Barn. & Ald. 421, 426; *Sea Laws*, 448, which may be found in 2 *Pet. Adm. Append.* p. 76; *Jac. Sea Laws*, bk. 2, c. 2, p. 94, § 4.

This duty of the master also required him to see that his vessel was not loaded so deeply as to expose the hull to worms above the metal; and, if a full cargo would so settle his ship, he should have guarded against the danger by an addition to the copper, if it could be procured, and that it could, is shown by the evidence. It further appears that the copper was 11 to 11½ feet high, and that the load draft of this brig was 13 to 13½ feet. So with a full load, two feet or more of her planking would be unprotected. Injury by worms is not a peril of the sea. *Rohl v. Parr*, 1 Esp. 445; *Hazard v. Insurance Co.*, 1 Sum. 218, 8 Pet. 557; *Martin v. Insurance Co.*, 2 Mass. 420. "Where the owner of a vessel chartered her, or offers her for freight, he is bound to see that she is seaworthy, and suitable for the service in which she is to be employed. If there be defects, known or not known, he is not excused. He is

obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accident." *Work v. Leathers*, 97 U. S. 380; *Hubert v. Recknagel*, 13 Fed. Rep. 912; *The Casco*, Daveis' Ware, 192; *Putnam v. Wood*, 3 Mass. 485. Independently of this obligation by law to keep in repair the vessel, the owners, by express undertaking in this charter, took on themselves that duty and burden.

If it is considered that the absence of a competent master occasioned the loss, the responsibility does not rest on the charterers. It was the duty of the owners to provide for such a contingency as the death of a captain, especially on a voyage to the gold coast, by employing a mate competent to take the place. *Richardson v. Winsor*, 3 Cliff. 395. Seaworthiness includes competent master and crew. *The Vincennes*, 3 Ware, 171. It is true that upon learning the death of the captain, and the incompetency of the mate, they made honest and prompt effort to supply the deficiency, by invoking the aid of the charterers; and the charterers, in their turn, in good faith endeavored to comply with the appeal to them, and sent out a captain to take charge. The failure of the person thus sent out was not any fault of the charterers. After they had selected him, and given him instructions in behalf of the owners, he was the agent of the owners, appointed at their request. If he had any authority as master under that appointment, he was, as master, the agent of the owners, and they were responsible for him. But no blame can properly be cast on him. He found on his arrival that a master had been appointed by Capt. Smith, to whose charge Evans, when dying, committed the interest of his vessel, and by the American consul, which appointment gave Klose authority to act, and made the owners liable for his management of their vessel. *The Jacmel Packet*, 2 Ben. 109; *MacLachl. Shipp.* 158; *The Zodiac*, 1 Hagg. Adm. 320; *The Alexander*, 1 Dod. 278; *The Kennersley Castle*, 3 Hagg. Adm. 1-8; *The Rubicon*, Id. 9; *The Tartar*, 1 Hagg. Adm. 1.

The failure to perform the charter being through the fault of the owners in not providing a vessel that was seaworthy, and in not keeping her so during the voyage, they are liable for the damages arising from that fault. The amount of damage must be decided on reference to a master; and, on the coming in of the report, the question of limitation of liability raised by the owners' answer will be properly presented.

From what has been said, it follows that the claim of the cross-libel for damages and injury to the vessel by misconduct of the charterers must be pronounced against. But the freight and demurrage and sums paid laborers may be regarded in considering the question of damages. Those matters are therefore left for further discussion on the report of the master.

ON MASTER'S REPORT.

(July 24, 1891.)

WEBB, J. The report of the assessor contains so full a finding of facts that, while not accepting or approving his conclusion in respect to dam-

ages, the court has in it all the *data* necessary for determining the amount of the decree. When the liability of Webster *et al.* under the charter was decided, the questions of demurrage and of limitation of liability were explicitly reserved for further argument on the coming in of the report, and they are now to be finally passed upon, in connection with the sum to be decreed in favor of the prevailing party.

No error is found in the assessor's determination as to the fact or the amount of demurrage, and the same is approved. But I cannot confirm his conclusions in regard to damages. He correctly holds that the action of the master, Klose, in selling any portion of the cargo was unjustifiable, and was without the knowledge or authority of his owners, and that it has not since been ratified or adopted by them. From this unwarranted and wrongful conduct of the master no small part of the loss arose.

I concur in the conclusion of BROWN, J., in *The Amos D. Carver*, 35 Fed. Rep. 665, and followed by NELSON, J., in *McPhail v. Williams*, 41 Fed. Rep. 61, that "the act of 1884, limiting the liability of the owners of a vessel on account of the same, does not restrict the liability of owners upon their own personal contracts, but only their liability on account of the vessel." But this interpretation of the statute does not make them liable without limitation for violation of his duty on the part of the master. The sale of the cargo by him was wholly apart from the owners' contract. It is indeed true that by reason of the contract he had the opportunity to meddle with the property of the charterers; and it may be, that, inasmuch as the necessity for landing the palm kernels or removing them from the Giles Loring would not have existed had the owners performed their contract that the ship should be seaworthy, they, in the absence of any law limiting their liability, would have been responsible for all the subsequent loss. But here we have a special loss from an independent cause,—the misconduct of the master,—for whose tortious acts the owners are liable only to the extent of their interest in the vessel and pending freight. The argument has been pressed that the owners of the vessel, under the charter, became bailees for hire, and responsible for the safe delivery of the cargo against all hazards, the acts of God, public enemies, and perils and dangers of the sea alone excepted. To so hold would annul the statute exonerating owners from liability to respond beyond a limited measure for the fraudulent doings of others. The act of March 3, 1851, embodied in Rev. St. §§ 4282-4284, added to the excuses and accepted risks of the carrier or bailee. "This language is broad, and takes away the quality of warranty implied by the common law against all losses except by the act of God and the public enemy," is the emphatic expression of SAWYER, J., in *Lord v. Steam-Ship Co.*, 4 Sawy. 301. Would the owners have any the less been bailees, or have stood in any different relation to the cargo, if their vessel, being in every respect staunch, seaworthy, and fit for the voyage, had encountered violent and continued storms, and had been, by the winds and the sea driven ashore and helplessly wrecked? or if the loss had been caused by fire, or by the willful and criminal embezzlement of

the master, mates, or seamen? Yet it would not probably be contended the owners, though bailees and carriers, were liable for losses so occasioned, if "done, occasioned, or incurred without their privity or knowledge," exceeding "the amount or value of" their "interest in the vessel and the freight then pending." In this case the facts forbid suspicion of such privity or knowledge. The vessel was on the west coast of Africa; the owners were in the United States, at this city of Portland. The captain of their appointment had died of the coast fever. They had taken measures to provide a suitable successor. Without any previous notice to them, and without their knowledge, the American vice-consul had assumed to place Klose in command of the vessel. As far as appears, Klose did not communicate with his owners, who could not be reached directly by telegraph, but took his instructions and advice from the vice-consul who appointed him,—if indeed he acted upon any advice, and not of his own motion. The owners have not in any way ratified or approved his doings. There can be no pretense of privity or knowledge on their part. Under such circumstances, the owners are entitled to the limitation on account of losses "done, occasioned, or incurred" by the unwarranted and wrongful proceedings of this captain, thus thrust upon them; though he was still their captain, for whose authorized acts they were answerable.

Then what were those losses? They can be nothing but the value of the palm kernels sold to third parties, and the expense incurred by Burnett, the charterers' agent, to regain possession for them of the 110 tons of the cargo. These are the only losses attributable to the wrongdoing of the master. All expenses attaching to those 110 tons besides the amount paid at the sale to secure them are the same as they would have been if no sale had been attempted, and must be carried to the account of loss arising from the breach of charter as to seaworthiness of the vessel. By statute the limited liability is measured by the value of the ship and freight pending. These values are to be taken at the time of the termination of the voyage. In this case the voyage terminated at Elmina, when the brig was condemned and sold. *The City of Norwich*, 118 U. S. 468, 6 Sup. Ct. Rep. 1150; *The Scotland*, 118 U. S. 507, 6 Sup. Ct. Rep. 1174; *The Great Western*, 118 U. S. 520, 6 Sup. Ct. Rep. 1172. By the charter-party one-half of the freight was earned and payable on right delivery of the outward cargo from Boston to the west coast, and that half was accordingly paid. The other half was freight pending when the voyage terminated, and would be earned only on delivery of the cargo at its destination, before which it was of no value to the owners. *The City of Norwich*, 118 U. S. 491, 6 Sup. Ct. Rep. 1150. As that portion of the freight was never earned, nothing is to be added on its account to the value of the vessel, for the purpose of showing the amount of the owners' liability. The only evidence as to the value of the vessel is that as to the price at which she was sold. No suggestion has been made of the inadequacy of that price, nor anything offered to excite the belief that the value exceeded the £68. 19s., the gross proceeds of sale. This in United States currency is equal to \$335.09.

We have also the demurrage to be considered. The finding of the assessor in respect to it and its amount is approved. But, in respect to the limitation of liability, it should be regarded as freight pending. It was an amount due from the charterers to the ship-owners for the prolonged use of the vessel. Though not technically freight, it partakes so much of the same character that it must be held subject to the same rule. It represents the earning of the vessel during the voyage or charter, in the performance of which losses were caused by the misconduct of the owner's agent, the master, for which, but for the limitation of the law, the owners would have been fully liable. There is no reason for allowing them to collect and retain it, free from all duty of giving the benefit of it to innocent losers. "Demurrage is only extended freight." *Hall v. Barker*, 64 Me. 343; *Jesson v. Solly*, 4 Taunt. 53. "'Freight' signifies the earnings or profit derived by the ship-owner, or the hirer of a ship, from the use of it himself, or by letting it to others, or by carrying goods for others." *Minturn v. Insurance Co.*, 2 Allen, 87, 91; Phil. Ins. § 327. "Taking all things into consideration, we are of opinion that this sum allowed in the name of demurrage ought to be considered in lieu of the earnings of the vessel which were lost by the detention." *Coggeshall v. Read*, 5 Pick. 454, 460. "All hire or reward for the use of vessels is freight." Ben. Adm. § 286.

The answer contains a statement that the proceeds of the sale of the vessel were appropriated to the discharge of liens of higher rank than the claims of the libelants. It is not for the owners to determine the priority of claims, or the distribution of the fund representing their limited liability. Neither is it their privilege to pass upon the question whether they are entitled to such limitation. There is a proper course for them to pursue if they seek the protection the law provides against all claimants. They have not pursued that course, nor indicated, except by the statement in the answer referred to, that there are any claims against them on account of this vessel, arising since the execution of the charter in this case, other than those of the libelant demanded in these proceedings. As to these demands they ask the benefit of the limitation. They can have a limitation, but cannot, by their voluntary act in disposing of a portion of the fund reserved for the satisfaction of their liability, restrict still more the limitation, or adjust the demands of claimants upon the fund.

Though I am of opinion, and decide, that, for the purpose of ascertaining the measure of liability, the demurrage due and unpaid must be treated as pending freight, yet in this case, the only party demanding damage being the same who is to pay the demurrage, the point is of little account, as, to this extent, the liabilities cancel each other. Had the limitation affected several creditors, the amount of the demurrage would make part of a fund for *pro rata* distribution.

Then, deciding that the owners of the ship are entitled to a limitation of liability as to the losses occasioned by the tortious acts of the master, and that the libelants, being the only creditors shown, are entitled for those losses to recover the whole amount of the value of the vessel and

the pending freight, and also that the owners of the brig Giles Loring are liable for all damage caused by their own breach of contract, and that the charterers are liable for the demurrage to the amount of \$731.50, the computation is as follows:

DAMAGES CAUSED BY BREACH OF CHARTER.			
78 tons palm kernels, wholly lost,	-	-	\$3,553 87
Forwarding 226 tons freight,	-	-	2,328 18
" 110 " at same rate,	-	-	1,138 18
Expense bagging and shipping 226 tons,	-	-	710 17
" shipping and storing 110 " -	-	-	140 94
			<hr/>
			\$7,866 34
Less charter freight saved.	-	-	3,398 00
			<hr/>
			\$4,468 34
LIMITED LIABILITY ON LOSS BY TORT OF MASTER.			
Value of the vessel,	-	-	\$ 335 09
Pending freight,	-	-	731 50
			<hr/>
			\$1,066 59
Less demurrage due from charterers,	-	-	731 50
			<hr/>
			335 09
			<hr/>
			\$4,803 43

As to costs, those on libel and cross-libel will be set off, and decree for the excess in favor of the party whose costs are greatest.

The only matter remaining for determination is whether the respondents are liable *in solido*, or only in proportion to their respective ownership in the vessel. The act of June 26, 1884, (chapter 121, § 18, 23 St. p. 57,) fixes the rule "that the individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole;" and the question is presented whether this limitation, like that which is measured by the value of the vessel and pending freight, is to be confined to the liability of owners "on account of the vessel;" that is, "the liability imposed on them by law in consequence of their ownership of the vessel," and incurred "without the owners' express intervention." Though the relation of part owners to each other is that of co-tenants, yet as to third parties they have made in law but one owner. It has been considered that in the employment of the common property they are *quasi* partners; because of their joint interest in the vessel, they have been held *in solido* on liabilities to strangers, whether arising from contract or tort. This statute was evidently designed to modify in some way the liability previously imposed on them by law, and to relieve ship-owners of some portion of that liability. The intention to accomplish this, in part, by breaking up the solidarity of responsibility, is plain. Relief in this way is not in terms made to depend on the condition that the owners are in position to take advantage of the other portion of the statute, and be discharged of all liability beyond the value of their shares of the vessel. The burden of a part owner, who can free himself from debt or obligation by the surrender of his interest in the vessel, did not more urgently

appeal to be lightened than that of him who must respond to the full extent of the liability, however small the value of his property. The language of the statute does not require any different rule of responsibility for the different state of facts under which the obligation is incurred. The well-known object of this statute was the increase of American shipping by a reduction of the burdens of ship-owners. That end would be promoted by discharging part owners from a liability *in solido* for the debts of each other. A construction giving such discharge is consistent with the language of the act, conforms with the intention of congress, and regards strictly the defect to be corrected. No principle of interpretation requires a different construction to the first clause of this section 18, and no other construction gives to it an effect so salutary and so helpful to owners, whose interests it aimed to serve. The aggregate liability of the owners in this case, after deducting the amount above allowed for demurrage, and including interest from date of filing the libe- to this July 24, 1891, when the final decree is entered, is \$6,139.65. The decree is ordered to be against each part owner for the proportion of this amount that his individual share of the vessel bears to the whole.

The costs must be differently dealt with. They cannot be treated as a liability or debt of the owners, as owners, but are expenses of litigation for which the owners contesting are held *in solido*. Let it be so decreed.

IN THE CROSS-LIBEL.

A decree in favor of libelants for demurrage in the sum of \$731.50, and costs.

THE WELLINGTON.

BLACKBURN v. THE WELLINGTON.

(District Court, N. D. California. November 30, 1891.)

SALVAGE—COMPENSATION—CONTRACT FOR TOWAGE.

The steamer W., bound to San Francisco with a cargo of 2,350 tons of coal, lost her propeller blades, became helpless, and drifted near the mouth of the Columbia river. While in communication with a vessel which offered to tow her to an anchorage, from which tugs were easily accessible, and while in no immediate danger, she hailed the steamer M., which was bound for San Francisco, and asked towage to that port. The M. was only about half her size, was not fitted for towing, and was also laden with coal. Her master, however, offered to leave the compensation to the decision of the W.'s owners, after arrival in San Francisco, which offer was rejected, and after much haggling \$15,000 was agreed upon. Neither vessel possessed a suitable tow-line, and five small lines were used. This, in case of bad weather, would have been a source of danger, but the weather proved good, and the vessels arrived in about five days. *Held* that, while the compensation was excessive, yet, in view of the fact that there was no compulsion, it was not so exorbitant as to justify the court in setting the contract aside.

In Admiralty. Libel by D. O. Blackburn against the steam-ship Wellington, her freight and cargo, upon a contract for towage. Decree for libellant.

Geo. W. Towle, Jr., for libelant.

Page & Ellis, for claimant.

Ross, J. This is an action upon a contract for services rendered the steamer Wellington by the master of the steamer Montserrat. Both vessels were at the time engaged in transporting coal from Departure Bay, in British Columbia, to the port of San Francisco. On the 24th of April last the Wellington sailed from that bay for San Francisco with a cargo of 2,350 tons of coal, and in the morning of the second day after sailing, without any apparent cause, lost all the blades of her propeller. She had not sufficient sail-power to give her master any control over her course, and she was therefore subject to be carried anywhere the currents and winds might take her. At the time of the accident the Wellington was about 72 miles in a south-westerly direction from the mouth of the Columbia river. The next day she encountered a severe gale, lasting about 24 hours, during which she lay in the trough of the sea, with the seas breaking heavily over her fore and aft. After the storm she continued to drift as carried by the currents, the wind being shifting, the weather unsettled, and the sea a strong north-west swell, until about 7 or 8 o'clock in the evening of the 29th of April she was within 10 or 12 miles of the mouth of the Columbia river, the sea then being comparatively smooth, and the weather moderate. The Columbia river has, at its mouth, a bad bar, which cannot be passed in very bad weather, and is not ordinarily crossed during the night. To the north and south of it, for a number of miles, there is anchorage near the beach, which is fairly good in moderate weather, but which is not safe in case of storms, which might, with reasonable probability, be anticipated at that season of the year. The current at the mouth of the river sets quite strongly to the northward and inshore. There is a light-house there, at which a lookout is kept. The light-house has means of communicating with tug-boats in the Columbia river which ordinarily, at night, lay at Astoria, about 15 miles up the river. There were at the time tug-boats in the river with sufficient power to have towed the Wellington into the Columbia river, or to have towed her to San Francisco. The Wellington, at the time of the making of the contract sued on, was within sight of the light-house. While in the position described, the steamer Sussex, bound out from the Columbia river, seeing the Wellington with a signal of distress flying, approached her, sent an officer on board, and offered to tow her to an anchorage near the bar, which she reported as breaking badly, for a salvage compensation. While the officer was on board, the Montserrat came in sight, approached the Wellington, was hailed by her master, who requested the master of the Montserrat to come on board, which he did. The master of the Wellington then asked the master of the Montserrat whether he thought he could tow the Wellington to San Francisco, and the latter replied that he thought he could. The master of the Wellington then dismissed the officer from the Sussex, asking him to report his thanks to his master, but that he did not want the proffered services. That being done, negotiations were opened with the master of the Mont-

serrat as to the terms upon which he would agree to tow the Wellington, with all on board, to San Francisco. The master of the Montserrat offered to perform the service and leave the amount of compensation to be fixed by the owners of the Wellington, but the master of the Wellington declined that proposition, and wanted a sum fixed upon. The master of the Montserrat then said he would perform the service for \$25,000. The master of the Wellington said, "No;" he would not listen to that, but offered \$5,000, and then \$10,000. The master of the Montserrat then said he would perform the services for \$20,000, and the master of the Wellington offered \$12,500. Fifteen thousand dollars was finally agreed upon between the parties for the service, and the master of the Montserrat undertook it. The mouth of the Columbia river is about 554 miles from San Francisco. The Montserrat is a merchant vessel, not fitted in any respect for towage purposes. The first hawser with which the attempt to tow was made was furnished by the Wellington. It was a large one, but when strain was put upon it, it immediately parted, was found worthless, and was cut adrift. Within an hour or two five small lines, part furnished by one vessel and part by the other, were got out, and made fast on board the Wellington, part to her anchor cable and part to her foremast; and, on the Montserrat, to her mooring bits, fore, aft, and amid-ships, that being the only available means of making the lines fast on that ship. In proceeding to San Francisco good weather was encountered so far as wind and sea were concerned, with about 24 hours of heavy fog, but the evidence shows that storms might have reasonably been anticipated at that season. The ships arrived safely in San Francisco in a little more than four days from the time the Montserrat entered upon the performance of the service, but the time consumed in towing was a little less than four days. Both ships were loaded, the Wellington's cargo being about double that of the Montserrat.

No one doubts that when the circumstances of a case render such action proper a court of admiralty will refuse to enforce a contract made for salvage services. But is this one of those cases? I cannot see any just ground for holding that the master of the Wellington, in making the contract in question, acted under compulsion or duress, or that any advantage was taken of his unfortunate position by the master of the Montserrat. Nothing could have been fairer than the offer of the master of the Montserrat to perform the service, and let the compensation therefor be fixed on arrival in San Francisco by the owners of the Wellington. Yet that offer was refused by the master of the Wellington, who, for some reason not apparent, wanted the amount to be fixed in advance. There was no compulsion about the case, first, for the reason that the salvor, as just stated, offered to render the service without any contract at all, which offer was refused by the master of the Wellington. This fact is of itself sufficient to dispose of that objection to the contract made. But it may be added that the Sussex was present, and her officer was, when the negotiation with the master of the Montserrat begun, contending that he, as representative of the Sussex, was entitled to be employed by the master of the Wellington. It is true, the Sussex did not propose

to tow the Wellington to San Francisco, the port of her destination, but only to an anchorage near the mouth of the Columbia river, where she would have been safe so long as good weather continued, and from which she could have been rescued by any passing steamer, or by a tug from the Columbia river. The tugs plying in that river could easily have been summoned by means of the light-house. The Wellington was therefore not only not in immediate danger, but other relief was available at the time her master entered into the contract in question. He was in a position to choose, and he chose not only to contract with the master of the Montserrat for the towing of his ship and cargo to her port of destination, but to fix in advance upon the amount to be paid for the service. That amount was undoubtedly too large for the service, but I do not think it so exorbitant as to justify the court in setting aside the contract thus made. There were many elements of danger in the service. In the first place, it was undertaken at a time of the year when, according to the evidence, it was reasonable to anticipate storms along that coast. The evidence further shows that the machinery of ordinary merchant vessels, such as the Montserrat, is about 25 per cent. less than that of vessels specially fitted for towage purposes; and that a vessel not so fitted, in undertaking to tow a heavily laden ship, like the Wellington, takes a very substantial risk of injury to her own machinery. In the event of such injury, the Montserrat herself might have become the subject of a salvage service, and, perhaps, a total loss. Besides, the ordinary danger attending the towing of a large and heavily laden ship in the open ocean by another ship was, in this instance, greatly increased by the fact that, instead of one large line, five small ones had to be employed in towing, and by the further fact that the tonnage of the Wellington was nearly double that of the Montserrat. Moreover, the master of the Montserrat was assuming responsibility for any damage the owner of his cargo might sustain by reason of delay in delivering it, caused by the service undertaken by him, the duration of which could only be surmised, and which was liable to be greatly extended by matters beyond his control. He also assumed responsibility to the owners of the Wellington for any injury that steamer might suffer by reason of the negligence of himself, his officers, and crew in carrying out the contract, the performance of which on his part was essential to entitle him to any compensation. In view of all of the facts and circumstances of the case, I am of the opinion that the contract entered into by the parties should be enforced by the court, and a decree in accordance therewith will be entered.

CANDEE v. SIXTY-EIGHT BALES COTTON.

(District Court, S. D. Alabama. March 9, 1891.)

1. SALVAGE—WHEN ALLOWED.

Salvage is allowed as a reward for the benefit conferred on the person whose property is saved.

2. SAME—RATE.

There is no rule governing absolutely the rate of salvage, but, when the property is derelict, it seems at least one-third of the value of the property saved may be allowed.

3. SAME—PASSENGERS AS SALVORS.

A passenger is entitled to salvage when his services are extraordinary.

4. SAME.

When mariners left in charge of cargo, necessarily thrown overboard, desert their post, and a passenger, by persuasion and rewards, induces them to return, and successfully directs them in the rescue of the cargo with the ship's appliances, he is entitled to salvage, but not to the extent of the full value of the service rendered by all.

In Admiralty. Libel for salvage.

The steam-boat *Anderson*, while coming down the Mobile river, had a part of the cargo, consisting of cotton in bales, to catch fire. An effort was made by the officers and crew of the vessel to extinguish the fire while the cotton was still on board. Being unsuccessful the master had the burning bales thrown overboard into the river, and ordered one of his officers and five or six members of his crew to take to the small boats, with proper appliances, and to endeavor to save the cotton from burning, and to secure and keep it until he could go with his steamer to Mobile, (some 20 miles distant,) and send up a tug-boat for it. The steam-boat went on without delay to Mobile. The libellant was at the time a passenger on said steam-boat. He voluntarily left the boat, abandoned for the time his trip to Mobile, and, with the crew left by the master, joined in the effort to save the cotton. Most of the cotton was saved, but some of it in a damaged condition.

M. D. Wickersham and Pillans, Torrey & Hanaw, for libellant.

Overall & Bestor, for respondent.

TOULMIN, J. The general principle is that salvage is only payable where a meritorious service has been rendered. It is allowed as a reward for the meritorious conduct of the salvor, and in consideration of a benefit conferred on the person whose property he has saved. There is no positive rule which governs absolutely the rate of salvage. In this case if the cotton had been derelict,—that is, had been deserted or abandoned by the vessel,—and it had been saved as set forth in the libel, I would award at least one-third—perhaps more—of its value as salvage. But I find from the proof that the cotton was not derelict,—was not abandoned,—but that the master of the vessel left an officer and six members of his crew to secure and preserve it until he could go to Mobile, and return or send for it. If this officer and these men had diligently and faithfully

¹ Reported by Peter J. Hamilton, Esq., of the Mobile bar.

performed their duty under their obligations to the boat and cargo, the services of the libelant would have been unnecessary. But it appears from the proof that one-half of the crew left by the master to perform the salvage service were about to desert their post of duty. They proposed to abandon their trust and to leave the work undone, so far as they were concerned. Here the efficiency and value of libelant's services came in, and his superior intelligence, will power, and energy were displayed. It appears from the proof that he induced these men to remain and continue in the work, and proposed to pay them \$3 apiece if they would do so. They did continue, and under his directions worked to save the cotton, (which it was their duty to do,) and he paid them the amount agreed on. The libelant's advice and direction must have constituted the chief merit of his service in the work actually done, as he had no appliances with which to do the work other than those furnished by the boat, and which were in the possession and charge of the boat's crew left for the purpose. The libelant states in his libel that he got a boat from the bank, and hired four men at \$5 apiece to perform the service, and that he with them saved the 68 bales of cotton. From the allegations of the libel, it would be inferred that the libelant had hired four men disconnected with the boat, and under no obligations to the vessel and cargo, to aid him in the work. If this was the proof I would at least allow \$6 a bale as salvage, which I consider a fair award for the whole service rendered, although the cotton was not derelict. The proof shows that the service was rendered by the boat's crew, with its appliances, in conjunction with the libelant, but it also shows that he mainly bossed the undertaking, and generously rewarded some of the men for performing their duty in the matter. It is sufficient to entitle the salvor to a just compensation that a beneficial service has been rendered; it is only in estimating the quantum of compensation that the motives by which he was actuated should be taken into account. The libelant in this case has rendered beneficial service. But, under the circumstances of the case, I do not consider him entitled to the full value of the service rendered by all engaged in it, but that he is entitled to a large proportion of it. Although a passenger, he is entitled to salvage. His services were extraordinary. *The Brabo*, 33 Fed. Rep. 884. But I consider \$200 ample compensation for the services rendered by him; and such will be the decree.

HEAD v. PORTER.

(Circuit Court, D. Massachusetts. December 3, 1891.)

FEDERAL COURTS—JURISDICTION—INFRINGEMENT OF PATENT—SUIT AGAINST FEDERAL OFFICER.

An officer of the United States, in charge of a government armory, may be sued in the circuit court for infringement of a patent, notwithstanding that all his acts in relation thereto have been performed under the orders of the government.

In Equity. Suit by Charles Head, as administrator of William S. Smoot, against Samuel W. Porter, master armorer at the Springfield armory, for infringement of a patent. Heard on plea to the jurisdiction. Plea overruled.

William A. Hayes, 2d, for complainant.

Frank D. Allen, U. S. Atty., for defendant.

COLT, J. The plea in this case raises the single question of jurisdiction. The suit was originally brought by William S. Smoot, the complainant's intestate, against James G. Benton, an officer of the United States army in command of the national armory at Springfield, Mass., charging him with infringement of two patents, dated, respectively, January 1, 1867, and August 27, 1867, for improvements in cartridge retractors for breech-loading fire-arms. Subsequently the defendant died, and thereupon the complainant moved to amend his bill by substituting the present defendant, Porter, master armorer at the Springfield armory. The amendment was allowed, reserving the right of the defendant to object. The defendant appeared, and without objections filed an answer in the case. The United States attorney, on behalf of Porter, urges this circumstance as tending to show that this suit is in substance, though not in form, against the United States, but I fail to see the force of this argument. The complainant, on the death of Benton, might have proceeded against his representatives; but he chose to sue the present defendant, who consents to be substituted for Benton. The suit, therefore, stands as if originally brought against Porter.

The defendant admits that since the date of the patents, and before the filing of the bill, he has superintended, and still superintends, the making of breech-loading fire-arms, at the Springfield armory, as the master armorer, but he alleges that all his acts in relation thereto have been done in obedience to specific orders from the secretary of war, and his superior officers, directing the construction thereof, and in no other way; in other words, his defense is that he has acted only as the agent of the government, and under its authority. The subject-matter of this suit is a patent issued by the United States, and it became important at the outset to determine the nature of this grant. It has been authoritatively declared by the supreme court that the right of a patentee under letters patent was exclusive of the United States, and that it stands on the same footing as other property. *James v. Campbell*, 104 U. S. 356; *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. Rep. 717. As-
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suming the allegations of the bill to be true, this is a suit where the property rights of an individual have been invaded by an officer or agent of the United States, acting under its direction, and the question is whether this court has jurisdiction in such a suit.

In cases where this general subject has come before the supreme court, the proposition is admitted that the United States, as the sovereign power, cannot be sued without its consent. I need only cite on this point, *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. Rep. 240. But it is not to be inferred from this that this court has not jurisdiction in an action where an officer or agent of the United States is sued for property in his possession as such officer or agent, or for injury to the person or property of another, where the defense is that he acted under the orders of the government.

In *U. S. v. Peters*, 5 Cranch, 115, the United States district court of Pennsylvania, in an admiralty proceeding, decided that the libelants were entitled to the proceeds of the sale of a vessel condemned as prize of war, which had come into the hands of David Rittenhouse as treasurer of Pennsylvania. The district judge declined to enforce the decree against the representatives of Rittenhouse, on the ground that the funds were held as the property of that state, and that as she could not be subjected to judicial process, neither could the officer who held the money in her right. An application for a writ of *mandamus* to compel the district judge to enforce the decree was granted.

In *Meigs v. M'Clung's Lessee*, 9 Cranch, 11, the suit was for land on which the United States had a garrison, and had erected a fort. The defendants were military officers in possession, and they insisted that no action could be brought against them because the land was occupied by the United States for the benefit of the United States, and by their direction. The court held that, the title being in the plaintiff, he might sustain his action.

Wilcox v. Jackson, 13 Pet. 498, was a suit against officers of the United States to recover possession of land which had been in the possession of the government for over 30 years. The court do not consider the question whether such an action could be maintained, but proceed to decide the question of the plaintiff's title.

In *Osborn v. Bank*, 9 Wheat. 738, the state of Ohio had levied a tax upon a branch of the bank located in Ohio. The sum of one hundred thousand dollars was seized by Osborn, the auditor of the state, and delivered to the treasurer of the state. In a suit by the bank, both were made parties defendant. Objections were raised to the jurisdiction of the court, on the ground that the state of Ohio was the real party in interest, that the parties defendant were her officers, and that they were sued for acts done in their official capacity, and in obedience to her laws. These objections were overruled. Chief Justice MARSHALL says, on page 842:

"If the state of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been

cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit."

Again, he says:

"The process is substantially, though not in form, against the state, * * * and the direct interest of the state in the suit as brought is admitted; and, had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the state was before the court. But this was not in the power of the bank. * * * A denial of jurisdiction forbids all inquiry into the nature of the case. * * * It asserts that the agents of a state, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States."

Grisar v. McDowell, 6 Wall. 363, was an action to recover possession of land, brought against Gen. McDowell as an officer of the United States. The land had been reserved for military purposes by the government. The objection that this suit was brought against a military officer of the United States for property belonging to the United States, and set apart for public use, and that, therefore, it was substantially a suit against the government, was not passed upon by the court, but the court proceeded to determine the question of title as between the plaintiff and the government. *Brown v. Huger*, 21 How. 305, is a similar case.

In *Davis v. Gray*, 16 Wall. 203, the state of Texas having made a grant of alternate sections of land along which a railroad should thereafter be located, and the railroad having been located through it, a suit was brought against the governor of the state, and commissioner of the land-office, and they were enjoined from delivering patents of the sections of land which belonged to the railroad company. The objection to the jurisdiction of the court was disposed of on the authority of *Osborn v. Bank*. The court says:

"Where the state is concerned, the state should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

While this language is cited in support of the majority opinion of the court in *U. S. v. Lee*, Mr. Justice MILLER, in that case, says he is not prepared to admit that "the court can proceed against the officer in all respects as if the state were a party." And in *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. Rep. 292, 609, the same eminent judge,

speaking for a majority of the court, declares that, while the action of court in *Davis v. Gray* has not been overruled, "it is clear that in enjoining the governor of the state in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further."

In the leading case of *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. Rep. 240, the action was ejectment to recover the possession of lands to which the plaintiff, Lee, claimed title. The defendants were in possession as officers of the government. The attorney general suggested to the court, without making the United States a party, that the property in controversy, known as "Arlington Cemetery," had been for more than 10 years, and now is, held, occupied, and possessed by the government, through its officers and agents, who are in the actual possession thereof as public property of the United States. To sustain this defense, the court held that it was necessary to show that the defendants were in possession under the United States, by virtue of some valid authority, and, the contrary appearing, judgment was awarded to the plaintiff. After reviewing the authorities, Mr. Justice MILLER says:

"This examination of the cases in this court establishes clearly this result: that the proposition that, when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case, as tried below, actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though, if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title, and of other perplexing questions, and have quickly disposed of the case."

Mr. Justice MILLER then proceeds to discuss certain expressions in the opinion of the court in *Carr v. U. S.*, 98 U. S. 433, and he says:

"As these remarks were not necessary to the decision of the point then in question, as the action was equally inconclusive against the United States, whether the persons sued were officers of the government or not, these remarks, if they have the meaning which counsel attribute to them, must rest for their weight as authority on the high character of the judge who delivered them, and not on that of the court which decided the case. That the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment, was sufficient to decide that case, and was all that was decided."

Looking at the question upon principle, he continues:

"It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. * * * The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice MARSHALL says, to examine whether this authority is rightfully assumed is the

exercise of jurisdiction, and must lead to the decision of the merits of the question. * * * The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property, without due process of law, or to take private property without just compensation."

Poindexter v. Greenhow, (one of the *Virginia Coupon Cases*), 114 U. S. 270, 5 Sup. Ct. Rep. 903, 962, was an action of detinue for personal property distrained by the defendant as treasurer of the state of Virginia for delinquent taxes, in payment of which the plaintiff had tendered coupons cut from bonds issued by the state under the funding act of March 30, 1871. By the terms of that act, the coupons, after maturity, were receivable for all taxes and debts due the state. It was held that this created a contract between the coupon-holder and the state, and that any subsequent act of the state which forbids the receipt of these coupons is in violation of the contract, and void as against coupon-holders. Upon the question now under consideration, Mr. Justice MATTHEWS, speaking for the majority of the court, says:

"It is next objected that the suit of the plaintiff below could not be maintained, because it is substantially an action against the state of Virginia, to which it has not assented. It is said that the tax collector who is sued was an officer and agent of the state, engaged in collecting its revenue under a valid law, and that the tax he sought to collect from the plaintiff was lawfully due; that, consequently, he was guilty of no personal wrong, but acted only in an official capacity, representing the state, and, in refusing to receive the coupons tendered, simply obeyed the commands of his principal, whom he was lawfully bound to obey; and that, if any wrong has been done, it has been done by the state in refusing to perform its contract, and for that wrong the state is alone liable, but is exempted from suit by the eleventh article of amendment to the constitution of the United States."

The opinion then proceeds to answer these objections in the light of the adjudged cases in the supreme court, reliance being placed especially on *U. S. v. Lee* and *Osborn v. Bank*. In the course of this discussion it is said:

"A defendant sued as a wrong-doer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the state of Virginia. The state has passed no such law, for it cannot; and what it cannot do it certainly, in contemplation of law, has not done. The constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law

made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defense."

It was accordingly directed that judgment be rendered for the plaintiff.

In *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. Rep. 292, 609, this general question was discussed, and the cases in which the court had taken jurisdiction, where the objection was interposed that the suit was substantially against the state, and that, therefore, the state was a necessary party, were examined and classified. The second class of cases is stated by Mr. Justice MILLER, as follows:

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. *Mitchell v. Harmony*, 13 How. 115; *Bates v. Clark*, 95 U. S. 204; *Metgs v. McClung*, 9 Cranch, 11; *Wilcox v. Jackson*, 13 Pet. 498; *Brown v. Huger*, 21 How. 305; *Grisar v. McDowell*, 6 Wall. 363; *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. Rep. 240."

This language is cited with approval in *Poindexter v. Greenhow*.

In reviewing the cases involving the general principle now under consideration, the fact should not escape observation that the judges of the supreme court have been much divided in opinion. The leading cases of *U. S. v. Lee* and the *Virginia Coupon Cases* were decided by a bare majority of the court, four of the judges dissenting in each case. But, notwithstanding this diversity of opinion, I think it is not going too far to say that the doctrine enunciated by Mr. Justice MILLER, under the second head of his classification in *Cunningham v. Railroad Co.*, has become the established law of the supreme court, and it is under this head the present case falls.

It cannot be said that the supreme court have authoritatively decided the identical question raised in this case, of the right of a patentee to maintain a suit in tort for the infringement of a patent-right against an individual whose defense is that all his acts in relation thereto were done as an officer or agent of the government and in obedience to its orders.

Cammeyer v. Newton, 94 U. S. 225, was an action brought for the infringement of a patent, and one of the defenses set up was that the use, if any, which the defendant had made of the patented improvement, was done under the direction of the United States, and as its agent or officer. Mr. Justice CLIFFORD, speaking for the court, says on this point:

"Public employment is no defense to the employe for having converted the private property of another to the public use, without his consent and without just compensation."

After reference to the clause in the constitution which provides that private property shall not be taken for public use without just com-

pensation, and to the section of the patent act giving the patentee the exclusive right to make, use, and vend to others his invention or discovery for a certain term of years, he then proceeds:

"Agents of the public have no more right to take such private property than other individuals under that provision, as it contains no exception warranting any such invasion of the private rights of individuals. Conclusive support to that proposition is found in a recent decision of this court, in which it is held that the government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor or making him compensation. *U. S. v. Burns*, 12 Wall. 246."

The question of infringement is then considered, and determined against the patentee. This opinion does not discuss the objection which has been raised in this class of cases to the jurisdiction of the court, and in view of the subsequent expressions of the court in *James v. Campbell*, 104 U. S. 356, and *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. Rep. 717, it can hardly be deemed conclusive of the question.

James v. Campbell was a suit brought upon a patent against James, a public officer, to respond for the use of the patented machine. The circuit court rendered a decree in favor of the complainant. *Campbell v. James*, 17 Blatchf. 42. After admitting the exclusive right of the patentee in the invention, which the government itself cannot use without just compensation, unless by consent, the opinion then proceeds:

"But the mode of obtaining compensation from the United States for the use of an invention, where such use has not been by the consent of the patentee, has never been specifically provided for by any statute. The most proper forum for such a claim is the court of claims, if that court has the requisite jurisdiction. As its jurisdiction does not extend to torts, there might be some difficulty, as the law now stands, in prosecuting in that court a claim for the unauthorized use of a patented invention; although where the tort is waived, and the claim is placed upon the footing of an implied contract, we understand that the court has, in several recent instances, entertained the jurisdiction. * * * If the jurisdiction of the court of claims should not be finally sustained, the only remedy against the United States, until congress enlarges the jurisdiction of that court, would be to apply to congress itself. The course adopted in the present case, of instituting an action against a public officer, who acts only for and in behalf of the government, is open to serious objections. We doubt very much whether such an action can be sustained. It is substantially a suit against the United States itself, which cannot be maintained under the guise of a suit against its officers and agents, except in the manner provided by law. We have heretofore expressed our views on this subject in *Carr v. U. S.*, 98 U. S. 433, where a judgment in ejectment against a government agent was held to be no estoppel against the government itself. But, as the conclusion which we have reached in this case does not render it necessary to decide this question, we reserve our judgment upon it for a more fitting occasion."

The court then proceeds to discuss the patent, and to decide the case upon its merits against the patentee.

It is to be noticed that this case is prior to *U. S. v. Lee* and the *Virginia Coupon Cases*; also that the foregoing remarks of Mr. Justice BRADLEY concerning the jurisdiction of the court are based upon *Carr v. U. S.*

In *U. S. v. Lee*, the language of the court in *Carr v. U. S.* is commented upon, and it is said that the decision in that case did not properly extend to certain remarks of the court. It may also be observed that Mr. Justice BRADLEY was among those members of the court who dissented in *U. S. v. Lee*; and that he wrote the dissenting opinion in the *Virginia Coupon Cases*. The more recent case of *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. Rep. 717, was a suit to enjoin the infringement of a patent, and one of the defenses relied upon was that all the acts of the defendant complained of in the bill were done by him in the discharge of his duties as collector of internal revenue of the United States, and by direction of the commissioner of internal revenue, and that he had acted as collector by virtue of legal appointment by the president of the United States.

Mr. Justice MATTHEWS, speaking for the court, refers to the doubts expressed in *James v. Campbell* whether such a suit against public officers could be sustained, or whether a suit upon an implied promise of indemnity might not be prosecuted against the United States in the court of claims, and then says:

"If the right of the patentee was acknowledged, and, without his consent, an officer of the government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie, within the jurisdiction of the court of claims, such as was entertained and sanctioned in the case of *U. S. v. Manufacturing Co.*, 112 U. S. 645, 5 Sup. Ct. Rep. 306. And it may be that, even if the exclusive right of the patentee were contested, such an action might be brought in that court, involving all questions relating to the validity of the patent; but, as we have concluded to dispose of the present appeal upon other grounds, it becomes unnecessary to decide the question arising upon this defense."

The opinion then proceeds to discuss the patent and to dispose of the case against the contention of the patentee.

It is at least doubtful whether the present action could be brought in the court of claims. In its present form it is an action in tort, and not upon any contract, express or implied, and, as was said by Mr. Justice BRADLEY in *James v. Campbell*, the jurisdiction of that court does not extend to torts. While the supreme court have declined to pass upon the question of jurisdiction in these cases, they have assumed jurisdiction and disposed of each case on its merits; in other words, no case can be found where the court has dismissed the suit for want of jurisdiction, and this would seem to be sufficient ground, in this case, to overrule the plea, and allow the case to be heard upon bill, answer, and proofs. If, however, the principle established in the cases we have reviewed, and the rule laid down by Mr. Justice MILLER in *Cunningham v. Railroad Co.*, are sound, it is difficult to see why the court has not jurisdiction in the present case. This is an action of tort for the infringement of a patent, brought against an individual, who is an officer or agent of the United States, and whose defense is that he acted under orders of the government. That this is no defense in actions of this general char-

acter has, as we have seen, been repeatedly held by the supreme court, and the objection interposed that these suits are substantially against the government, and that, therefore, it is a necessary party to enable the court to grant relief, has been many times urged without avail. The rights secured to a patentee under his grant from the government are a form of property, in the enjoyment of which he is entitled to protection against all trespassers, including the government. To deprive him of the full enjoyment of these rights by using his invention without his consent is to deprive him of his property without just compensation or due process of law, and therefore in conflict with those provisions of the constitution which secure this protection to the citizen. I am of opinion, therefore, that the plea in this case should be overruled.

GIDDINGS' EX'RS v. GREEN *et al.*

(Circuit Court, E. D. Virginia. 1880.)

EXECUTORS—RIGHT TO SUE IN ANOTHER STATE—VENDOR'S LIEN.

When an indorsee of a negotiable note given to secure the purchase price of lands dies before the note matures, while residing in a different state from that in which the land is situated, his executors, appointed in the state of his residence, may sue to assert a vendor's lien in the state where the land is situated, without procuring letters testamentary there.

In Equity. Suit by the executors of Calvin Giddings, appointed in Ohio, against A. B. Green and others, to assert a vendor's lien on lands situated in Virginia. On plea that the complainants cannot sue because they have not procured letters testamentary in Virginia. Plea overruled.

HUGHES, J. This is a suit in chancery, brought by the executors, under letters taken out in Ohio, of Calvin Giddings, deceased, who was a citizen of that state, and whose will was proved there; the executors, of course, being also citizens of Ohio. The object of the suit is to subject a certain piece of land near the town of Hampton, in this state, to the lien for part of the purchase money of the land evidenced by a negotiable note which had been indorsed to the testator in his life-time by the vendor of the land, and which matured some eight months after the death of the testator, and after the qualification of the complainants as his executors in Ohio. The note was found by the executors among the testator's effects in Ohio. The vendee of the land, who is the principal defendant in the bill, is not a resident of this state, but is a resident of New Jersey; nor has process been served upon him, but he has appeared by counsel, and pleads that the complainants ought not to be heard in this suit, because they have never received nor obtained letters of administration upon their testator's estate from any court or authority in the state of Virginia.

The sufficiency of this plea to defeat this suit is the only question before me in this cause. It is a technical defense. There is no principle of law more firmly established than that, where there are assets in one state of a deceased resident of another state, they cannot be collected by suit, except by an executor or administrator having letters of administration from a court of the state in which the assets are sued for. Otherwise, if there should be creditors of the deceased person in such state, they would be driven to a different jurisdiction to assert their claims, and their rights would depend upon the laws of another forum than that in which their rights of action arose. The authorities establishing this principle of law are so numerous that it is useless to cite them. But it may well be doubted whether this principle extends so far as to deny to the personal representative of a decedent, under all circumstances, the right to sue as such in any jurisdiction except that from which his letters of administration issued. Suppose an executor in Ohio has found among the effects of his testator in that state a jeweled watch, or valuable horse, or other specific article of corporeal property, and has put it into his inventory of the testator's effects, and the title to it has become vested in him, and he has become liable for it in Ohio to Ohio creditors; and suppose this article of property is stolen and carried into Virginia, and found in the possession of one of her citizens. Will it be contended that the Ohio executor, who, as such, has the exclusive title to the property, cannot sue for its recovery in Virginia; and can it be pretended that a Virginia executor, who has no title, must be appointed, or, if appointed, must sue for this property not vested by law in him? In such a case the right of action attaches to the person of the particular executor in which the title of the property has vested, and not to his office, considered in the abstract. Story, Conf. Laws, § 516, and cases there cited. If such executor, suing in Virginia, describes himself as executor, the words would be *descriptio personæ*. So, when an executor has been regularly made plaintiff in a judgment recovered by his testator during his life-time, by substitution of record, in the state wherein his letters were granted and the judgment obtained, then he may sue upon that judgment in another state without taking out letters testamentary therein, just as any other trustee may sue in a state other than that of his residence or citizenship. *Greasons v. Davis*, 9 Iowa, 219, 225. So, if an executor appointed in Vermont, of a resident who died there, receives a debt voluntarily paid him by a citizen of New York, due to his testator, that debtor cannot be afterwards sued in New York, by a creditor of the testator or other claimant in the latter state, for the claim which he has thus paid. The reduction of the claim to possession vests the fund in the executor, and makes it a part of the estate in Vermont, and terminates its character as assets in New York, at least so far as to exonerate the New York debtor from liability for it. Story, Conf. Laws, § 515, and cases there cited. It has been held that, inasmuch as an executor in one state may assign a chose in action, and thus wholly part with the property in it, his assignee may sue upon the chose in action in another state in his own right, if the statute law of that state

permit an assignee so to sue there, and letters testamentary need not be taken out there. *Harper v. Buller*, 2 Pet. 239.

A negotiable note is of the same character, as to the right of suit, with a chose in action assigned and sued upon as just instanced. Negotiable notes partake of the character of personal chattels on account of their transferability. The legal property in them passes by transfer, as it does in chattels. If a negotiable note matures after the death of a testator, as in the case at bar, it becomes vested in his local executor. See Story, Conf. Laws, §§ 355, 359, 517. It is his property, is inventoried by him as such, and the title to it vests in him precisely as that of a watch or a horse vests in him, as part of the home assets of the testator's estate, distributable as all other home assets are, as directed by the law of the particular state. The executor may indorse and deliver it to whom he may please, and such action on his part transfers to the indorsee the same right to sue all over the world as belongs to the holder of any other negotiable paper. Whether he indorses it, or does not, its proceeds or the note itself is home assets, subject exclusively to home distribution under the law of the domicile; and therefore it is maintained by Mr. Justice Story (Conf. Laws, § 517) that if he does not transfer the note by indorsement, but sues upon it himself in another state, he need not take out letters testamentary in the state where the debtor resides, in order to maintain his suit against him. I hold, therefore, that the plea of A. B. Green in this case is not good, and that the suit may proceed in the name of the executors, complainants. If the paper were transferable by indorsement (which includes delivery) when the executors came into possession of it, the fact that the testator wrote his name upon it in his life-time was nugatory, and the personal representative cannot complete the transfer by delivery. He must himself, in his full legal character, indorse the paper; that is, write the transfer on it and deliver it. 1 Daniell, Ch. Pr. § 367; *Clark v. Boyd*, 2 Ohio, 56; *Clark v. Sigourney*, 17 Conn. 511; *Bromage v. Lloyd*, 1 Exch. 32; *Insurance Co. v. Leavenworth*, 30 Vt. 11; *Thomp. Bills*, 91.

In the present case, even if I thought it necessary that these complainants should take out letters testamentary in Virginia, this requirement would not invalidate their present proceeding; for it would be competent for them still to do so; and the court would allow them to amend their bill to embrace this new feature in the case, as was done in *Swatzel v. Arnold*, 1 Woolw. 383.

LEWIS v. SHAINWALD.

(Circuit Court, D. California. November 25, 1881.)

1. JURISDICTION OF CIRCUIT COURTS—EQUITY RULE 90.

Equity rule 90, providing that, where the rules prescribed by the supreme or circuit courts do not apply, the practice of the circuit courts shall be regulated by the present practice of the high court of chancery of England, etc., affects the practice only of the circuit courts, and does not apply in determining questions of jurisdiction.

2. CREDITORS' BILL—JURISDICTION OF FEDERAL COURTS—FRAUD.

By virtue of the jurisdiction attaching to courts of equity in cases of fraud, and independent of any statute giving the right to maintain a creditors' bill, a federal court may entertain a bill alleging the return of an execution *nulla bona*, and that the debtor, pending the suit, has converted part of his property into cash, and is engaged in disposing of and concealing the remainder, or is about to carry it out of the state, all with the declared intent of so "fixing" his property that it cannot be seized to satisfy judgment.

3. *NE EXEAT*—JURISDICTION OF FEDERAL DISTRICT COURTS.

Under Rev. St. U. S. § 716, providing that the supreme court and the circuit and district courts shall have power to issue writs of *scire facias*, and "all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," the district courts have power to issue writs of *ne exeat republica*.

4. SAME—WHEN GRANTED.

The writ of *ne exeat republica* is not a mere provisional remedy, in the sense that it can only be issued pending the suit, and must expire with the rendition of judgment; on the contrary, its issuance may be provided for in the final decree, and it will continue in force until dissolved by the court, or until the decree is satisfied.

In Equity. Bill to reach property not subject to execution. On appeal from the district court. For former reports see 6 Fed. Rep. 753, 766, 8 Fed. Rep. 878.

J. D. Crittenden, for complainant.

Delos Lake, for respondent.

Before SAWYER, Circuit Judge.

SAWYER, J. This is a bill in equity, called by appellant's counsel a "creditors' bill," based upon a prior proceeding, in which a decree had been entered in the district court against the respondent, appellant here, for a large sum of money, and execution issued, upon which a return of *nulla bona* had been made. It is claimed by the respondent that, prior to the adoption of the Revised Statutes in the state of New York, no such thing as a creditors' bill, in the sense since used, was known; that a creditors' bill of the character here set forth was unknown to the court of chancery; and that, therefore, the case is not properly one of equity jurisdiction. Upon this proposition some decisions of the English courts are cited; and it appears that some of the latter decisions overrule some of the former ones upon certain points. In this connection equity rule 90 is cited as having a bearing upon the case, as prescribing that the English chancery practice shall be adopted in cases where our equity rules do not apply. That rule is as follows:

"In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery of England, so far as the same may

reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

In my judgment, that rule does not in any way affect the question. The jurisdiction of this court is derived from the constitution and laws of the United States, and these rules are simply rules of practice for regulating the mode of proceeding in the courts. They do not, and could not, properly, either limit or enlarge the jurisdiction of the court. The rule quoted simply regulates the practice in exercising the jurisdiction of the court in those respects wherein the rules adopted do not apply; but the practice of the high court of chancery is to be applied, not as controlling, but simply as furnishing just analogies to regulate the practice.

I am satisfied that creditors' bills of some kinds, whether of the precise character of that now under consideration or not, were entertained both by the English chancery courts and in the courts of chancery in the several states, particularly in the courts of New York, prior to the adoption of the Revised Statutes of the latter state. The creditors' bills which were recognized previous to that time were, perhaps, in different form from that then adopted; but there undoubtedly were instances of bills maintained by creditors to subject the assets of debtors to the payment of their debts. The discussions upon the subject related mainly to the character of the assets and the circumstances of the particular case. In the case of *Hadden v. Spader*, 20 Johns. 554, before the court of errors, and in which the decision of Chancellor KENT sustaining a creditors' bill is affirmed, I think the rule is established that certain assets can be reached and appropriated by a bill filed by a creditor; and several prior cases recognized the same principle. In the subsequent case of *Donovan v. Finn*, Hopk. Ch. 59, there was suggested some limitation. That case, however, did not overrule, or purport to overrule, as it could not, the decision of the court of errors in the case last referred to. Indeed, the two decisions, as to the real point involved and decided, do not conflict. The latter case was one into which the element of fraud, either actual or constructive, did not enter. It was simply a case where a legacy had been left to a debtor, which was in the hands of an executor, and a creditors' bill was filed to reach that legacy. There was no collusion or fraud, or voluntary conveyance, or other subject-matter of equity jurisdiction in the case. The debt was treated as an honest debt, and the chancellor held that it could not properly be reached by a creditors' bill. He recognizes, however, the propriety of filing such bills in cases of fraud. Frauds and trusts are in themselves subjects of equity jurisdiction. Indeed, matters of fraud and trusts are among the most extensive heads of equity jurisdiction. Wherever there is fraud in a case which cannot be fully remedied at law, equity intervenes and uncovers the fraud; and the fact that a creditor is injured by a fraudulent concealment or withholding of property brings him into such relations to the fraudulent transaction that he may, on that ground, invoke the equitable jurisdiction of a court of equity, have the fraud uncovered;

and take hold of the funds or the property fraudulently concealed and withheld from him. He comes within the jurisdiction of the court, not merely because he is a creditor, not because his bill is a creditors' bill, but because he presents a case in which he sets forth matters of fraud or trust; and equity entertains his bill simply because he stands in such a relation to the fraudulent transaction that he is entitled to have the fraud uncovered, or a trust declared and enforced.

This principle is recognized in the case last referred to. I read from the decision as reported in 14 Amer. Dec. 533. After stating that "it is apparent that this case does not belong to any general head of equitable jurisdiction, such as fraud, trusts, accidents, mistakes, accounts, or the specific performance of contracts;" that "there is neither fraud nor trust nor accident, nor any other ingredient of equitable jurisdiction,"—the chancellor proceeds to say:

"The English cases cited proceeded, as I conceive, not upon the ground of subjecting the credits of the judgment debtor to the payment of his debts, but upon some ground of equitable jurisdiction, as fraud or trust, existing in each case. * * * The case of *Bayard v. Hoffman*, 4 Johns. Ch. 450, was not the case of a judgment creditor; but the object of the suit was to annul an assignment in trust, made by a debtor without consideration. The assignor was insolvent when the assignment was made. That fact not being then known, no actual fraud was intended; but the assignment had all the operation of fraud against the creditors of the insolvent debtor, and for these reasons the cause was of equitable jurisdiction. * * * The case of *Hadden v. Spader*, 5 Johns. Ch. 280, and 20 Johns. 554, was also a case of an assignment by an insolvent debtor of property upon various trusts. It was clearly a case of trust; the assignment was charged to have been made by fraud, and, though the answers denied that fraud was intended, the facts exhibited a case of fraud. The effect of the assignment, if it had prevailed, would have been to withdraw and screen from execution the property of the debtor. The assignment was held to be void, and the judgment creditor had relief. These are the principal cases which have been adjudged in this court, and in all of them some acknowledged ground of equitable jurisdiction existed. In general, they were suits to set aside conveyances, which prevented the seizure of property by the sheriff, and the conveyances have been considered frauds, either actual or constructive. * * * In giving relief in such cases, this court does not proceed upon the idea of giving execution against a species of property which is exempt from execution at law; but it acts upon some of the most ancient grounds of its jurisdiction, which enable it to give relief in cases of fraud and trust, either to a judgment creditor or to any other person whose just rights may be destroyed or impeded by such a cause. * * * I fully concur with Judge PLATT in his opinion given in the case of *Hadden v. Spader*, and in his view of the powers and jurisdiction of this court, in respect to the rights and remedies of creditors. The case now to be decided has not one feature of equitable jurisdiction. In it there is neither fraud nor trust nor conveyance of property, nor any interruption of the effect of an execution or the due course of justice at law. * * * But when equity has jurisdiction, by reason of some disposition of the debtor's property, made in fraud of the creditor, and when, in such a case, the sheriff of the county in which the property is situated returns upon the execution that no property is found, the return is important evidence to show that the fraudulent disposition has had effect by preventing the service of the execution. By the existing law, the property of a debtor, consisting of things in action held by him without fraud, is

not subject to the effect of any execution issued against his property; and, while a court of law does not reach these things by its execution, a court of equity does not reach them by its execution for the purpose of satisfying either judgments at law or decrees in equity. All conveyances made to defraud creditors are void, both in law and equity. When a fraud appears to a court of law, the conveyance is there adjudged void. When such a fraud is presented to this court, it is of equitable jurisdiction; and the property of the debtor, fraudulently transferred, is subject to the satisfaction of his debts, in favor of a creditor complaining of the fraud. Does an insolvent debtor transfer his property to another person, in trust for himself, or in such a manner as to defeat the effect of a judgment and an execution? This is the frequent case. It is a case of both fraud and trust, and it is of equitable jurisdiction. It was the case of *McDermutt v. Strong*, 4 Johns. Ch. 687, and of *Hadden v. Spader, supra*. In all such cases this court vacates the fraud, sets aside the conveyance in trust, and, acting both upon the debtor and his trustee, it does complete justice to the creditor. Thus the jurisdiction of this court reaches, and reaches effectually, those cases of fraudulent conveyances and assignments in trust which form the great and most vexatious impediment in the course of justice between creditor and debtor. Bills for discovery, where no relief is sought, also afford important aid to creditors against their debtors. But this court has no power to cause stocks, credits, and rights of action, held by a debtor, without fraud, to be sold or converted into money, to be transferred to the creditor, or to be applied to the payment of debts."

Now, this is the distinction between this case of *Donavan v. Finn* and the other cases referred to: In the latter case it is the element of fraud which brings them within the jurisdiction; and a creditor, as well as any other party who is injured by the fraud, is able to maintain a bill to have the fraudulent act vacated, and to be relieved from the consequences of it. In a note appended to the report of the case last cited it is said:

"It is doubtful, where there has been no legislation upon the subject, whether, in the absence of fraud or any other well-known ground for supporting the exercise of its jurisdiction, equity will assist a creditor to reach those assets of his debtor which under no circumstances could have been subject to execution at law."

A large number of cases are then cited, and it is then added:

"What stocks, choses in action, franchises, and other property which were not subject to execution at common law, can now, in the absence of any statute on the subject, be reached by a creditors' bill, must still be regarded as unsettled. By such bills, creditors have in several instances succeeded in obtaining satisfaction out of the interest of an heir or distributee while still in the hands of an executor or administrator."

Then follows another citation of numerous authorities, which I have not examined, as I did not consider it necessary to this decision.

In this case the charge of fraud is set up in the bill, in which it is alleged that the respondent has made fraudulent transfers of his property; has converted portions of it into money, and secreted the proceeds; that other property, to the amount of many thousands of dollars, has been concealed from the complainant, in order to prevent him from securing it by execution issued under the decree of the court; and that he is about to

carry all his money and other property beyond the jurisdiction of the court,—the notorious and declared purpose of all these acts being to defraud the complainant, and render it impossible for him to realize any portion of the amount to which he is entitled under the decree. By his demurrer the respondent admits these averments of the bill, and takes his stand upon the point that the court is without jurisdiction to entertain or determine a cause of the character of that which is set forth in the bill. The case of *Mountford v. Taylor*, 6 Ves. 787, which has been cited here, was a case similar to the one at bar. The bill stated that the judgments were obtained at a time when “the defendant was, ever since has been, and now is, seised for his own use of freehold estates for his life, or some greater estate; that the plaintiff sued out writs of *elegit* upon these judgments; but neither of them has been able to discover where the estates of the defendant are situate,” and does not know what they are or where they are. But the complainant charges that in or about the year 1795, some years before, the defendant, upon taking a seat in the house of commons, took the oath as to his having the requisite amount of property to qualify him to act as a member of that body; and that “he also delivered to the clerk of the house of commons, or some other officer of the house, a schedule, containing the particulars of the estate, whereby he made out his qualifications; and the plaintiffs are unable to obtain the said schedule.” They also state that if, as he pretends, he has since conveyed the estates of which his qualification was composed, “such conveyance was without consideration, and in trust for himself;” and the bill prayed for a discovery. The defendant demurred as to the main statements recited in the bill, Mr. Mansfield and Mr. Pemberton claiming in his behalf that the object of the bill was idle curiosity; that no creditor had a right to make these inquiries. During the argument the lord chancellor, throwing out suggestions, says:

“It seems admitted that they have a right to come here for a discovery where the property is, in order to make their judgments available. That, certainly, will not affect real property had before the judgment was obtained, if no longer under such circumstances that the creditor can follow it; but it does not follow that he cannot, merely because it does not remain in the ownership of the debtor, for there may be many cases in which he might. There is a material charge in this bill,—that if there was any conveyance it was without consideration.”

There is no positive averment in the bill that there was a conveyance made by the defendant; but it alleges that, if there was a conveyance, it was made without consideration; and that, the lord chancellor says, is a material charge. He then proceeds to say:

“First, in the common case, will a bill for a discovery lie, with all this particularity, to know every estate he has sold and disposed of for three years? If so, he may go back forty years.”

He then remarks:

“There is difficulty upon the objection that this would extend to an estate parted with forty years ago, without consideration; and I am not quite clear that such a bill must not allege that at a given time the defendant was seised

of given lands, (not simply suggesting, as a fishing bill, that at some time or other he had some land;) and that he has conveyed these lands away fraudulently, to put them out of the reach of his creditor."

These remarks quoted were made by Lord ELDON during the argument; and he took the case under consideration, and on the 20th of March he overruled the demurrer, saying:

"The bill is met by a defense, admitting that it is a proper bill, and the answer does not negative all that is material to be answered. With respect to the nature of the qualification, if he had said the property he gave into the house of commons was not liable to execution, the court ought to be content with that, without requiring from him more particularity. But the bill charges that the defendant delivered in a schedule of the particulars of the estates, whereby he made out his qualification, and that he has conveyed them without consideration, as evidence that he has lands liable to execution, as 'hey may be unquestionably. Upon that I think he must answer.'"

In this case of *Mountford v. Taylor*, Lord Chancellor ELDON held that the conveyance of his estate by the defendant without consideration was fraud; and that a creditor, as well as anybody else, might avail himself of it. In their bill the complainants in the case declare that they do not know the character of defendant's estates, nor where they are situated; but that he had, upon taking his seat as a member of the house of commons, delivered to the clerk or other officer a verified schedule in which his estate was set forth, which schedule the plaintiffs are unable to obtain. All of the allegations of the bill with respect to the defendant's property are argumentative. The complainants further alleged, however, that the defendant had conveyed his estate without consideration, and in trust to himself, and they were unable to find it. These allegations of this creditors' bill are as indefinite as could possibly be; yet the lord chancellor sustains the bill, and his decision in that case, as well as the decisions in the cases of *Hadden v. Spader* and *Donovan v. Finn*, referred to, and numerous other cases cited in those decisions, sustain the ground that, where the case presented is one of equitable jurisdiction, a creditor, as well as anybody else, is entitled to the aid of and redress from the court.

In the bill in the case at bar it is alleged that the respondent has converted a certain portion of his property, to the amount of \$20,000, into cash, which he has concealed, with the intention of carrying it out of the United States; that he has other property to the amount of \$90,000, which he has so arranged and concealed that he will be enabled to take it out of the United States; and that his express and declared purpose in so concealing and arranging his property, and in carrying out his intention of taking it away with him, is to fraudulently evade this complainant's execution.

This bill has been designated by the appellant's counsel as "fishing bill." What is meant by this term is indicated by Lord ELDON in the cited case of *Mountford v. Taylor*, in the previously quoted language, "not simply suggesting, as a fishing bill, that at some time or other he had some land," which was a remark thrown out during the argument. Such a bill is one in which there are no allegations of a definite or posi-

tive character as to the defendant's having at any time owned property which could have been subject to execution upon the plaintiff's claim, or one asking for a discovery as to matters which cannot in any way affect the rights of the parties. It is evident, from the way he uses the expression, that it is to cases of that class that Lord ELDON refers. In that case it is alleged in the bill that, at a certain time, the defendant did have some property, which property he had since conveyed, if conveyed at all, without consideration, in trust for himself; and, although the complainants are unable to state where the property of the defendant is, the lord chancellor does not consider the bill a fishing bill, but overrules the demurrer, and compels the defendant to answer with reference to that particular property.

The nature of a fishing bill is defined by Chancellor KENT (then a judge of the court of errors of New York) in the case of *Newkirk v. Willett*, 2 Johns. Cas. 413, in which he says:

"The bill does not state sufficient equity to entitle the appellants to a discovery. It states, generally, that the respondent had made a demand upon one of the appellants, as executrix of Peter Schuyler, deceased, and that, as he did not produce any voucher, she had refused to pay him. It states, further, that he proposed an arbitration, which she refused; and that finally he had brought a suit against the appellants in the supreme court. The bill states, further, that the appellants knew nothing of the demand of their own knowledge, but that they believe it unjust, because the respondent took no measures to liquidate and settle it in the life-time of Peter Schuyler, and does not now produce any vouchers, and has been inconsistent in what he has from time to time said as to the nature and extent of his demand. This is the substance of the bill. It amounts to this: 'The respondent has sued us at law, and we do not know for what, and therefore we ask for a discovery beforehand, although we have reason to conclude he has sued us upon some groundless pretense.' Such a bill shows no equity; no right to a discovery. It sets forth no matter material to a defense at law, and which can be proven, unless by the confession of the opposite party. It is, to use Lord Chancellor HARDWICKE's expression, a mere 'fishing bill,' seeking, generally, a discovery of the grounds of the respondent's demands, without stating any right to entitle them to it. Such a bill may be exhibited by any executor or administrator, and, indeed, by any defendant, who is not already in possession of the plaintiff's proofs. But the court of chancery has wisely refused to sustain bills for discovery in such latitude, and unless the party calling for a discovery will state some matter of fact material to his defense, or which he wishes to substantiate by the confession of the defendant, the court will not enforce a discovery."

It is with this same view, as I understand it, that Lord ELDON, in the case before cited, alludes to a discovery of matters running back 40 years,—matters which cannot, by any possibility, affect the rights of the parties,—and a bill asking for such a discovery is a fishing bill. But as to a bill for a discovery of matters of such character and date that they can be immediately connected with the complainant's cause, and which matters he could not discover or ascertain without the aid of the court, the bill also alleging that, since the accruing of complainant's right, the respondent has conveyed away his estates, without consideration, and in trust for himself, such a bill is not a fishing bill, because

it sets forth matters material to the cause. A conveyance of the character alleged would be a fraud in law, and the complainant is entitled to a discovery.

In the present case, the charge of fraud is direct. In his bill, after setting forth that he has recovered judgment as against the respondent for a large sum of money; that execution has issued, and a return of *nulla bona* has been made thereon,—the complainant avers that a short time before the rendition of judgment, and during the pendency of the action, the respondent disposed of and converted into cash real property to the amount of \$20,000; that since the rendition of the judgment he has secretly transferred a large part of his property, and has secreted the remainder; that he has property to the value of \$90,000, which the complainant has been unable to reach by execution; that he intends and is about to convert into cash all his property, and to depart, taking it with him, beyond the jurisdiction of the court; and that all these acts and steps have been committed, taken, and proposed with the declared purpose of so “fixing” his property that it cannot be seized to satisfy the judgment, and to defraud the complainant of the money due under it. Those matters are material. Here is set forth the fraud which the complainant is seeking to unveil; and, if the alleged state of facts exists, he is entitled to apply the funds of the respondent, wherever they are, to the satisfaction of the judgment. The fact that the complainant is unable to describe and locate the property and funds of the respondent ought not to make it impossible to bring his cause within the jurisdiction of a court of equity, for under existing laws it is possible for a party to hold property in such a manner that only by a discovery can another be enabled to locate or describe it. If, in a case of this kind, a complainant were not entitled to a discovery, it would be possible for a debtor to conceal his property, or to convert it into money and put it in his pocket, and so evade a judgment. The arm of the court of equity would certainly be very short if it could not reach the respondent in such a case, although the complainant would be unable to describe the property or identify the money. In the nature of things it is impossible to identify the money. But if this respondent has in his possession the \$20,000 which he is alleged to have received for that portion of his property which he has sold, and other property as well, he is bound to discover it, and yield it up, that it may be applied to the satisfaction of the judgment. If, as is averred in the bill, the respondent in this case has converted a portion of his property into money, and intends to carry that money and his other property beyond the jurisdiction of the court, then this bill is sufficient.

Another point is made in this case, with reference to the issuing of a writ of *ne exeat republica*. Respondent's counsel contends that the court has erred in directing in its decree that the writ should issue; that such a writ is only a provisional remedy, the right to which expires upon the determination of the suit and the entry of judgment. The very object of this provisional remedy is to secure the presence of the party in

order that the judgment may be executed,—in order that he may not be able to evade it. This writ is not discharged any more than an attachment is discharged upon the entry of judgment. A writ of attachment is discharged upon the satisfaction of the judgment or upon giving security; and the writ of *ne exeat* should continue in force until the judgment is satisfied, or until the writ is dissolved, or proper security given. *Mitchel v. Bunch*, 2 Paige, 606; *McNamara v. Dwyer*, 32 Amer. Dec. 631.

It is claimed by the respondent's counsel that that portion of the decree which directs that this writ shall issue is arbitrary; that no limit is placed upon the length of time it shall continue in force. I presume the court will have power to control that matter. The decree may possibly be too broad in that regard; and, if counsel desire it, it can be so modified as to obviate any objection upon that ground. That this writ may be issued even after judgment is established, see *Moore v. Hudson*, 6 Madd. 218; *Elliot v. Sinclair*, Jac. 545; *Collinson v. —*, 18 Ves. 353; *Russell v. Ashby*, 5 Ves. 96. According to Daniell's Chancery Practice, and many authorities, a prayer in the bill for a *ne exeat* is not necessary. 3 Daniell, Ch. Pr. 1936; *Dunham v. Jackson*, 1 Paige, 629; *Gibert v. Colt*, 14 Amer. Dec. 561, note. It is sufficient if the facts alleged in the bill and established show a proper case for the writ, and it may be granted in the decree under the prayer for general relief; or the facts may be shown, and the writ applied for upon a petition presented in the case either before or after judgment or decree. The limitation of equity rule 21 only applies where the writ is asked for "pending the suit."

"And it is further ordered, adjudged, and decreed that the writ of *ne exeat republica* of the United States of America issue out of and under the seal of this court, to restrain the said Harris Lewis from departing out of the jurisdiction of this court." That is the form of that portion of the decree relating to this matter. I think it would have been better, and it certainly would have avoided criticism, if to this had been added, "until the satisfaction of the decree or the further order of the court." Respondent's counsel cites a case in 2 Wash. C. C. (*Gernon v. Boecabine*, page 130) to show that a district court has no authority to issue a writ of *ne exeat*. In that case, however, the writ was issued by the judge, and not by the court. That case arose at a time when the jurisdiction of the district court was limited, and did not cover a case of the character of that now under consideration at all. There is a distinction between the judge and the court,—a distinction recognized in the Revised Statutes. Section 717 reads:

"Writs of *ne exeat* may be granted by any justice of the supreme court in cases where they might be granted by the supreme court, and by any circuit justice or circuit judge in cases where they might be granted by the circuit court of which he is judge. But no writ of *ne exeat* shall be granted unless * * * satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States."

By Rev. St. § 716, it is provided that "the supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The writ of *ne exeat* is one of the writs necessary to the exercise of the present jurisdiction of the district court. The jurisdiction of that court has been enlarged since the adoption of these statutes, and since the date of the decision last referred to. In cases of the character of the one at bar, it has now concurrent jurisdiction with the circuit court. The authority of the district court to issue this writ is therefore unquestionable. The decree of the district court must be affirmed, except that, if the appellant so elects, it may be modified in the respect indicated.

COURTRIGHT v. BURNES.

(Circuit Court, W. D. Missouri, W. D. May, 1881.)

1. COMPROMISE—ACTION TO SET ASIDE.

C. took a contract in his own name to build a railroad; the remuneration being certain bonds of the railroad company, thereafter to be issued, and also all funds or property which could be obtained as a bonus from people living along the proposed route. B. and several others, however, had certain interests in the profits of the contract, and C. constituted B. his attorney in fact to manage the construction, and all other matters connected with the enterprise. After the road had been built, C. pressed B. for an accounting and settlement, which B. delayed, assigning various reasons. Finally, C. constituted an attorney his attorney in fact and agent, with full powers to obtain a complete settlement. The attorney thereupon called upon B., presented his power of attorney, and the two then made a writing, reciting the transactions in which B. had been engaged, and agreeing to meet at a certain date for a settlement of all these matters. They accordingly did meet; B. accompanied by his attorney, and another person interested in the contract. Some papers in the nature of accounts were presented, but these covered less than half the transactions in dispute. Propositions and counter-propositions were made for full settlement, and after two days of negotiation a full settlement was effected, the papers executed, and a release in full of all claims growing out of the transactions given to B. *Held*, that this was not a mere accounting of an agent to his principal, in which any mistake or fraud in the accounts rendered would be a ground for opening the settlement, but was a compromise, in which each yielded something of what he considered his rights, and hence chancery would not set it aside.

2. SAME—TENDERING BACK DEEDS.

B. having made a deed to C. of all his interest in the lands acquired along the route, as part of the settlement, C. could not maintain a bill to set aside the settlement without tendering a reconveyance of this property.

In Equity. Bill to set aside settlement, and for an accounting.

De Camp, Botsford & Williams, for complainant.

Waters, Stringfellow, Woodson & Hull, for respondent.

MILLER, Justice, (*orally*.) We have arrived at a satisfactory conclusion to us in the case of *Milton Courtright v. James N. Burnes*, and I will proceed to announce the judgment of the court, and give our reasons for it.

The history of the transactions which are brought before us by this bill in chancery begins with the proposition of constructing a railroad from some point on the Chicago & Rock Island Railroad, in a southwestern direction, through the states of Iowa and Missouri. It is not very clear who was most prominent in getting up the plans. It appears, however, that the defendant, Burnes, was one of the parties engaged in it, and that Mr. Winston, who became president of the corporation organized, was another, and one or two citizens of the state of Missouri besides, and that the main reliance for building the road, at least from Washington, in Iowa, to Cameron, in Missouri, was upon the aid which should be given by the Chicago, Rock Island & Pacific Railroad Company.

The contract for the construction of the road from Washington to Cameron was made by Mr. Courtright, the present plaintiff, and in his name, with the corporation known as the "Southwestern Railroad Company." Courtright undertook to build the road between those two points, and he was to receive for the building of the road \$5,000,000 of the bonds of the Southwestern Railroad Company, which would have been of little value but that their payment was guarantied by the Rock Island Railroad Company. He was also to receive all such other donations, gifts, subscriptions, and aid of every kind, as could be obtained along the line of the road from parties interested in having it built. There is no question in our minds—there can be none—but that before or after, but probably before, this contract was made, he had an agreement with Burnes and Winston and Aller, three gentlemen residing in this region of the country, that they should have an interest in the profits of the contract. We do not think it is established that they were interested in the contract itself. It does not appear that they would be liable for any loss, or that they were under any obligations to the corporation which was to own the road; but it is very clear—and for the purpose of this suit it is immaterial when that arrangement was made—it is very clear that Mr. Courtright agreed with Winston, Aller, and Burnes that they should have half of the profits that arose out of that contract, and they should superintend the whole of the construction of the road; that he did not intend to be here to do it, and that he left that to them. In pursuance of that arrangement, and contemporaneously with it, and probably because of it, Winston was made president of the corporation. In order, also, that Winston might properly represent Mr. Courtright, he had a power of attorney from Courtright. The main part of the road was probably built in that way, and under that state of affairs; that is, the road from Washington to Cameron.

About the same time, and contemporaneously with this, there were several projects for the extension of that road, or connection with it, to points on the Missouri river. It is only necessary for the purposes of this suit to speak of the one to Atchison. Contracts were made to build this road to Atchison. The contract for building the road to Atchison was not given to Mr. Courtright. It is not material to state in whose name it was taken, because it was assigned to a man by the name of

Glover, I believe, to hold in trust. It is equally certain that in that contract Mr. Courtright had an interest of two-fifths, not, as in the other case, in its profits, but was interested in the contract, which was held by the trustee for the benefit of the parties.

These works went on simultaneously. About the time the railroad was completed between Washington and Cameron, for some reason or other, Mr. Winston ceased to be president of that company, and ceased also to be representative of Mr. Courtright in the contract. There seems to have been a disagreement between him and Aller and Burnes and Campbell, who, about this time, in some way, had become interested in the one-half that did not belong to Courtright. At any rate, Mr. Winston retired from his place as trustee and representative of this one-half interest that was not owned by Mr. Courtright, and also relinquished the power of attorney and right to act for Mr. Courtright; and at that time he delivered to Mr. Burnes an order stating that he (Burnes) was authorized to assume all the control which Winston had previously had over the matters relating to that contract. And about the same time Mr. Courtright made a power of attorney to Mr. Burnes, giving to him the powers which had formerly been exercised by Mr. Winston. The exact nature and extent of the power of attorney from Courtright to Burnes, it is not necessary, as we think, in this case, to determine. It is admitted by the counsel in this case that at the settlement, which is the main subject of controversy here, all matters which were in controversy were intended to be settled and adjusted. And whether Burnes acted under a power of attorney that was competent or not, or whether De Camp acted under a power of attorney which authorized him to do all these things, is not material, because it has been admitted in argument—and, if not, it is established by telegrams and letters—that De Camp had full power, and that Burnes was settling up all that was between him and Courtright unsettled, growing out of either or both of these two contracts.

Having stated these preliminary circumstances, we proceed now to consider the present suit or bill in chancery itself. It was brought by Mr. Courtright on the proposition or idea that Mr. Burnes, as his agent or attorney, had not accounted properly to him for money and property received as such agent and attorney in fact; that there was in his hands a large sum of money and bonds, and perhaps other property, for which he had not accounted, and for which this bill requires him to account before the court. The bill, after stating that much in general terms, proceeds to say that there had been an attempt at a settlement between Courtright and Burnes, made in August, 1877, and that in this settlement Courtright was represented by his agent and attorney in fact, Mr. De Camp; that the settlement itself was fraudulent and unjust, and in many ways inequitable; and the bill asks that it may be set aside; that a release which Courtright, through De Camp, had given to Burnes, and which on its face purported to be a full satisfaction and adjustment of all claims growing out of these matters, may be set aside on the ground of fraud and misrepresentation practiced by Burnes upon De Camp in

the settlement. If these allegations are sustained, the release ought to be set aside, and the case considered *de novo*. If they are not sustained, the release executed on that settlement is a full defense to all claims set up in this bill. So that the first and principal question to be decided is whether that release is to be treated as fraudulent, and whether it shall be annulled and set aside by order and decree of this court.

The first consideration important in the decision of that proposition is to get at the nature and character of the papers that were executed, and of the settlement that was made. Counsel for the plaintiff in this bill have, throughout the argument of the case, treated the transaction as though Mr. Burnes was nothing more than an ordinary agent employed by Mr. Courtright to look after his interests, and that Mr. Burnes, in that settlement, presented as such agent an account of debtor and creditor, and that the adjustment was made upon the basis of that account, and upon the presumption of Courtright's attorney that the account was correct, and that in coming to that conclusion he relied upon the statements and representations made by Mr. Burnes. If this statement were true about the account, if there was any fraud, or even if there was no intention of fraud, but if there was a misrepresentation, known to the party who made it,—Mr. Burnes; or if there was any serious mutual mistake in such settlement as that a court of equity would set it aside, and place the parties where they were before the settlement was made; or if such settlement were one in which the accounts were kept solely by the agent, and in which they ought to be kept in regular order in books, in which naturally the principal, if he were present, or his agent, would rely solely on the statements and accounts presented by the agent,—any mistake or error growing out of misrepresentation or reliance on the account might be corrected. But we are of opinion that this is not in the nature of a settlement of that kind, and, to see what is its nature and character, it is necessary to look into the evidence of the matters and things which precede and accompany this settlement. We leave out of the question for the present that Mr. Burnes claims that he and Courtright were jointly interested in this affair, and that it was his right to take care of his own interest in making this settlement, and we proceed to some of the circumstances preceding and accompanying the settlement, to show that it was not such a one as that alluded to.

In the first place, Mr. Courtright seems to have been pressing Mr. Burnes, and urging him, for six or eight months, not only to render an account, but the phrase repeatedly used is, "render an account and make settlement and payment." Mr. Burnes, for various reasons, seemed not ready to make a settlement, and put it off, asking for time; Courtright pressing all the time for an adjustment of the matter. At this time in the history of these proceedings, Mr. Burnes was still the attorney in fact of Courtright. The power which he held from Courtright, and had held for five or six years, was unrevoked. But in July, 1877, Mr. De Camp appeared at the business place or residence of Mr. Burnes with a regular power of attorney from Courtright authorizing him to make all the settlements, and with full power to settle all the matters in

dispute between them, which power of attorney revoked Burnes' former power of attorney, and discharged him as agent, and he was then no longer agent. Mr. De Camp appeared at Burnes' place of business with the demand that they proceed to a settlement of the accounts and adjustment of the transactions.

Mr. Burnes then said he was not ready; stated that neither party could then proceed properly to a settlement and adjustment; that he and De Camp, or De Camp alone, should go over the line of the road, and make inquiries respecting the matters which must be considered in that settlement. All this Mr. De Camp declined, and the interview at that time resulted in a written agreement between De Camp, as attorney of Courtright, and Burnes, in which they agreed to meet about the 12th or 15th of August, which was finally postponed till the 22d. They signed the paper—both of them—that they would meet for a settlement; and the paper recites in what transactions Mr. Burnes had been engaged, and states that the whole of it was to be settled and adjusted between them. They did meet, and Mr. De Camp, who was both an attorney at law and agent and attorney in fact for Mr. Courtright, seems to have been satisfied with the knowledge he had of the facts to go through a settlement. Mr. Burnes was accompanied by his counsel, by Mr. Aller, who was interested with him in these different transactions, and by his nephew, who kept the accounts.

Now, if we can imagine anything better calculated to produce an idea that this settlement was to be formal, valid, important, and final, than all these details and all these meetings, I do not know how it is to be done. They took two days and more to make a settlement, and papers were produced in the nature of accounts; but it is perfectly clear in looking at the settlement that was made, and the purpose for which it was made, that they constituted but a very small part. Perhaps I am not exactly right in saying a very small part; but they constituted but a part, and probably not the largest part, of the transactions which were settled and adjusted at that time. In fact, so far from that paper being simply the basis on which the accounting of Mr. Burnes and the settlement was made, the parties had not been together long before propositions began to be made for a general compromise. This appears from the telegrams, which are a part of the evidence, passing between Mr. Courtright and Mr. De Camp, showing that various propositions were made, and that they were not made on the basis of, nor did they rest upon the correctness of, the account. But the parties were saying, "What will you give, and what will you take, by way of a settlement of these conflicting claims?" And the settlement was made, the papers were exchanged, and formally signed. It does not appear that either party was exactly suited with the settlement. Mr. De Camp, as near as I can get at it from these dispatches, very soon after the papers were signed, telegraphs to his principal: "Settled on terms I telegraph. I don't like it." Mr. Courtright says, "Do the best you can, and settle, if it is your judgment." Mr. Burnes, when the settlement commenced, denied that Mr. Courtright had any interest in the Atchison branch, or

was entitled to anything on account of it. Yet in the settlement finally he recognized that interest, and undoubtedly paid a considerable sum on account of it to Mr. Courtright.

We state these things to show that it is no such thing as merely a recognition of the account, and that the settlement was not made on that basis, but that each and every matter between the parties was settled, or was intended to be settled, and that in the adjustment neither party admitted that the other was right, but that each yielded something for a final compromise. That this is true is evidenced by a matter that must be considered in two relations, both as to what entered into the settlement to show that it was a compromise, and also to show the impossibility of sustaining this bill on another ground. It was part of that settlement that Mr. Burnes made a formal deed of release and conveyance of quitclaim to Mr. Courtright of any and all interest which he had in certain lands and lots in Iowa and Missouri, which had been contributed and conveyed to Courtright as part of the funds given to enable him to build the road. The title to this land was in Courtright, but it is shown that it is part of the profits of the concern, and that Burnes had one-sixth interest in it. Burnes conveyed all his interest in these lands and town lots, whatever it was. Nobody knows what it was worth; at least, it has not been stated in this testimony. Burnes conveyed and released all that interest to Mr. Courtright, and Courtright, in bringing this suit to set aside that settlement, says nothing about that paper; does not offer to return the paper nor to reconvey the land. His counsel say that Mr. Burnes had no interest in this land that was capable of being conveyed. But, if Mr. Burnes had any interest in this land, it was conveyed by this quitclaim deed made at the settlement; and that he had an interest in the land we have not the shadow of a doubt from the testimony, because all the money that was obtained for the building of the road from Washington to Cameron went into its construction. It was generally admitted that no one received any money from it, and Burnes had received none at the time of this transaction. What profit arose from the building of that part of the road was probably represented by these lands and town lots. It is certain that Burnes had a one-sixth interest in this property; and what became of it? Whatever his interest was, he conveyed it to Courtright at this settlement.

That Burnes had an interest in these lands appears upon the face of the entire negotiation. In the letter from Courtright to Burnes, introducing De Camp, in 1876, in which he tells him that Mr. De Camp is authorized "to settle with you for my interest yet in your hands arising from the building of the railroad from Washington to Cameron, and the Atchison branch road,"—in this he says: "I am satisfied our lands are valuable, and should receive our care and attention." In his letter in regard to a settlement, the only thing which is pointed out besides the Atchison bonds and their interests is "our lands." Mr. De Camp, in his second telegram to Courtright about the offers made by Burnes at the settlement, says: "Offers all lands and lots, \$20,000 in township

bonds, \$4,500 cash, to release him alone." To that Mr. Courtright answered: "Suppose you come on with proposition, so that we can talk it over, that I can understand the whole matter. Bring statement of assets in Burnes' hands,—collected and outstanding,—including lands, lots, and houses." Whenever Mr. Courtright speaks of what is in controversy, he alludes to these lands. That is the one thing which he purposely points out and specifies as a matter which he wants attended to. And in the Exhibit F, prepared by Mr. De Camp as the paper to be signed in the settlement, one of the things set out is that James N. Burnes releases all title, right, and interest in the judgments, notes, and all real estate in Iowa to Courtright. So Mr. De Camp himself is aware of this interest, and sets it out in the statement he wants signed at the settlement; and in Mr. Merryman's statement it is said that the said James N. Burnes releases all right, title, claim and interest in all the judgments and notes and evidences of indebtedness in the property aforesaid, and all interest he has in the real estate in Iowa. So it is idle to say that Burnes had no interest in this land, or that Courtright placed no value upon his interest. We cannot see how we can get rid of the argument that, since Mr. Courtright desires this settlement to be set aside, the parties must be placed in the situation in which they were before the settlement was made, and the interest in these lands be reconveyed by Courtright to Burnes.

But we do not propose to rest our decision upon that point, by any means. We refer to it as showing the purpose and character of the settlement between Burnes and De Camp. We think that this was a settlement in the nature of a compromise and adjustment of doubtful and conflicting rights, in which each party desired to settle, and in which each party made concessions, and that they finally came together upon an agreement, each believing at the time he was losing by the transaction, and so settled for the sake of compromise. We say, in such a settlement as that, it must be satisfactorily proved that there was some positive fraud, some false representations made, some gross advantage taken by one party or the other, to set it aside; and, without going fully into the evidence, it is sufficient to say that neither of us believe that any such case has been made against Mr. Burnes, nor do we believe that he intended to commit any fraud upon Mr. De Camp in this settlement. We do not believe that any fraud was committed upon De Camp as the representative of Courtright. It may be that, in rendering his statement in regard to the salary item, it may not have been exactly correct, and we are prepared to admit that there is some doubt about this \$18,000 salary item; and if this account was all there was in this case, it might be necessary to refer it to a master for investigation. We are not clear that Mr. Burnes was entitled to that. As to the testimony in regard to the East Leavenworth Company's account of \$27,000, or whatever it may be, we think the preponderance of the testimony is in favor of the fact that it was rightfully retained by Mr. Burnes; but whether it is absolutely so or not, it is not necessary to decide in this case. Mr. Burnes made large concessions. Mr. De Camp

was communicating to his principal by telegraph. They were two days in making propositions and counter-propositions. Each said to the other: "You yield, and I will yield. We think it is best, in view of other matters, to have all matters between us settled." And they were settled. And it is not for one party to come in and ask that it be set aside, unless he can clearly show that he was misled and defrauded. This, in our opinion, has not been done in this case.

With these views, gentlemen, in which my Brother KREKEL concurs, the bill in this case will be dismissed.

CUTTING v. FLORIDA RY. & NAV. CO., MEYER v. SAME, BROWN v. SAME, CENTRAL TRUST CO. v. SAME, GUARANTY T. & S. D. CO. v. SAME, DAVIS v. SAME, (MALLORY *et al.*, Interveners.)

(Circuit Court, N. D. Florida. December 15, 1891.)

CONTRACTS—CARRIERS—POOLING AGREEMENT.

A number of competing railroads were negotiating for the formation of a pool of the business from the Chattahoochee river to northern and eastern ports, and a certain steam-ship line agreed with one of them to enter the pool as its connecting line. The companies failed, however, to form a through pool, but formed a pool from the Chattahoochee to the South Atlantic ports only, of which fact the steam ship line received timely notice. *Held*, that the latter was not entitled to share in the profits realized from the pool by the railroad, although the latter may have used the agreement with it as a menace to secure better terms for itself.

In Equity. On petition for rehearing. Denied. For former report, see 43 Fed. Rep. 743.

PARDEE, J. This case was submitted to the circuit judge on petition for rehearing, Judge SPEER of the southern district of Georgia, who originally heard and decided the case, having ceased to act in the northern district of Florida. It has been argued orally and by brief, and has been fully considered on all the issues made and sought to be made. The main grounds urged in the petition for a rehearing, in various forms of recital, amount to this: That the master and the judge deciding the cause reached a wrong conclusion on the facts of the case; but complaint is also made that the judge held the exceptions to the master's report to be too vague and indefinite to authorize him to go behind the report to inquire if the master had correctly reported the facts in the case. The strict rule in regard to exceptions to a master's report is that only such exceptions will be heard by the court as have been made before the master; and further, that exceptions must be precise and specific, raising well-defined issues, the finding of the master being *prima facie* correct. See *Gaines v. New Orleans*, 1 Woods, 104; *Cowdrey v. Railroad Co.*, Id. 331; *Story v. Livingston*, 13 Pet. 359; *Medsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. Rep. 351; *Burns v. Rosenstcin*, 135 U. S. 449, 10 Sup. Ct. Rep. 817. As I read the opinion of Judge SPEER, filed in

the case, (reported 43 Fed. Rep. 743,) he did, as a matter of fact, go behind the master's report and examine the testimony taken before the master to ascertain the facts in the case, and found the master's report sustained by the evidence. However this may be, on this application for a rehearing the strict rule has been waived, and all the testimony in the case examined and considered.

The case shows: (1) That in the summer of 1886 the railroad companies engaged in the carrying business from the Chattahoochee river to northern and eastern ports, in connection with their own and connecting steam-ship lines, entered into negotiations with a view to form a pool which should divide the profits, do away with competition, and avoid a war of rates. (2) That the petitioner's steam-ship line from Fernandina to northern ports had been and was respondent's main connecting line in carrying such business as respondent could secure from the Chattahoochee river to northern and eastern ports. (3) That in the negotiations aforesaid it was understood and agreed between respondent and petitioner that petitioner's line should be included as the connecting line of respondent, to be bound by the contract made, and to participate in the earnings of the pool. (4) The pool for business to the northern and eastern ports contemplated was not formed, it being impossible for the contracting parties to agree upon the details and percentages; but in lieu thereof a pool of the carrying business from the Chattahoochee river to South Atlantic ports only was entered into between respondent and others, which included the railway lines engaged in the carrying trade from the Chattahoochee river to South Atlantic ports, and did not include the petitioner's or any other steam-ship line. (5) That the agreement for pooling the Chattahoochee business to South Atlantic ports was made on the 16th of July, 1886, to take effect August 1, 1886, and a copy thereof was furnished by respondent's traffic agent to petitioner on the 26th day of July, 1886, thereby giving full notice to petitioner that the pool agreed upon only included business of the Chattahoochee river to South Atlantic ports, and did not include any business to northern and eastern ports. (6) The case does not show that the petitioner suffered any specific damages in its business or otherwise because not included in the pool as made. The respondent, in fact, carried no freight under the operation of the pooling contract, and yet collected \$14,210.97 as its share in the pool,—\$11,085.03 being for cotton carried directly to Savannah for local delivery or foreign export. It is this share so collected by respondent which petitioner insists should be divided with him. Waiving the question whether the petitioner's demand is one to commend itself to a court of equity, it seems clear that petitioner's grievance is that a pool was not made of the business to northern and eastern ports. In a pool of the Chattahoochee business to South Atlantic ports, the petitioner's line was not a competitor, and there was no reason why it should be included when it could render no assistance, nor interpose any hindrance. That petitioner's line, as a probable competing line in case no pool was made, was used as a menace by respondent to force better terms for himself, is probably true, but it constitutes no legal ground for

compelling respondent to share with petitioner the receipts from the pool actually made, which included no steam-ship lines. That petitioner was deceived into believing that its line would be included in any pool entered into by respondent may be true, and still no cause of action could arise in petitioner's favor until specific damages growing out of the deceit should be alleged and proved. In short, petitioner's case, viewed in its most favorable light, is one in which respondent agreed to form a pool of the Chattahoochee river business to northern and eastern ports, and to include petitioner's line in such a railway and steam-ship pool, and then failed and neglected to make such pool, but instead made a pool of Chattahoochee river business to southern Atlantic ports, in which business steam-ship lines could not participate, and which pool did not include petitioner's line. I am satisfied that the conclusion reached by the master in his report and by the court on the hearing was correct. The rehearing asked for is denied, with costs.

FIRST NAT. BANK OF DANVILLE v. CUNNINGHAM.

(Circuit Court, D. Kentucky. December 12, 1891.)

1. JUDGMENT ON CONFESSION—VALIDITY—FRAUD.

A warrant of attorney contained in a note to confess judgment thereon remains in force only so long as the note is unpaid; and where the payee, after receiving satisfaction thereof, fraudulently conceals the fact, and procures an attorney to appear and confess judgment without the maker's knowledge or consent, such appearance confers no jurisdiction on the court, and the judgment is void.

2. SAME—MOTION TO VACATE—COLLATERAL ATTACK.

Where a judgment has been fraudulently obtained in the absence of the defendant, the fact that he subsequently moves to vacate the same, and afterwards withdraws his motion by leave of court, does not constitute an appearance to the action such as will render the judgment valid, and he may still impeach it in a collateral suit.

3. JUDGMENT OF ANOTHER STATE—COLLATERAL ATTACK—CONSTITUTIONAL LAW.

The provision of the federal constitution that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state gives to a judgment rendered in another state only such credit as it is entitled to in that state; and, if it may there be collaterally attacked for want of jurisdiction in the court rendering it, it may be so attacked in any other state.

4. ACTION ON FOREIGN JUDGMENT—FRAUD.

In a suit brought upon a judgment rendered in another state upon the appearance and confession of an attorney under a warrant contained in the note sued on, the defendant may show that the judgment was fraudulent and void by reason of the fact that the warrant of attorney had expired by previous payment of the note.

At Law. Action by the First National Bank of Danville, Ill., against J. A. Cunningham upon a judgment rendered against him by a state court of Illinois. Heard on demurrer to the answer. Overruled.

A. C. Rucker and Gibson, Mashall & Lochre, for plaintiff.

Wm. Lindsay and Humphrey & Davie, for defendant.

JACKSON, J. The plaintiff's motion to file the amended petition tendered is allowed; and the second paragraph of the defendant's answer

will be treated (as it was discussed) as applicable to both the original and amended petition in the consideration of plaintiff's demurrer thereto.

The attention of counsel is called to the fact that the demurrer, as filed, states that said second paragraph of the answer does not constitute a defense to the matters set up in the first paragraph of the petition. The demurrer was discussed as relating to the second paragraph of the petition. If the demurrer, as expressed on its face, is intended to question the sufficiency of the answer to the first count or paragraph of the petition, it is clearly not well taken. If intended to question the sufficiency of said paragraph of the answer to the second count of the petition, as assumed at the hearing of the demurrer, plaintiff may amend the same. The court will deal with the question on the assumption that this amendment will be made.

The second count of the petition sets out that on November 28, 1890, the plaintiff instituted an action against the defendant in the circuit court of the eleventh judicial district of the state of Illinois, in and for the county of McLean, in said state, to recover damages sustained by it by reason of the failure of defendant to pay certain sums of money alleged to be due it from defendant, on certain written obligations, viz., promissory notes executed by him to plaintiff; that said circuit court of McLean county, Ill., had jurisdiction of the subject-matter of said action, and the defendant, on the 28th of November, 1890, appeared to said action by his counsel thereunto authorized by defendant to so appear for him, and filed his *cognovit* therein, wherein he confessed that plaintiff had sustained the damages claimed by it by reason of the breach of his promises to plaintiff as claimed in said action, and thereupon, on said day, said court caused to be entered of record in said action a judgment in favor of plaintiff against the defendant for the sum of \$36,301.20, the amount of damages so confessed, and costs expended, and that execution issue therefor. It is then alleged that said judgment is still of record in said court, is in full force, and wholly unsatisfied. A complete transcript of the record in said action, certified and attested as required by law, is filed as an exhibit to, and part of, the petition, which seeks to recover against defendant the amount of said judgment, with interest thereon. The amended petition states that after the rendition of the aforesaid judgment against him by said McLean circuit court of Illinois, at its November term, 1890, the defendant, Cunningham, on the 19th day of December, (being one of the days of the November term, 1890, of said court,) appeared in said court by counsel expressly chosen and authorized by him so to do, and moved said court to vacate and set aside the judgment rendered against him as aforesaid; that as a part of said motion he assigned, as reasons for setting aside and vacating said judgment, the alleged facts that at the time of the entry of said judgment, and long prior thereto, the notes upon which said judgment was rendered had been fully paid; and, second, that a large portion, to-wit, \$25,000, of said notes had been paid, and said judgment was entered for too much; that at the same time, to support his said motion,

the defendant filed in said action his own affidavit, wherein he recited certain facts showing, or tending to show, that the notes sued on in said action, and on which judgment had been rendered, had been fully paid several years before said action was instituted; that said McLean circuit court, by the statutory laws of Illinois, had, at the time said motion was made by defendant, full control over said judgment, with power to vacate and set it aside, and it was its duty to set it aside on defendant's said motion, if the reasons assigned therefor had appeared to said court to be well founded, and supported by sufficient evidence; and, if said judgment had been set aside and vacated, the defendant would have had the lawful right to defend the said action the same as if no judgment had ever been entered therein; but that defendant, without insisting on his said motion, and without asking a hearing or decision of the same, again appeared in said court by his counsel, on the 25th day of March, 1891, and, after obtaining leave to do so, withdrew his said motion to vacate and set aside said judgment; and the said action which had remained pending on the docket of said court on account of defendant's said motion was thereupon stricken from the docket. A complete transcript of the proceedings had in said action, subsequent to the rendition of the said judgment, upon said motion to vacate, and the withdrawal thereof, is filed as a part of said amended petition.

It appears from the transcript of the record filed with and as a part of the original petition that plaintiff's action and judgment in the circuit court of McLean county, Ill., was based upon certain notes executed by defendant to plaintiff in 1882, 1883, and 1885, to each of which was attached a warrant of attorney to confess judgment thereon. The form of this warrant of attorney attached to four of the notes, maturing in 1886, was as follows:

"And to secure the payment of said amount, we, or either of us, hereby authorize, irrevocably, any attorney of any court of record to appear for us in such court in term-time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and five per cent. of the principal amount as attorney's fees, and to waive and release all errors which may intervene in such proceeding, and consent to immediate execution upon such judgment."

To the other two notes, maturing in 1882 and 1884, the warrant of attorney was as follows:

"Now, therefore, in consideration of the premises, we do make, constitute, and appoint E. R. E. Kimbrough, or any attorney of any court of record, to be our true and lawful attorney, irrevocably, for us, and in our name, place, and stead to appear in any court of record, in term-time or vacation, or before any justice of the peace in any of the states or territories of the United States, at any time after said note becomes due, to waive the service of process, and confess judgment in favor of said First National Bank of Danville, Ill., its order or assignee, upon said note, for the above sum, and interest thereon to the day of the entry of said judgment, and also to file a *cognovit* for the amount thereof, with an agreement therein that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue thereof," etc.

Said transcript shows that plaintiff's action was commenced and its declaration filed November 28, 1890; that its attorney, J. B. Mann, made affidavit to the signature of James A. Cunningham to the several notes sued on and powers of attorney thereto attached; that each of said several notes was unpaid; and that said Cunningham was still living. Following this affidavit, and said notes and powers of attorney, it is recited that defendant, by his attorney, came and filed in said cause his certain *cognovit*, November 28, 1890, which is in the words and figures following, to-wit:

"And now comes the said defendant, by E. R. E. Kimbrough, his attorney, and says that he cannot deny the said several allegations in said declaration, nor that said plaintiff has sustained damages by reason of the breach of the said several promises in said declaration mentioned to the amount of thirty-six thousand three hundred and one dollars and twenty cents, and therefore he confesses judgment in behalf of said defendant, and in favor of said plaintiff, for the said sum and costs of suit herein.

"E. R. E. KIMBROUGH, Atty."

Then follows the judgment entry in the cause, which recites—

"That plaintiff files its declaration, and thereupon comes E. R. E. Kimbrough, an attorney of this court, and by virtue of a warrant of attorney for that purpose executed, and the execution thereof by said defendant, James A. Cunningham, being duly proven by the affidavit of J. B. Mann, on file herein, waives the issuing and service of process in this cause, and confesses that said plaintiff has sustained damages, by reason of the non-performance of certain promises in its declaration, in the sum of \$36,301.20, and consents that judgment may be rendered against said defendant therefor. It is therefore adjudged by the court that said plaintiff, the First National Bank of Danville, Ill., * * * recover of and from said James A. Cunningham, defendant, the sum of \$36,301.20, the amount of damages so confessed, and also the costs in this behalf expended, and that execution issue therefor."

Executions for both damages and costs were issued the same day, and were returned by the sheriff, November 29, 1890, "No property found."

To the present suit upon said judgment thus obtained the defendant, by way of defense, sets up in the second paragraph of his answer the payment and discharge of each and all the notes on which said judgment was founded prior to the rendition thereof, under and by virtue of an agreement of accord and satisfaction made and entered into between himself and the plaintiff in 1886, and which was fully completed on his part, and accepted on the part of plaintiff. The facts set forth in the answer as constituting the accord and satisfaction of the notes on which plaintiff's judgment was based and rendered are, if true, clearly sufficient to establish said defense, and to show that plaintiff had no valid cause of action on said notes when it commenced action and obtained said confessed judgment thereon in the circuit court of McLean county, Ill. Said paragraph of the answer further alleges that said satisfaction and discharge of said notes was well known to the plaintiff and to its attorney when said action was commenced thereon in said Illinois court; that said plaintiff and its attorney, J. B. Mann, concealed from him the fact that any action was to be brought

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on said discharged notes; that they concealed from the circuit court of McLean county, Ill., and from the attorney, E. R. E. Kimbrough, whom they procured and called in to represent defendant and confess judgment in his behalf, the fact that the notes sued on were settled and paid; that he (defendant) was a citizen and resident of Louisville, Ky., when said action was commenced, and had been for more than a year prior thereto, as plaintiff and its attorney well knew; that he was not served with summons or other process, and had no notice or knowledge of said action, and of the proceedings had and taken therein, until some time after said judgment had been rendered against him, and said court had finally adjourned; that the entry of his appearance to said action and confession of judgment in his name was unauthorized and fraudulent, and was procured by plaintiff and its said attorney, Mann, for the purpose of preventing him from interposing his defense to any suit instituted upon the said notes or either of them; that if said Kimbrough, who undertook to act as his attorney, did not know that said notes had been paid, the fact was fraudulently concealed from him by the plaintiff and its attorney, who represented to him that said notes were still due and unpaid. To the sufficiency of this answer as a defense to the suit on its said judgment the plaintiff has demurred, or, as the court understands, intends its demurrer to apply.

It is settled law, under the constitutional provision, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of any other state, and the act of congress passed in pursuance thereof, that plaintiff's judgment should have the same credit, validity, and effect in any other court within the United States which it has in the state of Illinois, where it was rendered, and that whatever pleas would be good to a suit therein in that state, and none other, can be pleaded in defense to a suit thereon in any other court within the United States. *Hampton v. McConnell*, 3 Wheat. 224; *McElmoyle v. Cohen*, 13 Pet. 312-326; and *Embry v. Palmer*, 107 U. S. 10, 2 Sup. Ct. Rep. 25.

It is also well settled that, in an action brought in any court on a judgment of a court of another state, the jurisdiction of the court to render the judgment may be assailed or attacked collaterally by proof that the defendant was not served and did not appear in the suit; or, where an appearance was by an attorney, that the appearance was unauthorized; and this, even where the proof directly contradicts the record. In other words, all facts necessary to give the court rendering the judgment sued on jurisdiction, either as to the subject-matter or the person, may be contradicted. *Shelton v. Tiffin*, 6 How. 163; *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas-Light, etc., Co.*, 19 Wall. 58; *Starbuck v. Murray*, 5 Wend. 148; *Shumway v. Stillman*, 6 Wend. 447; *Kerr v. Kerr*, 41 N. Y. 272; *Ferguson v. Crawford*, 70 N. Y. 257; *Gilman v. Gilman*, 126 Mass. 26; and *Wright v. Andrews*, 180 Mass. 149.

Now, the defense presented by the answer is clearly something more than an attack upon the judgment sued on for error or irregularity in the proceeding after jurisdiction had attached, or for fraud in its procure-

ment. The facts disclosed by the answer, and for the purposes of the demurrer admitted to be true, go far beyond that. They impeach the judgment for want of jurisdiction of the court rendering it over the person of the defendant. This is the legal effect and operation of the allegations of the answer that defendant was a resident and citizen of Kentucky when plaintiff's action was commenced and judgment taken against him; that he was not served with process, and had no notice or knowledge of the proceeding till after judgment was rendered; that the notes forming the cause of action and only ground of liability had previously been fully paid and discharged; that plaintiff and its attorney well knew this fact, etc.; and that the attorney whom they procured to represent the defendant, enter his appearance, and confess judgment, acted without authority, being induced to do so by the fraudulent concealment or misrepresentation of the facts on the part of plaintiff's agent or attorney. These facts, if true, establish not only a want of jurisdiction over the defendant, but a fraudulent attempt to acquire the same; for it admits of no question that the warrants of attorney attached to the several notes sued on in the Illinois court were only made to secure the payment of such notes; that they were "irrevocable" only while the notes remained unpaid; and that, upon the payment and discharge of said notes, the authority conferred by said warrants of attorney thereby ceased and terminated, both in fact and law, especially as against a holder of the notes who knew the fact that such notes were satisfied and discharged. No other construction can properly be placed upon said warrants of attorney, which, in dispensing with notice and all opportunity to be heard by the makers thereof, the courts treat with little favor,—interpret strictly,—and require to be followed to the letter of the powers conferred. Thus in *Reid v. Southworth*, 71 Wis. 288, 36 N. W. Rep. 866, it was held that a warrant of attorney (substantially like the present) to confess judgment for the amount unpaid on a note authorizes confession of judgment only for the amount actually due on such note. But, without dwelling upon this aspect of the case, it is perfectly clear that the answer presents a defense that would be good to a suit on the judgment, not only in Illinois, where it was rendered, but in Kentucky, where it is sued upon. *Williams v. Preston*, 3 J. J. Marsh. 608; *Lawrence v. Jarvis*, 32 Ill. 305; and *Rea v. Forrest*, 88 Ill. 276. In this last case it was held by the supreme court of Illinois—

"That, where the payee of a note has been paid, if he afterwards takes judgment thereon, under a power of attorney attached thereto, without the knowledge or consent of the maker, it will be fraudulent and void, and that he cannot enforce its payment in a court by a suit on such judgment."

Section 66, c. 110, of the Illinois statute, which authorizes the confession of a judgment in such cases, is as follows:

"Any person, for a debt *bona fide* due, may confess judgment by himself or attorney, duly authorized, either in term-time or vacation, without process."

Tested by the foregoing principles and authorities, considered in connection with the cases of *Spence v. Emerine*, 46 Ohio St. 433, 21 N. E. Rep. 866, and *Sewing-Mach. Co. v. Radcliffe*, 137 U. S. 287-299, 11 Sup.

Ct. Rep. 92, which intimate a grave doubt whether a judgment obtained as plaintiff's was can have any validity in another state than that in which rendered, we entertain no doubt that the defendant's answer sets up a good defense to the judgment as presented in the original petition.

But it is earnestly insisted on the part of counsel for demurrant that, conceding this, still the facts presented by the amended petition cure all defects in the judgment, or want of jurisdiction in the court rendering it, because defendant's voluntary appearance on the 19th of December, 1890, and his motion to vacate the judgment on the ground that the notes on which said judgment was based had been previously paid, operated to waive all jurisdictional questions or other defects in the proceeding, and rendered the judgment valid. The claim is that the mere making of the motions to vacate the judgment brought the defendant in, as a general appearance to the action, and bound him, without any regard to subsequent proceedings on such motion; that the making of said motion was not only an appearance to the action, but operated to give validity to the previously rendered judgment, just as effectually as though defendant had been regularly served with process, and had personally come into court and confessed the judgment sued on. In support of this contention there is cited the case of *Burdette v. Corgan*, 26 Kan. 104, where it is said:

"In the first place, we remark that this appearance by motion, though called special, was in fact a general appearance, and by it this defendant appeared so far as she could appear. The motion challenged the judgment, not merely on jurisdictional, but also on non-jurisdictional, grounds; and whenever such a motion is made the appearance is general, no matter what the parties may call it in their motion. Such a general appearance to contest a judgment on account of irregularities will, if the grounds therefor are not sustained, conclude the parties as to any further questioning of the judgment. A party cannot come into court, challenge its proceedings on account of irregularities, and, after being overruled, be heard to say that he never was a party in court, or bound by those proceedings. If he was not in fact a party, and had not been properly served, he can have the proceedings set aside on the ground of want of jurisdiction; but he must challenge the proceedings on that single ground."

This ruling was substantially followed in *Association v. Lemke*, (Kan.) 19 Pac. Rep. 337. In both of these cases, as appears, the motion was acted upon and overruled by the court. In the present case there was no action of the court upon defendant's motion to vacate, but the same was, by leave of court, withdrawn by the defendant. This withdrawal by leave of the court was had on March 25, 1891, after plaintiff had commenced its action on said judgment in this court. The plaintiff does not appear to have been notified of said motion to vacate, and was in no way prejudiced or delayed in proceedings on its judgment by the making thereof. Execution had already been issued and returned on the judgment before the motion was made. While it was pending, the plaintiff, on December 27, 1890, brings suit on the judgment in this court; and thereafter the defendant, by leave of the Illinois court, withdraws his motion to vacate, and makes his defense here in the jurisdic-

tion of his domicile. His motion to vacate, taken in connection with his affidavit filed in support thereof and the record in the case, under the authority of *Rea v. Forrest*, 88 Ill. 276, was a valid objection to the validity of the judgment. In *Cunningham v. Goelet*, 4 Denio, 72, a party appeared by counsel to make objections to the sufficiency of the proceedings, and which objections were overruled. This action was claimed in subsequent proceedings to be a waiver of such objection, but the court, by BRONSON, C. J., said: "It would be strange, indeed, if that could be construed into a waiver of the very objection which he took." In the present case there was no adverse action on the defendant's motion to vacate, and by leave of court it was withdrawn. Is such motion and its withdrawal to have the same effect as if the court had retained and overruled it? Is the party making it concluded by the judgment, notwithstanding non-action thereon by the court, except in granting leave to withdraw the motion? Had the defendant, by leave of court, the right to withdraw it so as to reinstate himself in the position he was in with respect to the judgment, before making his motion to vacate? These questions are essentially different from those presented in *Burdette v. Corgan*, 26 Kan. 104, and are not controlled by that decision.

In *Forbes v. Hyde*, 31 Cal. 346, a motion was made and granted to withdraw an answer for one defendant. As to the effect of such withdrawal, the court says:

"Upon the discovery of the mistake, upon application and a proper showing promptly made to the court, and by order of the court, the mistake was corrected, and the answer, and consequently the appearance involved in the filing, was withdrawn. * * * The plaintiff was in no way injured."

In *Creighton v. Kerr*, 20 Wall. 8, it was held that a withdrawal of a general appearance by attorney for defendant, if granted upon the condition that it is to be without prejudice to the plaintiff, does not deprive the latter of rights founded upon the rule that a general appearance is a waiver of defect in the service of process. The intimation of the court in that case is very clear that, but for the condition imposed by the court in allowing the withdrawal, a different rule would have been applied.

In *Graham v. Spencer*, 14 Fed. Rep. 603-607, where the authorities on this question are cited and reviewed, LOWELL, C. J., says:

"I have cited two cases from Pennsylvania and one from California, and all other cases which I have seen are to the same effect, that the withdrawal of appearance, when there has been no plea to the merits, or if that, too, has been withdrawn, leaves the case as it was before the appearance was entered."

He further states, very properly, that the two cases of *Jones v. Andrews*, 10 Wall. 327, and *Harkness v. Hyde*, 98 U. S. 476, "taken together, will show that a mere appearance, without pleading to the merits, is not necessarily a submission." In *Harkness v. Hyde*, 98 U. S. 479, it is said that "it is only where he (the defendant) pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

In *Haldeman v. U. S.*, 91 U. S. 585, the court, in discussing the subject as to what will conclude a party, say:

"But there must be at least one decision on a right between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit; * * * but the idea of turning the mere withdrawal of a suit into an intentional abandonment of the claim or demand asserted thereby is an after-thought."

The making and the withdrawal by leave of the court of defendant's motion to vacate a void judgment is certainly no decision on the right involved in the controversy between plaintiff and defendant, as presented in this case. Nor is it such an appearance to the action as will estop the defendant from any other remedy or attack upon the validity of the judgment. In *Woods v. Dickinson*, 7 Mackey, 301, it was held that "the service of a notice and copy of a motion upon the plaintiff's counsel does not, where the motion was abandoned and never acted on, constitute such appearance as to waive the necessity of process."

But an authority more directly in point upon the question under consideration is found in the case of *Godfrey v. Valentine*, (Minn.) 40 N. W. Rep. 163, where it was held that an appearance in court after the rendition of a judgment which is void for want of jurisdiction is not effectual to render the judgment valid.

In *Dorr v. Gibboney*, 3 Hughes, (U. S.) 382, it was held that an appearance after a decree was rendered, entered for the purpose of moving to strike the case from the docket on the ground that the proceeding was invalid, was not such an appearance as would waive defects in the previous service, or validate a decree totally void.

Upon the foregoing authorities, and upon sound principles, it cannot be held that defendant was concluded by his motion to vacate the plaintiff's judgment, when such motion, before adverse action had thereon, was by leave of the court withdrawn; nor is the proposition a sound one that, having made that motion, he thereby elected a remedy of relief, which he could not afterwards abandon and seek relief elsewhere or in any other mode. Assuming that the judgment was void for want of jurisdiction over the defendant, three remedies were open to him: He could make application to the court rendering the judgment to set it aside; or he could invoke the aid of a court of equity to restrain its enforcement and to vacate it, (*Landrum v. Farmer*, 7 Bush, 46; *Caruthers v. Hartfield*, 3 Yerg. 366; *Johnson v. Coleman*, 23 Wis. 452; *Connell v. Stelson*, 33 Iowa, 147;) or he could await suit thereon, and attack its invalidity collaterally. Until there was some adverse action against him on the question, he could not be estopped from taking each of the foregoing remedies. The abandonment of either or both of the first two modes of attack by leave of court, before adverse action on the question, would not estop or preclude him from adopting the third mode, by way of defensive attack, as has been pursued in this case. In the opinion of the court, the answer presents a valid defense to the petition both original and as amended; and the demurrer thereto is accordingly overruled, with costs thereof to be taxed against the plaintiff. Leave is granted defendant, if desired, to file an amended or supplemental answer to the amended petition.

GRISWOLD v. BRAGG *et ux.*

(Circuit Court, D. Connecticut. May 27, 1880.)

1. **CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—EJECTMENT—"BETTERMENT ACT."**
Rev. St. Conn. p. 382, § 17, providing that final judgment shall not be rendered against a defendant in ejectment until the court shall have ascertained the present value of improvements made in good faith, and the amount reasonably due for use and occupation, and until plaintiff shall have paid defendant any excess of the former sum over the latter, does not impair the effect of the conveyances under which plaintiff holds, so as to violate Const. U. S. art. 1, § 10, forbidding the states to pass laws impairing the obligation of contracts.
2. **SAME—DUE PROCESS OF LAW.**
The statute is not in contravention of the inhibition of the constitution of Connecticut against depriving a person of his property without due course of law.
3. **SAME—TRIAL BY JURY—ASCERTAINING VALUE OF IMPROVEMENTS.**
The fact that the value of the improvements, and of the use and occupation, are to be determined by the court upon equitable principles, does not deprive the plaintiff of a right to trial by jury, in contravention of the inhibition in the state constitution.

In Equity. Bill supplementary to an action in ejectment, for the purpose of ascertaining the value of betterments and improvements. On demurrer to bill.

W. F. Wilcox and Richard D. Hubbard, for plaintiff.

Simeon E. Baldwin, for defendants.

SHIPMAN, J. At the September term, 1879, of this court, the jury rendered a verdict, in an action of ejectment, in favor of the present defendants against the present plaintiff, that they recover the seisin and possession of an undivided fourth part of a tract of land in the town of Chester. Upon motion of the defendant in the ejectment suit, judgment and execution were stayed until further order. He thereupon filed a supplemental bill on the equity side of the court. This bill, after setting out the state statute hereinafter recited, commonly called the "Betterment Act," alleges, in substance, that the plaintiff and those under whom he claims have held said land by a series of connected conveyances since 1846, which deeds purported to convey, and were intended and believed to convey, an absolute estate in fee-simple, and that the plaintiff and his grantors have had uninterrupted possession of said land since 1846, under a like belief that they had an absolute estate; and that during this time, and before the commencement of the ejectment suit, improvements of the value of \$10,000 have been made on said land, by said reputed owners, in good faith, and in the like belief; and prays that the present value of said improvements, and the excess of the value thereof over the amount due to the defendants for the use and occupation of said premises, may be ascertained, to the end that the equitable relief provided by said statute may be granted. To this bill the defendants have demurred. Their title became vested in them in 1878.

The statute (Revision 1875, p. 362, § 17) provides as follows:

"Final judgment shall not be rendered against any defendant, in an action of ejectment, who or whose grantors or ancestors have, in good faith, believ-

ing that he or they, as the case may be, had an absolute title to the land in question, made improvements thereon, before the commencement of the action, until the court shall have ascertained the present value thereof, and the amount reasonably due to the plaintiff from the defendant for the use and occupation of the premises; and, if such value of such improvements exceeds such amount due for use and occupation, final judgment shall not be rendered until the plaintiff has paid said balance to the defendant; but, if the plaintiff shall elect to have the title confirmed in the defendant, and shall, upon the rendition of the verdict, file notice of such election with the clerk of the court, the court shall ascertain what sum ought, in equity, to be paid to the plaintiff by the defendant, or other parties in interest; and, on payment thereof, may confirm the title to said land in the parties paying it."

The original statute was passed June 26, 1848, (Laws Conn. 1848, p. 48.) It plainly appears from the act as passed, and as reproduced in the Revisions of 1849 (section 223) and 1866, (section 281,) that the proceeding in the state court, upon the motion of the defendant, after the verdict, is a proceeding in equity.

The question of law which is raised by the demurrer is in regard to the validity of this statute. It is not denied that the statutes of the several states in regard to realty, except when the constitution, treaties, or statutes of the United States otherwise require or provide, which are in conformity with the constitutions of the respective states, are rules of property, and rules of decision in the courts of the United States, (*Bank v. Dudley's Lessee*, 2 Pet. 492;) and that, if a state legislature has created a right and established a remedy in chancery to enforce such right, such remedy may be pursued in the federal courts, if it is not inconsistent with their constitution, (*Clark v. Smith*, 13 Pet. 195; *Ex parte Biddle*, 2 Mason, 472;) and that an inability of the federal courts to proceed in the exact mode provided by a state statute need not prevent a party from the benefit of the relief which is intended to be granted, if the modes of proceeding in courts of chancery are adapted to carry into effect the statute. (*Bank v. Dudley's Lessee*, cited *supra*.) This is true, although the right which has been established by the local statute is a new right, and one previously unknown to a court of chancery in this country or in England. *Lorman v. Clarke*, 2 McLean, 568; *Bayerque v. Cohen*, 1 McAll. 113. The practice in equity is, in general, except where otherwise directed by statute or by the rules of the supreme court, regulated by the English chancery practice as it existed in 1842, before the adoption of the "new rules." Equity Rule 90; *Badger v. Badger*, 1 Cliff. 237; *Good-year v. Rubber Co.*, 2 Cliff. 351.

The statute practically impresses upon the land of a successful plaintiff in ejectment a lien for the excess, above the amount due for use and occupation, of the present value of the improvements which have been placed on the land, before the commencement of the action, by a defendant or his ancestors or grantors, in good faith, and in the belief that he or they had an absolute title to the land in question, and forbids occupancy by the plaintiff until the lien is paid. There is a natural equity which rebels at the idea that a *bona fide* occupant and reputed owner of land in a newly-settled country, where unimproved land is of small value,

or where skill in conveyancing has not been attained, or where surveys have been uncertain or inaccurate, should lose the benefit of the labor and money which he had expended in the erroneous belief that his title was absolute and perfect. While it is true that improvements and permanent buildings upon land belong to the owner, yet, in a comparatively newly-organized state, where titles are necessarily more uncertain than they are in England, there is an instinctive conviction that justice requires that the possessor under a defective title should have recompense for the improvements which have been made in good faith upon the land of another. The maxim, often repeated in the decisions upon this subject, *nemo debet locupletari ex alterius incommodo*, tersely expresses the antagonism against the enrichment of one out of the honest mistake, and to the ruin, of another. It is obvious that this statutory equity is not without occasional hardships. The true owner may be forced to sell his land against his will, and may sometimes be placed too much in the power of capital, but a carefully regulated and guarded statute should ordinarily be the means of doing exact justice to the owner.

It is well known that the English law made no provision for reimbursement of expenditures of this kind, as against the owner of the legal title, except by allowing the *bona fide* occupant to recoup the value of his improvements, when he is a defendant in a bill in equity praying for an account of rents and profits. The established theory was that a court of equity should not go any further, and "grant active relief in favor of such a *bona fide* possessor making permanent meliorations and improvements, by sustaining a bill, brought by him therefor, against the true owner, after he has recovered the premises at law." *Bright v. Boyd*, 1 Story, 478, 495. Such was the opinion of Chancellor WALWORTH in *Putnam v. Ritchie*, 6 Paige, 390, and such may be taken to be the state of law in this country, in 1841, apart from local statutes, and of the English law then and now. In 1841 Judge STORY decided, in *Bright v. Boyd*, in favor of the power of courts of equity to grant affirmative relief, at the suit of a *bona fide* possessor, against the true owner; and in 1843 restated his opinion, after an additional hearing of the same case. 2 Story, 605. The learned judge thus states his view of the law:

"I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration; and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation."

This opinion of Judge STORY, though often favorably quoted, cannot be considered as the established law of this country, apart from the statute, because it has rarely had occasion to be reviewed, inasmuch as the "Betterment Acts" have become the predominant statutory system of the country. The supreme courts of Missouri, Maryland and Oregon—

states which apparently have no statute on the subject—have adopted his views. *Valle's Heirs v. Fleming's Heirs*, (1859,) 29 Mo. 152; *Union Hall Ass'n v. Morrison*, (1873,) 39 Md. 281; *Hatcher v. Briggs*, (1876,) 6 Or. 31.

The theory of the Connecticut statute is that of Judge STORY, that an equitable lien is placed upon the land for the value of the improvements which the *bona fide* occupant has innocently made. Furthermore, the legal owner has his election either to take possession of the land by paying the lien, or to receive, in lieu of the land, the sum which the court shall ascertain to be equitably due him. The owner's title is not forced away from him, but the equitable lien of the occupant is preserved. There is no election on the part of the occupant to keep the land, and thus compel the owner to abandon his title. Neither is any judgment rendered against the owner for the value of the improvements, to be enforced by levy of execution. These two provisions in the statutes of Ohio and Iowa, respectively, were held to be unconstitutional upon the ground that they invaded the rights of private property as secured by the constitutions of the respective states. *McCoy v. Grandy*, 3 Ohio St. 463; *Childs v. Shower*, 18 Iowa, 261. It may be remarked that the original statute of 1848 provided that "the court shall order and decree the balance so found due to be paid." This clause is not found in the present statute, and the amount of the lien cannot, apparently, be collected by levy upon the defendant's property.

The statute is said to be unconstitutional, in that it impairs the effect of conveyances, in violation of the provision of the constitution of the United States, (article 1, § 10,) which prohibits a state from passing a law impairing the obligation of contracts; and that, as regards pre-existing conveyances or estates, it is contrary to the state constitution, because it deprives a person of his property without due course of law, and deprives him of his right of trial by jury. I do not think that it is necessary to enter into a critical examination of these constitutional provisions. The defendants' suggestions are founded upon a harsh view of the nature of the statute. It does not impair the obligation of any contract between the owner and his grantor, or between the state and the owner. It interferes with no legal title. It interferes with, and is an abridgment of, the right to the immediate possession and beneficial enjoyment of property, as that right existed at common law, and, to that extent, impairs the interest which owners formerly had in lands. It cannot be said to be an unjust or unreasonable limitation of the common-law right of possession, but, on the contrary, the provisions are reasonable. *Society v. Wheeler*, 2 Gall. 105; *Jackson v. Lamphire*, 3 Pet. 280; *Curtis v. Whitney*, 13 Wall. 68; *Welch v. Wadsworth*, 30 Conn. 149.

Discussion upon the constitutionality of this statute has not, apparently, arisen in the courts of this state. An examination of decisions elsewhere upon statutes of this class shows that *Green v. Biddle*, 8 Wheat. 1, decided that the betterment act of Kentucky was unconstitutional, because it was a violation of the compact between Virginia and Ken-

tucky. It may fairly be inferred, from the express views of the court, as given by Judges STORY and WASHINGTON, that it disliked the statute irrespective of the contract, and was not satisfied with its provisions. These *dicta* may properly be read in the light of the decision in *Bank v. Dudley's Lessee*, 2 Pet. 492, in which case no opinion was expressed upon the general principles of the betterment act of Ohio. The constitutionality, with relation to the constitutions of the respective states whose courts gave the decisions, or the justice of statutes similar in substance or in principle to the Connecticut statute, has been learnedly discussed and sustained in the following, among other, cases: *Withington v. Corey*, 2 N. H. 115; *Whitney v. Richardson*, 31 Vt. 300; *Armstrong v. Jackson*, 1 Blackf. 874; *McCoy v. Grandy*, 3 Ohio St. 463; *Ross v. Irving*, 14 Ill. 171; *Childs v. Shower*, 18 Iowa, 261. The constitutionality of the Tennessee statute was condemned in *Nelson v. Allen*, 1 Yerg. 376. Judge CATRON says that the question of constitutionality did not properly arise in that case, and expresses no opinion upon the point. The demurrer is overruled.

NATIONAL WATER-WORKS CO. v. SCHOOL-DISTRICT NO. 7.

(Circuit Court, W. D. Missouri, W. D. May, 1882.)

1. SCHOOL BUILDINGS—CITY SCHOOLS—INCORPORATION OF DISTRICT—CONSTRUCTION OF CONTRACT.

Act Mo. 1877, provides that "any city, town, or village, the plat of which has been filed in the recorder's office of the county in which the same is situate, may, together with the territory which is or may be attached thereto, be organized in a single school-district, and when so organized shall be a body politic." *Held* that, when schools formerly under control of a city are organized under this law, the property in the school buildings does not cease to be in the city, and hence a water-works company, which contracts to furnish water free of charge for "all public buildings and offices of the city," is bound to supply the school buildings; especially so when the contract was made before the schools were so organized.

2. MUNICIPAL CORPORATIONS—CONTRACTS—CONSTRUCTION.

The rule that a court, in construing a doubtful provision of a contract, will follow the interpretation placed upon it by the parties, does not apply to contracts made by a municipal corporation in matters affecting the public interest.

At Law. Action by the National Water-Works Company against School-District No. 7 of Kansas City, to recover compensation for water used in the school buildings. On motion to set aside a nonsuit. Motion denied.

KREKEL, J. The controversy in this case between the water-works company and the school board of Kansas City has its origin in the construction of an ordinance under which the water-works of the city were built, incidentally requiring the ascertainment of the object and policy of that portion of the school laws of Missouri under which public schools in cities, towns, and villages are organized. It appears that in 1873 the city of Kansas entered into a contract with the National Water-

Works Company of New York for the construction of its present water-works, fixing the obligation and liabilities of the parties by an ordinance, the portion of which pertaining to this controversy reads as follows:

"The city may also use and take, and the company is to supply, from the water-works as now constructed and hereafter extended, water for use in all public buildings and offices of the city, and for any fountains the city may erect on the public grounds, and for any drinking places the city may choose to erect in any portion of the city, and for basins for watering stock from waste water out of such fountains. * * * Said company shall not have any pay or compensation for water the city may so use or take, other than the hydrant rent to be paid as by this ordinance is provided."

The question is, do the public school buildings come within the meaning of this ordinance, and are they public buildings of the city of Kansas, and as such to be supplied with water by the water-works company free of charge? The plaintiff claims they are not public buildings, within the contemplation of the ordinance, and that they have not been so regarded; and hence the school board has made a verbal contract with the water-works company by which they agree to pay for the water used by the public schools. In 1873, the time when the water-works ordinance was passed, no school board of any kind existed, and the city, under its corporate authority, had full and complete control over its schools, as may be seen from the provisions of its charter, which are as follows:

"The mayor and councilmen shall have power to sell in fee-simple, lease, regulate, or otherwise dispose of, all lots of ground, and all money and property, to which the inhabitants may be entitled for the benefit of schools, and may take all necessary steps to maintain suits to recover the same, or effect compromises with conflicting claimants, and to appropriate such money or property in such manner as they may consider advantageous to the support of schools."

At the time of contracting for the building of the water-works, nearly all the public school buildings of Kansas City had been erected, and were occupied and used for school purposes. The present defendant corporation had no existence, and the city had entire control over its schools, including the right of property. Under such a state of facts, it would seem that scarcely a doubt could exist as to the school-houses being public property, and within the spirit and meaning of the provisions of the ordinance. But we have the admitted verbal agreement of the present or some former school board with the water-works company to pay for the water used at the public schools. Regarding this verbal agreement, it may be said that the construction given to a doubtful provision by the parties to a contract, and affecting their interest only, often influences courts in their judgment, upon the reasonable presumption that the parties to a judgment are in a condition to best know what was meant or intended by it, and, moreover, likely to guard their interest. The force of such reasoning is broken when we come to apply it to municipal corporations. They must of necessity have their affairs conducted by persons selected according to law, who often have but a

general public interest in the matters intrusted to them, are frequently changed, and not always the best calculated to construe contracts made by their predecessors. This is illustrated to some extent in the case before the court, in which school directors of one board contracted to pay, and the same or another set of directors afterwards refused payment. A court asked to construe the provisions of a contract under such or similar circumstances may well hold itself free to do so without being influenced by the views entertained or even acted on by the corporators, especially in a case involving public interests, as the present one does.

Passing from the question of construction to the consideration of the nature of the two corporations, the present school board and Kansas City proper, it is contended for the water-works company that they are distinct bodies, each having its own property and exercising control over it, and that, therefore, with no propriety can the public school buildings, the property of the school board, be considered the property of Kansas City within the meaning of the water-works ordinance. We have already seen that at the time of the passage of the city ordinance contracting for the building of the water-works the city of Kansas owned and had full control of its public schools and property pertaining thereto, and, if any such control and ownership passed from it, it must have been when the present board of school directors was organized, which was long after the passage of the ordinance. The present school organization of Kansas City was effected under the act of 1877, according to the laws of Missouri on the subject of schools and that part of it regarding schools in cities, towns, and villages. How did the organization, under this act, affect the public schools of Kansas City, and the title to the property in them, and are the buildings in which they are kept no longer public buildings of the city? The law in reference to the organization of schools in cities, towns, and villages, to which reference has been made, provides: "that any city, town, or village, the plat of which has been previously filed in the recorder's office of the county in which the same is situate, may, together with the territory which is or may be attached thereto, be organized in a single school-district, * * * and when so organized shall be a body politic, and known as school district No. — of — county." Although the school-district is designated a county district, yet that no change in the ownership of the property of the schools was thereby intended is indicated by the requirement that a plat of the city, town, or village shall have been recorded, thus identifying the territorial extent of the *quasi* corporation, and making it identical with the city, town, or village which has organized schools under its provisions. It still more clearly appears that property rights were not affected thereby, for neither the act itself undertakes to transfer the property, nor is there power given therein for the transferring of any title the cities, towns, or villages had to property pertaining to their schools. If the intention of the law was to have the schools in cities, towns, and villages disconnected from other municipal affairs merely, there existed no necessity for authority to transfer property, and the absence of such a provision is accounted for. We take it

that the legislature of Missouri, by authorizing district school organizations in cities, towns, and villages, intended nothing more than the separation of the control of the public schools from general municipal affairs. This view is also supported by the provisions of the law intrusting the election of school directors of cities, towns, and villages to their qualified voters, thus completely identifying the school-districts with the corporations upon which they are ingrafted. Regarding the duality of the corporation in this case, it may be further suggested that municipal corporations are the creatures of the legislative will, which uses them for its own purposes and ends. The distribution of municipal affairs among designated bodies is of frequent occurrence, and these *quasi* corporations, as they are called, while acting independently within their assigned limits, are yet subordinate to the main corporation. Thus we understand the Missouri school law. It has authorized the establishment of schools in cities, towns, and villages, and intrusted the management and control of them and their property to separate organizations for convenience and as a matter of policy, and has made them corporations, in this case called "District No. 7." That such a *quasi* corporation was to remain, and continue to be, a part of the main corporation, we cannot doubt.

It may be further argued in support of the views entertained that the grants of land by congress for school purposes of the sixteenth section in each congressional township is to the inhabitants of the township for the use of schools. The grants here referred to are at the basis of the organization of our school system. The special provisions of law regarding cities, towns, and villages found in the Missouri statutes have their origin in grants made by the act of congress of the 13th of June, 1812. Under the succession of ownership of the country by Spain and France, certain grants of lands and lots had been made to towns and villages and their inhabitants, which grants were recognized by the national government after the cession of the territory. In order to settle the title to property granted before the change, congress passed the act of 1812, already referred to, thereby confirming the grants to the inhabitants in the towns and villages named in the act; and such lands as were not rightfully owned were reserved to the inhabitants for the support of schools. St. Louis, one of the villages named in the act, largely profited by the grant of vacant lots, and early organized schools under legislation to that end. Other villages did the same, and thus legislation for their benefit was ingrafted upon the school laws of Missouri, and under modification became, and now are, the laws regarding cities, towns, and villages. Kansas City, as we have seen, organized its schools under this law. It had no special grants of land, but constituted a part of one or more congressional townships, and thus obtained the benefit of the sixteenth section. The enabling act of 1820, authorizing Missouri to become one of the states of the Union, granted to the embryo state, among others, the following lands: "Section number 16 in every township, for the use of the inhabitants of such township for the use of schools." The grant is to the inhabitants of the townships,

be they in a city, town, village, or in the country, without special organization. To the property derived from the source named the citizens of Kansas City generously added, until to-day they possess magnificent school buildings and schools. To the suggestion that the property belongs to School-District No. 7, or the board of school directors, the citizens of Kansas City would readily and truthfully reply, "We are School-District No. 7, and the school board is ours. Neither can deprive us of our property, nor affect its character." To such argument there is no answer; nor is it invalidated by the fact that a fraction of territory outside, but adjoining, the city, may for convenience and its own benefit have connected itself with the school organization of the city, as under the law may be done.

The conclusions reached are that the verbal agreements made by the board of school directors in behalf of School-District No. 7 with the water-works company, to pay for water used for public schools, was without consideration and void; that the public school-houses of Kansas City are public buildings of the city, within the meaning of the water-works ordinance; and that the water-works company is bound to furnish water for their use free of charge, other than provided in the ordinance. Motion to set aside nonsuit denied.

In re DAVENPORT, Chief Supervisor of Elections.

(Circuit Court, S. D. New York. October 11, 1880.)

1. ELECTIONS — MISCONDUCT OF CHIEF SUPERVISOR — INSTRUCTIONS TO SUPERVISORS — REGISTRATION OF VOIERS.

Under Rev. St. U. S. § 2025, which provides that chief supervisors of elections shall discharge the duties imposed upon them "so long as faithful and capable," the issuing by a chief supervisor to his subordinates of instructions that are substantially and materially the same as others previously issued, and approved *ex parte* by the district attorney for the United States and the judge of the United States district court, is not a ground for his removal from office. Such approval is sufficient to repel any imputation of bad faith.

2. SAME.

A United States chief supervisor of elections instructed his subordinates that, under certain circumstances, "you will * * * require" the statutory oath to be put to an applicant for registration, and "you will make of him" certain inquiries. *Held*, that this should be construed as a direction to request the state inspectors to administer the oath and make the inquiries as provided by the New York election laws, and hence the instruction was a proper one.

3. SAME — REGISTRATION — PROOF OF NATURALIZATION.

The following questions may be proposed by a federal supervisor of election to state inspectors of election as proper to be put to applicants for registration, since they tend to elicit proof of the applicant's naturalization, as contemplated by the election laws of New York, (Laws N. Y. 1872, c. 675:) (1) His age; (2) whether he has served in the army, and been honorably discharged; (3) whether his parents, or either of them, have resided in this country, and, if so, whether they are naturalized, and the time, i. e., whether they, or either of them, were naturalized before the applicant became of age; (4) whether he procured his first papers before receiving his certificate, and, if so, whether it was two years before; (5) whether he appeared in court, or whether his certificate was sent to him, or given him elsewhere; (6) whether he took a witness with him when he received his certificate, and, if so, how long he had known such witness.

4. SAME—CHALLENGING APPLICANTS FOR REGISTRATION.

An instruction from the chief supervisor of elections for the southern district of New York to the election supervisors to challenge an applicant's right to register is not improper, since Rev. St. U. S. § 2012, authorizes the supervisors to do so, and section 2028 requires them to be voters, and voters are given said authority by Laws N. Y. 1872, c. 675.

5. SAME—PREVENTING REGISTRATION.

An instruction that, if it shall appear that an applicant has in his possession a certificate of naturalization improperly issued or granted or improperly obtained, "you will see that such person is not allowed to register," is not improper, since it merely advises the use of proper means to prevent his unlawful registration.

6. SAME—INVALID CERTIFICATE OF NATURALIZATION.

An instruction that in such case you "will take from him" his certificate, and attach thereto a statement of the facts as given by the applicant, etc., is improper, since it may be construed to require the supervisor to take the certificate without the applicant's consent, or even by force, which he has no authority to do.

At Law. Application for the removal of John I. Davenport from the office of chief supervisor of elections for the southern district of New York.

His removal was asked under Rev. St. U. S. § 2025, which provides that chief supervisors of elections "shall, so long as faithful and capable, discharge the duties" imposed upon them; and a want of fidelity and capacity such as is contemplated by the statute was alleged to exist because, as chief supervisor of elections, he had issued instructions to the supervisors of election as follows:

"INSTRUCTIONS TO SUPERVISORS OF ELECTION.

"OFFICE OF CHIEF SUPERVISOR OF ELECTIONS, SOUTHERN DISTRICT OF NEW YORK, ROOMS 100 AND 101, FOURTH FLOOR, UNITED STATES COURT-HOUSE.

"NEW YORK, October 4th, 1880.

"To Each Supervisor of Election in the City of New York: You will see to it that every applicant for registration who is possessed of a so-called certificate of naturalization purporting to have been issued from the supreme and superior courts in this city in the year 1868, unless the same was issued by the supreme court under date of October sixth, 1868, and that day only, is notified that his said certificate is believed to be false and fraudulent; and, if he then persists in registering himself, you will challenge his right to register, and require the statutory oaths to be put to him. Upon such challenge, after the party is sworn, you will make of him the following inquiries: *First.* What was his age when he came to this country. *Second.* Whether he has served in the army, and been honorably discharged. *Third.* Whether his parents, or either of them, have resided in this country, and, if so, whether they are naturalized, and the time of such naturalization, *i. e.*, whether they, or either of them, were naturalized before the applicant for registration arrived at the age of twenty-one. *Fourth.* If the answer to question one shows that the applicant for registration was over the age of eighteen when he came to this country, and the answers to questions two and three be in the negative, he should then be inquired of as to whether he procured his first papers before receiving his certificate, and, if so, whether it was two years before. *Fifth.* Whether he personally appeared in court when he obtained his certificate, and was sworn, or whether it was sent to him, or given him elsewhere. *Sixth.* Whether he took a witness to court with him when he received his certificate, and, if so, how long he had known the person who was his witness. If the board of inspectors decide thereafter to register any such person, you will note your compliance with these instructions in your supervisors'

book, against the name of the applicant, under the column headed 'Remarks.' Such entries will be made in the following manner: 'Challenged and examined, and oath taken.' You will also note in the back leaves of your book a memorandum of the several persons so notified and challenged, and of their answers to above inquiries. Your rigid compliance with these instructions will be required. You are further directed: (1) That whenever, upon your examination of any person applying for registration, it shall appear that such person has in his possession a certificate of naturalization improperly issued or granted, or improperly obtained, you will see that such person is not allowed to register, and will take from him his certificate, and attach thereto a statement of the facts as given by the applicant, together with his name and address, and return the same with your book to the assembly district aid, to be forwarded to the chief supervisor. (2) It has come to the knowledge of the chief supervisor of elections that many persons possessed of fraudulent and void certificates of naturalization issued by the superior and supreme courts in the city of New York in the year 1868 have torn up or destroyed their certificates. Some of these persons have heretofore been allowed to register upon their claim to have been naturalized, but to have 'lost their papers.' Where a person seeks to be registered by reason of his having been naturalized, he must produce his certificate, or be required to obtain a duplicate thereof. If, for any substantial reason, such as that the records of the court where the applicant was naturalized have been burned or otherwise destroyed, so that he cannot obtain a duplicate, then the evidence of any one who knows the fact of the naturalization of the applicant, or who has seen up his certificate, may be received; but the court, and the date of the naturalization, as nearly as possible, and the time and circumstances under which the certificate was lost, must be stated. (3) Each supervisor will be careful to inspect each naturalization certificate presented, and observe its date, as set forth in the front part of the certificate. The date at the close is frequently the date of the issue of a duplicate, and you must be careful, and not be misled by it. (4) The most rigid compliance with these instructions, and those contained upon the last page of the supervisors' book, is urged. The chief supervisor expects each officer to fully discharge his duties. The office of supervisor of election is no sinecure, and any appointee who feels himself unable to properly perform its duties had better resign. (5) The yellow-covered book sent you is the chief supervisor's copy, and must be written up upon each of the stained lines, beginning with the first, and must be a copy of the other book kept by you, save that it must not be spaced, and no regard must be paid to any order of arrangement by streets or house numbers, as in your other book. In other words, it must be written up as the parties appear for registration, line by line.

"Respectfully,

JOHN I. DAVENPORT,

"Chief Supervisor of Elections."

E. E. Anderson and G. W. Wingate, for the application.

E. W. Stoughton and E. Root, opposed.

Before BLATCHFORD and CHOATE, JJ.

BLATCHFORD, J. We are prepared to dispose of this matter now. The two judges concur entirely in their views upon the subject, although the decision must be considered as being made by the circuit judge sitting alone, with the advice and concurrence of Judge CHOATE. We do not think a case is made out for removing Mr. Davenport, under this petition. The instructions, so far as the substance and materiality of them are concerned,—everything that precedes the second further direc-

tion,—appear to be the same which were issued previously, and approved, so far as such approval went, although *ex parte*, by the district attorney and by Judge Woodruff. Under such circumstances, this court would not be authorized to say that the reissuing of these instructions was evidence of want of fidelity or want of capacity on the part of the chief supervisor. Certainly, these circumstances repel all imputations of any bad faith on his part, while at the same time they may not be conclusive upon this court, sitting judicially, as to the propriety of the instructions.

Now, as to the instructions themselves. The question of their propriety has been argued to us, and we have been asked to express an opinion in regard to them. The decision not to remove Mr. Davenport disposes, perhaps, of the prayer of the petition; but we deem it proper, in view of the questions involved, and of the arguments of the counsel on both sides, to give our views upon the instructions, as the views of the court, without making any order whatever in the premises, except to deny the prayer of the petition for the removal of Mr. Davenport.

We regard the inquiries which the instructions direct shall be made of the person presenting an 1868 certificate of naturalization as proper ones to be made. We do not understand that there is anything in these instructions which is intended to interfere in any manner with the proper prerogatives and duties of the inspectors. The inspectors are to decide whether the applicant is to be registered or not. If they refuse to register him, the remedy is by *mandamus* from the supreme court of the state; and, if they improperly put his name upon the registry, undoubtedly there is a remedy. We do not see anything in these instructions which in any manner militates against this proposition. If these inquiries, or any other inquiries, are asked of the applicant, and he refuses to answer one way or the other, the consequence will be that his name will not be registered. If he says that he will not answer the inquiries because the answers may tend to criminate him, that will make no difference. He does not answer, no matter what the reason is; and, if he says he will not answer, he assumes the consequence.

These instructions were made with reference to the registration and election laws of the state of New York, (Laws N. Y. 1872, c. 675;) and we consider the inquiries or questions to be inquiries running *pari passu* with the questions which are authorized and required by those laws to be put to a person offering to vote as a naturalized person. The inspectors are not only required to put certain questions, but they are authorized to put such other questions as affect the right of the person to vote. Such is also the purport of the oath.

The instructions direct the supervisor to challenge the right to register of a person who persists in registering on an 1868 certificate. We think sufficient is shown to warrant an inquiry into these 1868 papers. We cannot go behind the affidavit of Mr. Davenport. We have not the facts before us upon which he acted, and must take his affidavit upon that subject as showing sufficient grounds for an inquiry in regard to persons offering to register on 1868 papers. The right of the supervisor

to challenge any person offering to register is expressly given by the statute of the United States, (Rev. St. § 2017;) and that statute (section 2028) requires that the supervisor shall be a voter. The statute of the state gives the right of challenge to any voter.

The instructions then direct the supervisor to require the statutory oaths to be put to the applicant. That is no more than asking the inspector to put the statutory oath. The inspector is the proper person to put the statutory oath, and he is, under the state law, required to do so. When the oath is put, the applicant is to be examined. How is he to be examined? The state law provides that the inspector shall put the questions. These instructions say: "Upon such challenge, after the party is sworn, you will make of him the following inquiries." Further on, they say: "Whenever, upon your examination of any person applying for registration, it shall appear that such person," etc. It does not follow at all, from this language, that the questions are to be put directly by the supervisor to the applicant. They are to be put in the usual lawful way,—through the inspector. That is the meaning, although the language might be made more accurate. The inspector, being by law the person who is to administer the oath and put the questions, may not put the questions proposed by these instructions. He may have his attention called by the supervisor to the advisability of putting these questions, and he may refuse to put them; but nevertheless they are proper questions for the supervisor to ask to have put.

The theory of the statutes of the state of New York in regard to registration is that the right of a naturalized person to vote, even though he presents a certificate of naturalization, is to be inquired into by the inspectors; and there is nothing in the decision of this court in *In re Coleman*, 15 Blatchf. 406, which conflicts or interferes with this view.

The instructions then proceed:

"That whenever, upon your examination of any person applying for registration, it shall appear that such person has in his possession a certificate of naturalization improperly issued or granted, or improperly obtained, you will see that such person is not allowed to register," etc.

That is not an instruction of prohibition. If the inspector is about to put down the name of the applicant as a registered voter, this instruction does not mean that the supervisor is to seize the pen, and take it from the inspector's hand, and thus prevent the registering. It merely means that the supervisor is to use proper means to see that the inspector does not register the applicant. But, of course, the inspector may still register him. The form of expression is, perhaps, not as accurate as it might be, but at the same time it is a form not improper to have been used; and we do not understand that it conflicts in any manner with the freedom of action of the inspector.

The instruction proceeds:

"And will take from him his certificate, and attach thereto a statement of the facts as given by the applicant, together with his name and address, and return the same, with your book, to the assembly district aid, to be forwarded to the chief supervisor."

That portion of this instruction we regard as unwarranted, and not to be supported. We regard it as tending to a breach of the peace, and as totally unauthorized under the circumstances in respect to which it is given. If a person is arrested, under section 2022 of the Revised Statutes of the United States, by a deputy-marshal or a supervisor, for illegally attempting to register, and, in connection with that arrest, the inculminating and inculpatory certificate is taken, together with the person, before a magistrate, that may be a proper proceeding; but it will be a very different proceeding. We do not think that the words, "will take from him his certificate," are capable of the modified construction sought to be given to them by one of the counsel,—that the supervisor is merely to receive the certificate if the person gives it up. It is capable of a different construction. Moreover, in the petition in this case, it is stated that in several cases the certificate has been taken from the applicant, and on his demanding it back the supervisor has refused to return it. If it is submitted to the inspector, and the inspector passes it to the supervisor, and the applicant then asks to have it returned to him, the withholding it then by the supervisor amounts to the same thing as if he had taken it forcibly from the applicant. We do not think that that portion of the instruction can be upheld.

In regard to the point raised by Mr. Wingate, in his last observations to the court, about the evidence to be submitted as to naturalization,—either the original certificate or some substituted evidence,—it would seem that perhaps the instruction goes a little beyond the intent of the state statute. The state statute seems to be that the applicant is to produce the original certificate of naturalization, if he can, but that, if it is lost, he may show the fact of his naturalization by other evidence than the production of a duplicate of such certificate. This instruction seems to proceed upon the principle that the best attainable evidence must be produced,—either the original certificate or a duplicate. It says:

"If, for any substantial reason, such as that the records of the court where the applicant was naturalized have been burned or otherwise destroyed, so that he cannot obtain a duplicate, then the evidence of any one who knows the fact of the naturalization of the applicant, or who has seen his certificate, may be received."

This is stated as the opinion of the chief supervisor of elections. It may or may not be acted upon by the inspectors. It would seem, so far as the court now perceives, to be a departure somewhat from what is required by the state statute. We have not had an opportunity to examine it with care, and it has not been commented upon by the counsel for the chief supervisor. But the departure is not a very grave or serious one; and the matter is, unquestionably, to be regulated by the inspectors. If the supervisor sees fit to say to the inspectors, under these instructions, that the state law is so and so, and it is not, the inspectors know better, for they have the guidance of the state law, and of the instructions to them thereunder; and they will continue to act as they see fit. The instruction in question, though it may be erroneous, is not sufficient ground for removal, and does not require more serious comment.

These are our views on the subject, in which both judges concur. They cover the whole ground; and my associate, Judge CHOATE, says that he has nothing to add.

COMMISSIONERS OF THE SINKING FUND OF LOUISVILLE *et al.* *v.* BUCKNER *et al.*

(Circuit Court, D. Kentucky. December 1, 1891.)

1. CIRCUIT COURTS—JURISDICTION—SUIT TO RECOVER INTERNAL TAXES.

A suit against an internal revenue collector to recover taxes alleged to have been illegally collected is cognizable in the circuit court, both under Rev. St. U. S. § 629, giving that court jurisdiction of causes arising under any law providing internal revenue, and under Act Cong. March 3, 1887, giving it jurisdiction of causes arising under the laws of the United States.

2. LIMITATION OF ACTIONS—DEMURRER.

In a suit to recover internal revenue taxes alleged to have been illegally collected, where the complaint shows that more than two years have elapsed, and it is therefore barred by Rev. St. U. S. § 8227, the bar may be raised by demurrer, since that section contains no exceptions.

3. INTERNAL REVENUE—ILLEGAL TAXATION—SUIT TO RECOVER.

As the right to sue the United States through its collectors, to recover taxes alleged to have been illegally collected, is only a remedy given by statute, no such right exists, unless the conditions prescribed by Rev. St. U. S. §§ 3226, 3227, are strictly complied with, namely, that an appeal must first be taken to the commissioner of internal revenue, and the suit must be brought within two years from the date of his decision.

4. LIMITATIONS OF ACTIONS—CLAIM BY CITY.

The rule that statutes of limitation do not run against the state does not apply in favor of a city, in virtue of the governmental powers exercised by it, in respect to a claim of the city against the United States for taxes alleged to have been illegally collected.

5. SAME—REMOVAL OF BAR.

Act Cong. June 16, 1890, authorized the secretary of the treasury and the commissioner of internal revenue to audit and adjust the claim of the city of Louisville "for internal revenue taxes on dividends on shares of stock" owned by the city in the Louisville & Nashville Railroad Company, "to the extent that such taxes were deducted from any dividends due and payable," and to pass upon the claim "in the same manner as if said claim had been presented and prosecuted within the time limited and fixed by law." *Held*, that this removed the bar of the statute of limitations against the claims specified, in respect both to taking an appeal from the collector to the commissioner of internal revenue, as provided in Rev. St. U. S. § 3226, and to the time of bringing suit, as provided in section 3227.

6. SAME.

But the words of the act, "taxes on dividends on shares of stock" owned by the city, do not include taxes paid by the railroad on its gross receipts and on undivided profits, and the bar is not removed as to a claim therefor.

7. SAME—INTEREST ON ILLEGAL TAXES.

As the taxes were originally paid without protest, and no appeal was taken to the commissioner of internal revenue, and no demand made for repayment, no interest would have been allowed on the claim, under the general policy of the government, if it had been prosecuted before the statute had run to completion; and therefore, as the act of 1890 authorized judgment to be rendered on the claim "in the same manner and with the same effect as if said claim had been presented and prosecuted within the time fixed by law," no right to interest was given thereby.

At Law. Action by the commissioners of the sinking fund of Louisville, Ky., against Lewis F. Buckner, as executor of James F. Buckner, and others, to recover taxes alleged to have been illegally collected by

James F. Buckner, as collector of internal revenue for the United States. Heard on demurrer to the bill. Demurrer sustained.

Albert S. Willis and F. T. Fox, for plaintiffs:

George W. Jolly, U. S. Atty., for defendants.

BARR, J. The plaintiffs sue the defendants, who are the executors and heirs of James F. Buckner, for various sums of money, which he, as collector of internal revenue for this district, received before the 1st of May, 1872, and which they allege were taxes illegally assessed and collected of the Louisville & Nashville Railroad Company, under the authority of various acts of congress. The city of Louisville was at the time a large stockholder in said railroad company, and plaintiffs claim that the taxes which were assessed and collected of said company on the city's share of the gross earnings, the undivided surplus, and the dividends (cash and stock) of said company were illegal and invalid. Neither the city of Louisville nor the commissioners of the sinking fund had made application to have said taxes refunded within the time or in the manner required by the acts of congress. Congress, by an act approved June 16, 1890, and entitled "An act for the relief of the board of the commissioners of the sinking fund of the city of Louisville, Ky.," enacted as follows:

"That the secretary of the treasury and the commissioner of internal revenue be, and they are hereby, authorized and required to audit and adjust the claim of the board of the sinking fund commissioners of the city of Louisville, Kentucky, for internal revenue taxes on dividends on shares of stock owned by said board for said city of Louisville in the Louisville and Nashville Railroad Company, to the extent that such taxes were deducted from any dividends due and payable to said board, and to pass upon said claim, and render judgment thereon in the same manner, and with the same effect, as if said claim had been presented and prosecuted within the time limited and fixed by law."

The plaintiffs presented their claim under this law, and the secretary of the treasury and commissioner of internal revenue allowed them \$42,514.03, which has been paid by the United States. This sum was the taxes collected on the dividends, both cash and stock, which were declared by the railroad company and paid by the city of Louisville. They, however, refused to allow any interest, or to refund the taxes which had been collected on the gross receipts, and the taxes on the undivided profits or surplus.

This suit is brought to recover interest on \$9,494.72 from May 9, 1872, which sum is the amount of taxes he collected on dividends belonging to the city of Louisville, and which had been refunded to plaintiffs without interest; and the sum of \$4,590.57, which is the city's share of the taxes alleged to have been received by said Buckner, as collector, from the railroad company, on its gross receipts, with interest from November 28, 1870; and \$1,704.20, which is the taxes alleged to have been collected by him on the city's share of the undivided surplus or profits, with interest from November 10, 1871.

The defendants have demurred to the petition, and have alleged several grounds therefor. The first is that this court has no jurisdiction. The plaintiffs and defendants are citizens of the same state, but we think this is a cause arising under a law of the United States providing internal revenue, and is one of the class of cases of which the circuit court is given jurisdiction by the fourth subdivision of section 629, Rev. St. It is also a case arising under the laws of the United States, and is within the first clause of the act of March 3, 1887, which gives the circuit court jurisdiction of causes arising under the laws of the United States. 25 St. at Large, p. 434. This ground of demurrer is therefore overruled.

The second ground is that the petition shows the plaintiffs' cause of action accrued more than two years before the commencement of this suit, and is therefore barred by section 3227, Rev. St. The bar of a statute of limitation may be raised by demurrer when there is no exception to the statute, and the petition shows the bar of the statute complete. *Bank v. Lowery*, 93 U. S. 72; *Bank v. Carpenter*, 101 U. S. 567; *Rankin v. Turney*, 2 Bush, 555; *Chiles v. Drake*, 2 Metc. (Ky.) 146.

In cases like this one, there can be no doubt of this, as the action is really a statutory remedy, and an indirect action against the United States, although nominally against a collector for the recovery of taxes illegally collected by him. The appeal of the commissioner of internal revenue to refund taxes illegally assessed and collected, and then a suit within the time provided by the statute, is a condition precedent. The supreme court, in discussing this subject, lays down this rule:

"An allowance by the commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose, under an act of congress. Until an appeal is taken to the commissioner, no suit whatever can be maintained to recover back taxes illegally assessed or erroneously paid. If on the appeal the claim is rejected, an action lies against the collector, (Rev. St. § 3226,) and through him, on establishing the error or illegality, a recovery can be had. If the claim is allowed, and payment for any cause refused, suit may be brought in the court of claims. This, as it seems to us, is the logical result of the legislation of congress upon the subject." *U. S. v. Bank*, 104 U. S. 784.

An action like this one is not a common-law action for money had and received, but is a remedy given and regulated by statute. See sections 989, 3220, 3226-3228, 3689, Rev. St., and *Cheatam v. U. S.*, 92 U. S. 85; *James v. Hicks*, 110 U. S. 272, 4 Sup. Ct. Rep. 6; *Arnson v. Murphy*, 109 U. S. 238, 3 Sup. Ct. Rep. 184, 115 U. S. 584, 6 Sup. Ct. Rep. 185; *Savings Inst. v. Blair*, 116 U. S. 200, 6 Sup. Ct. Rep. 353.

The ingenious argument in the able brief of the counsel for the plaintiff, to prove that the limitation of the statute as to the time of bringing suit does not apply, is not convincing, because, as we have seen, the remedy they are pressing is a statutory one, given by congress, by which the United States is being sued indirectly through a suit against a collector of the internal revenue. This remedy is given only when the statute is followed, and when the suit is brought within the time designated in the statute, and there is no exception in this act in favor of

even a state of this Union, much less a city. The statutory remedy must be pursued as granted by congress, else there is no right of action. But if this action was a common-law one, for money had and received, we think the bar of the statute of limitation would apply to the plaintiffs' action, if nothing else appeared. Assuming that the holding of stock in the Louisville & Nashville Railroad Company by the city of Louisville is not merely a private property right, but is a public right, and is the exercise of governmental powers pertaining to sovereignty, the maxim, *nullum tempus occurrit regi*, is not applicable. This maxim is applied only to the sovereign or government that has enacted the limitation act. If foreign nations, subjects or citizens thereof, or municipalities deriving their power from a country other than that which has the act of limitation, seek the tribunals of the latter country, they are not entitled to apply this maxim, and will not be excepted from the limitation, unless the act of limitation excepts them in terms. The states of this Union, as between each other, or as between them and the United States, are not excepted from acts of limitation as to bringing suits, by the application of this maxim.

The plaintiffs' claims, as set out in the petition, are barred by the statute, unless the act of June 16, 1890, has prevented the bar. If this action was one against the defendants individually for money had and received for their use, the act of June, 1890, would not, we think, prevent the running of the limitation. But we have seen that it is, in effect, a statutory action against the United States, indirectly to adjudicate and ascertain the amount due plaintiff. In this view, I am of the opinion the bar of the statute is lifted as to the claim covered by this act. It may be urged that the bar of the statute as to the time of presenting the appeal, under section 3226, is all that is lifted by this act; but the act should be liberally construed and applied to section 3227, as well as section 3226.

This act requires the claim of the board of sinking fund commissioners of the city of Louisville to be audited and adjusted; and the inquiry is, what is that claim? The act itself answers the inquiry, and describes it as being "for internal revenue taxes on dividends on shares of stock owned by said board for said city of Louisville in the Louisville & Nashville Railroad Company, to the extent that such taxes were deducted from any dividends due and payable to said board." Thus, to come within the description, plaintiffs' claim must be for taxes on dividends on shares of stock owned by plaintiff, and which were deducted from said dividends. The taxes paid by the Louisville & Nashville Railroad Company on its gross receipts, under section 103 of the act of June 30, 1864, are not, by any possible construction of this law, a tax on dividends owned by plaintiff, and from which the tax was deducted. The tax was upon all of the receipts of the railroad company, without regard to their source or use, and is in no sense a tax on a dividend on stock owned by plaintiffs. "Dividend" is defined by Webster thus: "A sum divided; a division; a part or share made by division; the percentage divided; applied in cases of the *pro rata* division of assets among cred-

itors, or profits among stockholders." A cash dividend in corporation law is, we think, a division made between stockholders by the legal authority in the corporation of a part of the assets of the corporation, usually out of its profits, by which the stockholders become, and the corporation ceases to be, the owner of so much of its assets thus divided. A stock dividend is unlike a cash dividend, in that the assets of the corporation are not divided, or the property therein changed, but the stock is increased and divided, and the separate holdings of the stockholders increased to the extent of the dividend declared. Neither is the surplus or profits of the Louisville & Nashville Railroad Company, which were undivided, a "dividend," within the meaning of this act of June 16, 1890. They were assets belonging to that company, and did not belong to the stockholders until made their separate property by a division made by the proper corporate authority in the shape of a dividend. This was not done; hence this surplus was not a dividend, nor was the tax on it a tax on a dividend. The allegation of the petition that this surplus or profits were undivided dividends does not make this surplus dividends, within the meaning of the act of 1890. Neither the gross receipts or the undivided profits of the Louisville & Nashville Railroad Company taxed, are within the description of claim of plaintiffs which was to be audited and adjusted under this act. If we were allowed to consider the reason why the act confined the plaintiffs' claim to dividends on stock out of which the taxes had been deducted, it might perhaps be found in the fact that these were the only taxes the city directly paid. The other taxes were assessed and paid by the Louisville & Nashville Railroad Company on its own property, and not upon property belonging to the city, as between it and the city. The taxes levied under section 122 of the act of June 30, 1864, was upon income. In the one instance it was upon the income of the city, and in the other upon the income of the railroad company from its profits which remained undivided. The reasoning of the court in *U. S. v. Railroad Co.*, 17 Wall. 324, recognizes this distinction; hence held the tax illegal in that case. But, whatever may have been the reason for thus confining plaintiffs' claim to one for taxes paid on dividends, we think the construction given the act by us is certainly correct.

The only remaining question is that of interest on the \$9,494.72 from May 9, 1872. This sum has been refunded without interest, and plaintiffs claim they demanded it of the secretary and commissioner, and it was refused, in 1890. This claim must be considered as one against the United States, because, if it be regarded as one against the collector individually, it cannot be sustained at all. There is no allegation to take it out of the bar of the statute of limitation as a claim against the collector individually. The act of June, 1890, provides that the secretary of the treasury and commissioner of internal revenue are "to pass upon said claim, and render judgment thereon, in the same manner and with the same effect as if said claim had been presented and prosecuted within the time limited and fixed by law." All right of action against Buckner individually, if the plaintiffs ever had any, was abso-

lutely barred by the statute of limitation, and clearly these words do not restore the right. Congress may have authority to enact such a law, but this one is evidently intended to lift only the bar of the statute as to the United States. It would require clear and explicit language to make Buckner personally liable for a claim from which he was already freed by the bar of the statute of limitation. Indeed, Buckner would not be personally liable for these taxes, for another reason, and that is, there was no protest or objection made to his collection of them. The allegation is that these taxes were paid by the Louisville & Nashville Railroad Company without the knowledge or consent of the plaintiffs, but there is none that the railroad company protested or objected to their collection or payment. The question of interest, as a claim against the United States, is one not free from difficulty, and I have read with much pleasure and enlightenment the brief of the learned counsel upon this subject. It is, however, not in point to show that recognized writers upon international law declare that interest is demandable between nations, nor that the United States and other nations have demanded and received interest in certain cases of indemnity, and compensation for injuries done their subjects or citizens. The city of Louisville, as well as the state of Kentucky, is a part of the United States, and I presume the rule as to the payment of interest is the same between the United States and the city of Louisville as that between the United States and any citizen.

The rule is stated thus in *U. S. v. Bayard*, 127 U. S. 260, 8 Sup. Ct. Rep. 1156, viz.:

"The case, therefore, falls within the well-settled principle that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established as a general rule in the practice of the government that interest is not allowed on claims against it, whether such claims originate in contract or in tort; whether they arise in the ordinary business of administration, or under private acts of relief passed by congress on special application. The only recognized exceptions are where the government stipulates to pay interest, and where interest is given expressly by an act of congress, either by the name of interest, or by that of damages. * * * Not only is this the general principle and settled rule of the executive department of the government, but it has been the rule of the legislative department, because congress, though well knowing the rule observed at the treasury, and frequently invited to change it, has refused to pass any general law for the allowance and payment of interest on claims against the government."

See, also, *Tillson v. U. S.*, 100 U. S. 43; *Harvey v. U. S.*, 113 U. S. 243, 5 Sup. Ct. Rep. 465.

The inquiry is whether congress has by an act, either general or special, given or allowed interest on claims which may be allowed under section 3220. That section authorizes the commissioner of internal revenue, under such regulations as may be prescribed by the secretary of the treasury, to refund and pay back all taxes erroneously or illegally assessed or collected, and all penalties collected without authority, and also to repay any collector the full amount of such sums of money that may be recovered against him in any court for any internal taxes col-

lected by him, with the cost and expenses of suit, but is silent as to interest. Section 989 provides that when a recovery is had against a collector or other officer of the revenue, for any official act done by him, or for any money paid to him, and by him paid into the treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury. But the section is silent as to interest, either before or after judgment. The permanent appropriation of 1874 is "to refund and pay back duties erroneously or illegally assessed or collected under the internal revenue laws." Rev. St. p. 725, § 3689. This section is silent as to interest on money refunded for taxes illegally or erroneously collected. Section 1090 provides that "no interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest." This, of course, does not bind this court, but it does show a general legislative intent not to allow interest on claims, in the absence of an express contract to do so, or an express provision of a statute.

The supreme court has decided, in considering the effect of a certificate of probable cause, under section 989, that such a certificate practically converts the claim into a claim against the government, "but not until then." *U. S. v. Sherman*, 98 U. S. 567. The court was construing section 989, but this does not apply to section 3220, as to the necessity for such a certificate. The court, in a subsequent case, decided that the commissioner of internal revenue might, under section 3220, pay a judgment rendered against a collector directly to the plaintiff, who recovered the judgment against him, and that, too, when the trial court had refused a certificate of probable cause. *U. S. v. Frerichs*, 124 U. S. 315, 8 Sup. Ct. Rep. 514.

The counsel refer us to several decisions which they claim sustain plaintiff's right to interest. These will be briefly considered. The cases of *Durand v. Lawrence* and *Rheimer v. Maxwell*, 2 Blatchf. 399, and 3 Blatchf. 124, were customs duties, and they were decided in 1852 and 1853. In both cases the importers protested. The case of *White v. Arthur*, 10 Fed. Rep. 81, was also a customs duty case, and the question was whether the judgment for customs duties which had been illegally exacted should bear interest after rendition until paid. The United States had paid the amount of the judgment, but declined to pay interest from the rendition of the judgment until payment, although there had been a certificate of probable cause given by the court at the time of the judgment. The court decided the United States was not bound to pay the interest on the judgment, and ordered a satisfaction of the judgment to be entered upon the motion of the United States. I do not understand that the court intimated an opinion that taxes illegally collected bore interest from the time of their exaction. The case of *U. S. v. McKee*, 91 U. S. 442, was a revolutionary claim, and the question

was as to the proper construction of a special act of congress allowing the claim. The claim was referred to the court of claims—

"With full jurisdiction to adjust and settle the same, and, in making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases, giving proper consideration to official acts, if any have heretofore been had in connection with this claim, and without regard to the statute of limitation."

The court of claims allowed interest, and the supreme court affirmed the decision. The court says:

"The fifth section of the act of August 5, 1790, already referred to, directed the commissioners, who under that act were to settle the claims of the states against the general government, to allow interest, and, but for the bar of time in that act, this case would have come under that statute. The act under which the court of claims took jurisdiction of this case directed it to be 'governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases.' The is a like case to those in which interest was to be allowed by the act of 1790."

We think there is nothing in that case which throws any light on the question of interest in this case. The case of *Bartels v. Redfield*, 23 Blatchf. 486, 27 Fed. Rep. 286, also reported in 16 Fed. Rep. 336, was where a judgment in the nature of special verdict was by consent entered for interest on taxes (customs) illegally exacted, and the effort was made many years thereafter to set it aside. This motion rather indicates that, but for the consent order, no interest would be allowed, though the court did not consider that question. The supreme court, however, in a similar case against Redfield, refused to allow interest on a special verdict of like kind, because there had been a delay of many years in bringing the case to final judgment. *Redfield v. Iron Co.*, 110 U. S. 174, 3 Sup. Ct. Rep. 570.

The case of *Erskine v. Van Arsdale*, 15 Wall. 75, is important, and, as far as it decides, is very much in point. There the lower court instructed the jury that—

"If the collecting officer had notice, at the time of payment, from the taxed person, that the tax was illegal, and that he would take measures to recover it back, the action may be maintained for all the taxes paid; and that if they found for plaintiff they might add interest."

Both instructions were sustained by the supreme court. Chief Justice CHASE, delivering the opinion, said:

"Taxes illegally assessed and paid may always be recovered back if the collector understands from the payer that the taxes are regarded as illegal, and that suit will be instituted for the refunding them. * * * The ground for the refusal to allow interest is the presumption that the government is always ready and willing to pay its ordinary debts. When an illegal tax has been collected, the citizen who has paid it, and has been obliged to bring suit against the collector, is, we think, entitled to interest in the event of recovery from the time of the illegal exaction."

The court had previously decided that a person who voluntarily paid illegal taxes could not recover them from the collector, but that if he paid such taxes under protest, or at the time of payment gave notice to the col-

lector that he intended to bring suit against him to test the validity of the tax, he could maintain an action of *assumpsit* against the collector. *Philadelphia v. Collector*, 5 Wall. 732. The court, however, explained in *Collector v. Hubbard*, 12 Wall. 12, that this action of *assumpsit* was not a common-law action based upon an implied promise of the collector, because, if that was the fact, a good defense to it would be that the law required the taxes to be paid into the treasury of the United States, and that he had paid them over in obedience to the law, but said this action, in form *assumpsit*, was really a statutory remedy against the collector, to ascertain and determine the liability of the United States. We understand the present law not to require a protest at the time of payment, but an appeal to the commissioner of internal revenue will be sufficient. We, however, think that, if the United States is liable for interest at all, it can only be from the time of a protest, if one is made, or from the refusal to refund, after the appeal to the commissioner under section 3220. Any other rule would be unjust. If the taxes are voluntarily paid, the United States is not in default in the repayment until a demand or protest. In the case at bar, the United States would not, in the absence of a statute of limitation, be in default as to the refunding of these taxes until a demand was made upon it to refund. Neither the United States nor its collector, Buckner, could be presumed to have known these taxes were illegally collected. The illegality depended upon the fact that the city of Louisville was a stockholder, and to that extent only was it illegal. The assessment and payment were both *prima facie* regular and legal, and, as far as this record shows, the United States has never been in default as to the refunding of these taxes. In the case of *Bailey v. Railroad Co.*, 22 Wall. 604, and 106 U. S. 109, 1 Sup. Ct. Rep. 62, the taxes were paid under protest, and after the railroad company's property had been taken under distress warrants. In that case interest was allowed from the time of payment. See *In re New York C. & H. R. R. Co.*, 6 Lawr. Dec. 137. I cannot find that the question of interest was considered by the court, though Judge LAWRENCE, then comptroller, seems subsequently to have protested vigorously against it when it was too late to make the question.

If we are correct in our view of the law, the only possible claim for interest must be based upon the act of 1890. That act must not only have lifted the statute of limitation, but have conferred the right to interest from the time of the collection from the railroad company, or from two years after this collection. The language of this act is "to pass upon said claim, and render judgment thereon, in the same manner and with the same effect as if said claim had been presented and prosecuted within the time limited and fixed by law." The claim as described was for the taxes illegally collected, and the interest was an incident to the claim, if allowed. It would be compensation given for the use of the money—taxes—withheld, or in the nature of damage for the delay in refunding it. But, considered as a claim, there was none at the time of the passage of the law, because the necessary steps had not been taken. Congress must therefore have intended merely to lift the bar of the statute

of limitations, and allow the claim as described in the act to be passed upon with the same effect as if it had been presented within the time limited; or not only to do this, but, in addition, to give plaintiffs the right to interest, which they did not then have, and could not have recovered, if there had been no bar of the statute of limitation. It seems to me the proper construction of the act is that congress only intended to prevent the running of the statute of limitation by allowing the claim to be considered and passed upon with the same effect as if there was no such statute, and did not intend to increase plaintiffs' existing rights by giving a demand made in 1890 the same effect, as to interest, as if it had been made in 1872. I am inclined to the opinion that the law, as announced in *Erskine v. Van Arsdale*, 15 Wall. 75, has been somewhat modified, as to interest on taxes illegally collected, by the later cases. See *U. S. v. Bayard*, 127 U. S. 260, 8 Sup. Ct. Rep. 1156; *Stuart v. Barnes*, 43 Fed. Rep. 281. But, assuming the law as laid down by Chief Justice CHASE is unmodified, the plaintiffs cannot recover interest in this case, because they have not taken the necessary steps to entitle them to it, and the act of June, 1890, has not given it to them. We conclude, therefore, that defendants' demurrer must be sustained to the entire claim and petition, and it is so ordered.

HICKS v. JAMES' ADM'X.

(Circuit Court, E. D. Virginia. January, 1883.)

INTERNAL REVENUE—RECOVERY OF TAXES ILLEGALLY PAID—PRESENTATION OF CLAIMS—LIMITATIONS.

A claim for the refunding of taxes alleged to have been illegally collected was made to the commissioner of internal revenue upon form 47, prescribed by the department for claims "for the remission of taxes improperly assessed," instead of upon form 46, for claims "for taxes improperly paid," and was rejected. After a long delay, caused by loss of papers by the department, it was at length presented on form 46, supported by the proper affidavits. Act Cong. July 13, 1866, c. 184, § 19, as amended by Act Cong. June 8, 1872, c. 315, § 44, declares that no suit shall be maintained to recover taxes illegally collected until claim has been made to the commissioner and a decision had thereon, or until the decision has been delayed for more than six months; and that no suit can be brought more than one year after his decision. *Held*, that the claim was not in shape for decision on the merits until the last presentation, and, the decision being delayed more than six months, suit could be brought, notwithstanding that more than a year had elapsed since the first rejection, and that the commissioner refused to act on the ground that the first rejection was final.

At Law. Action by S. D. Hicks against the administratrix of William James, deceased, to recover taxes alleged to have been illegally collected by him as United States internal revenue collector, at Richmond, Va.

Upon the subject of refunding taxes, Act Cong. July 13, 1866, c. 184, as now embodied in Rev. St. U. S. § 3220, provides, among other things, that "the commissioner of internal revenue, subject to regulations prescribed by the secretary of the treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously

or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount or in any manner wrongfully collected." Section 19 of the same act, as amended by the act of June 6, 1872, c. 315, § 44, (Rev. St. U. S. § 3226,) provides, in substance, that no suit shall be brought to recover taxes illegally or erroneously collected, unless an appeal has first been taken to the commissioner of internal revenue, and a decision thereon had by him: provided, that a suit may nevertheless be brought if his decision is delayed more than six months, but that no suit shall be brought more than a year after a claim is rejected.

HUGHES, J. This is an action for the recovery of \$3,292.95, claimed to have been illegally collected for taxes claimed to have been not really due, on 218½ boxes of manufactured tobacco, which were claimed to have been removed from the place of manufacture previously to the 1st September, 1862, and therefore not subject to the tax imposed by the act of July 1, 1862, "to provide internal revenue," etc. The defendant's intestate, William James, was collector of internal revenue at Richmond, Va., and the tax was paid by the plaintiff, under protest, in October, 1865, to him as collector. A claim, dated December 23, 1865, was filed in the office of the commissioner of internal revenue at Washington by the plaintiff on the 8th February, 1866, for this identical sum of \$3,292.95. That claim was made on form 47, entitled "For the remission of taxes improperly assessed," which, under regulations of the department, was and is used only in cases where the amount of taxes assessed is alleged to have been excessive; and the claim is only for the reduction of the assessment, but not for the refunding of taxes which have already been actually paid. It seems that plaintiff's attorney or agent in the matter, confounded form 47 with form 46, which latter is the form required by the regulations of the department to be used where the claim is for the refunding of taxes already paid to the collector, its caption being "Claim for taxes improperly paid." This claim for the correction of an assessment was formally rejected by the commissioner of internal revenue, because, as I presume, it was made on a wrong form. It was rejected by a letter from the commissioner to the collector dated the 10th of May, 1866. Some time after the filing of this claim, to-wit, on the 9th of March, 1866, the plaintiff filed his claim in the office of the commissioner, made out this time on the proper form,—46,—but not supported by the certificate either of the assessor, or assistant assessor, or collector of the district, which is required to accompany every such claim, by regulations of the department. This claim was also rejected by the commissioner, in the same letter of May 10, 1866, already mentioned. It was rejected, I presume, because of its lack of the certificate of some proper officer of the revenue in the district, as required by regulations of the department. Afterwards, to-wit, on the 8th day of January, 1868, the claim was again filed with the commissioner by the plaintiff, this time on the proper form,—46,—and this time accompanied by the certificate of the proper officer, as required

by the regulations of the department. Thus it seems this claim was never, until January 8, 1868, before the department in a form in which it could be considered and rejected on its merits, in accordance with what I conceive to be the meaning of section 19 of the act of July 13, 1866, (14 St. at Large, 152.)

Somewhat voluminous affidavits and proofs were filed in support of this claim; but the papers belonging to it were by some accident lost by the department, and were afterwards imperfectly substituted and supplemented by other papers. Much delay resulted from this accident, during which counsel for the plaintiff, though quite persistent, was unable to obtain a consideration (or reconsideration) of the claim by the commissioner. Such action seems to have been prevented by an awkward discrepancy of opinion between the commissioner and the counsel of plaintiff as to whether or not this claim had been rejected on the 10th of May, 1866. The commissioner insists that it was rejected then, while counsel for plaintiff contends that the claim was never before the commissioner in form to be considered on its merits until the 8th January, 1868, when it was properly presented on form 46, and sufficiently supported by official certification. I think myself that not until January 8, 1868, did the plaintiff's claim come before the department in a form in which it could be decided on its merits. I think, moreover, that section 19 of the act of July 13, 1866, contemplates that before suit can be brought for the refunding of a tax claimed to have been improperly collected it must have been rejected by the commissioner of internal revenue on its merits; otherwise claimants could intentionally present their claims in irregular form for the purpose of enabling themselves, by their rejection, to bring suits in the courts in contravention of the object of the law. The claim which plaintiff's agent or attorney made him present in February, 1866, on form 47, was not really the one he was entitled to make. It was not an improper assessment of the tax which he sought to have corrected, but the improper collection of a tax which he sought to have rectified by repayment. The claim he presented on the 9th of March, 1866, on form 46, would have been the claim which the plaintiff was entitled to prefer in the manner contemplated by section 19 of the act of July, 1866; but this claim, by not having the certificate required by the regulations of the department, was not before the commissioner in a manner in which it could be considered on its merits, or considered at all, except for the purpose of rejection for irregularity. The claim, therefore, was before the commissioner for the first time in a manner to be considered on its merits, on January 8, 1868; and the only question is whether the commissioner's letter of January 22, 1879, was a rejection of the claim as filed on the 8th January of the preceding year. That letter erroneously treats the claim then filed as identical with that which had been filed two years before on the 8th February, 1866; and, in insisting, though erroneously, that the rejection of the claim on form 47 was a rejection of the subsequent claim preferred on form 46, was in fact and effect a rejection of the latter claim. That being so, and the claim of January 8, 1868, having been before the commissioner for a longer

period than six months, it is not barred either by section 19 of the act of July, 1866, or section 44 of the act of June, 1872, (17 St. at Large, pp. 257, 258.) Judgment must go accordingly.

In re HOUDLETTE et al.

(Circuit Court, D. Massachusetts. December 12, 1891.)

CUSTOMS DUTIES—CLASSIFICATION—SUFFICIENCY OF PROTEST.

The collector classified certain "shank steel," used in the manufacture of boots and shoes, under paragraph 146 of the tariff act of October 1, 1890, and also imposed an additional duty of one-quarter of a cent per pound on the goods, as "cold-rolled" steel, under paragraph 152. The importer protested against the additional duty, and on appeal the board of general appraisers held that the original classification was wrong, and that the goods should have been entered under paragraph 140, as "other steel," etc. They also found that they were not subject to the additional duty, but that the protest was insufficient, because it failed to point out the proper classification. *Held* that, as the objection was made only to the additional duty, and not to the original classification, the importer was not bound to point out the error in the latter, and the protest was sufficient.

Petition of F. A. Houdlette & Co. to review a decision of the board of general appraisers as to the classification of certain imports. Reversed.

J. P. Tucker, for petitioners.

Henry A. Wyman, Asst. U. S. Dist. Atty., for collector.

COLT, J. This is a petition to review a decision of the board of general appraisers. Act June 10, 1890, § 15. The importation in question is known as "shank steel," and is used in the manufacture of boots and shoes. The question for review by this court is raised under the third assignment of error in the petition, and relates to the sufficiency of the protest.

It is admitted that the subject of importation is steel, in form or shape three to four inches wide, fifty to sixty feet in length, thinner than No. 20 wire gauge, cold rolled, and valued at three cents or less per pound. The collector classified the import under that clause in paragraph 146 of the act of October 1, 1890, which provides for "steel in all forms and shapes not specially provided for in this act;" and it being of a value above two and two-tenths cents, and not above three cents, per pound, it was held subject to a duty of one and two-tenths cents per pound. The collector also imposed an additional duty of one-fourth of one cent per pound, under paragraph 152 of said act, which provides that on "all iron or steel bars or rods, of whatever shape or section, which are cold rolled, * * * there shall be paid one-fourth of one cent per pound in addition to the rates provided in this act." The importers duly protested against the imposition of this additional rate, upon the ground that the import was not steel in "bars or rods," within the commercial or any known understanding or application of these

words. Upon appeal to the board of general appraisers, they decided that the collector's assessment of one and two-tenths cents per pound was wrong, and that the article should have been assessed at one and three-tenths cents per pound, under paragraph 140 of said act, which provides for "other steel" valued at three cents per pound or less, eight inches or less in width, and thinner than No. 20 wire gauge. The board also found as a fact that the merchandise in question was not iron or steel bars or rods which are cold rolled, cold hammered, or polished in any way, in addition to the ordinary process of hot rolling or hammering; and therefore they decided that it was not subject to the additional duty provided for in paragraph 152 of said act. While the board decided, in favor of the petitioners, that the import was not subject to the additional duty imposed by the collector, they overruled the protest on the ground of insufficiency. They say, in substance, that, the protestants having failed to specify the proper paragraph under which their merchandise should be classed, and also having erred by claiming that the same was subject to a less rate of duty than that provided by law, the protest must be overruled.

It does not seem to me that this is a fair construction of the protest. The whole scope of the protest was simply an objection to the imposition by the collector of the additional duty under paragraph 152 of the tariff act. The protest says: "It is against the assessment of this one-fourth of a cent per pound that we object." The petitioners, in their protest, did not undertake to say whether or not the collector was right in his assessment of one and two-tenths cents per pound under paragraph 146. From all that appears, they were content with that assessment. Under these circumstances, I do not think it was the duty of the petitioners to point out in their protest that the merchandise was dutiable under paragraph 140, instead of paragraph 146. They were only seeking to have the additional duty assessed by the collector under paragraph 152 corrected, and this was the sole object of the protest. Paragraph 152 is entirely distinct from paragraph 146, and all the petitioners claimed was that paragraph 152 had no application to the merchandise in question. I know of no statute or rule of law, as applied to the construction of protests, which requires the importer, in a protest of this character, where two distinct duties are imposed, and the importer objects to one, to point out specifically the paragraph under which the merchandise should be classed. I am of opinion that the protest was properly drawn, and that it stated with clearness and accuracy the contention of the importer, and that it should not have been overruled on the ground of insufficiency. *Schell v. Fauché*, 138 U. S. 562, 11 Sup. Ct. Rep. 376. In this particular, therefore, the decision of the board is reversed, and the petitioners are entitled to judgment for the difference between the amount of duties assessed by the collector and an assessment of one and three-tenths cents per pound under paragraph 140 of the act of October 1, 1890; and it is so ordered.

In re SCHILLING *et al.*

THE AMSTERDAM.

(Circuit Court, S. D. New York. December 3, 1891.)

CUSTOMS DUTIES—CLASSIFICATION—"SWEETENED CHOCOLATE."

"Sweetened chocolate" is subject to duty as "manufactured cocoa," under paragraph 319 of the tariff act of 1890.

At Law. Appeal by the collector of customs at New York from the decision of the general appraisers concerning certain merchandise imported by Schilling, Stollwerck & Co. Reversed.

Edward Mitchell, for collector.

Curie, Smith & Mackie, for importers.

LACOMBE, Circuit Judge. "Crude cocoa" is on the free-list. "Cocoa manufactured," which is apparently a very comprehensive term, is contained in paragraph 319. Cocoa, according to the testimony, is manufactured into a substance known as "prepared cocoa;" also into a substance known as "chocolate;" and of chocolate we have information here of two varieties,—chocolate confectionery and sweetened chocolate. As manufactured cocoa, all these articles—prepared cocoa, chocolate and its varieties—would be included in the phrase "cocoa manufactured." "Cocoa prepared" is expressly provided for in paragraph 319. "Chocolate confectionery" is expressly provided for in paragraph 238. "Chocolate" itself, excepting the confectionery and the sweetened chocolate, is specially provided for in paragraph 318. I find no provision in the tariff act for "sweetened chocolate," except in a parenthetical phrase, where it is excepted in the enumeration of chocolate; and therefore I think it should be classified under "manufactured cocoa," as covered by paragraph 319. The decision of the board of general appraisers is therefore reversed, and the merchandise in this case should be classified by the collector as cocoa manufactured, (paragraph 319,) and duty imposed accordingly.

ARGALL *v.* SEYMOUR *et al.*BIERMAN *et al. v.* SAME.

(Circuit Court, S. D. Iowa, C. D. May, 1883.)

1. FRAUDULENT CONVEYANCES — CHATTEL MORTGAGES — CHANGE OF POSSESSION — RECORDING.

When a chattel mortgage authorizes the mortgagee to take possession at any time, the fact that he does not record it for over 30 days, and allows the mortgagor to remain in possession for about 70 days, selling from the stock in the usual course of business, does not avoid the mortgage as to prior existing creditors, in the absence of any fraudulent intent.

2. SAME—INTERVENING CREDITORS.

But as to a prior creditor, who extended the time of payment while the mortgage was unrecorded, the mortgage is void.

At Law. Proceeding in garnishment.

MCCRARY, J., (*orally.*) These cases are before me, having been submitted upon the answer of the garnishee and other testimony taken upon the issue joined thereon, by stipulation of counsel jury being waived. The proceeding is against one Toy, as garnishee; and the claim of the plaintiffs in the several cases—I believe there are a number of them, all to be determined by the ruling upon these two—is that Toy, as garnishee, is responsible to certain judgment creditors of A. W. Seymour for the value of the stock of goods which Mr. Toy took under a chattel mortgage, and caused to be sold, receiving the proceeds. Seymour was a merchant in the town of Alta, in the northern part of this state, carrying on a retail establishment. Being indebted to Mr. Toy for money advanced by Toy to him in order to enable him to pay certain debts, he executed a chattel mortgage upon his stock of goods. The mortgage was dated on the 30th of September, 1881. It was not filed for record until the 3d of November, 1881, a period of about 30 days. Possession was not taken until the 12th of December, 1881. During the period from the time of the execution of the mortgage until the time when possession was taken, the mortgagor, Seymour, remained in possession of the stock of goods, and continued to deal with it, making sales therefrom in the ordinary course of business. There was no provision in the mortgage authorizing him to retain possession and continue to make sales; but he did so, with the consent, undoubtedly, of the mortgagee, and that was the understanding and purpose, as clearly appeared in the proof. The claims of these plaintiffs, with one exception, to which I shall presently refer, all, so far as I am advised, antedated the execution of the mortgage. In other words, none of them, with the exception to be noted, contracted with the mortgagor after the execution of the mortgage and before its record.

The rule laid down in the case of *Robinson v. Elliott*, 22 Wall. 523, is recognized as establishing this proposition: A mortgage of chattels, which provides that the mortgagor may retain possession of the property and continue to deal with it as his own by selling therefrom from time to time, is at least constructively fraudulent as to creditors, and therefore void. That case went no further than that. It held that, where

the mortgage itself by its own terms provided that the mortgagor should retain possession and continue to deal with the property as his own, it was constructively fraudulent and void. But I am of opinion that another proposition necessarily follows, and that is this: That where such a mortgage does not upon its face provide for the retention of possession by the mortgagor, and that he may continue to deal with the property as his own, yet, if it be shown by proof that such was the understanding of the parties, and that the mortgagor did in fact retain possession of the goods and continue to deal with them as his own by selling portions thereof, etc., the same result follows, and the mortgage must be held void; that is to say, it is not a question as to the nature of the proof by which the character of the transaction is to be established, but it is a question as to the fact itself,—as to the nature of the transaction itself. This may be shown by the terms and stipulations of the mortgage. It was so shown in the case of *Robinson v. Elliott*. And it may also appear by evidence *aliunde* the mortgage; and, if it is established as a fact in either mode, the same result must follow.

But there is another question here, and that is this: Whether in a case where the mortgage is silent upon the question of possession, and makes no provision authorizing the mortgagor to continue to deal with the property mortgaged, and the mortgagee delays for a brief period to take possession under it, and permits the mortgagor during that period to deal with it as his own, this itself, in the absence of proof of actual or intentional fraud, will render the mortgage void in law. This question is not settled by the case of *Robinson v. Elliott*, because there the possession had continued for more than two years in the mortgagor after the execution of the mortgage, and during all that time he had continued to deal with the property as his own, being authorized so to do by the express terms of the mortgage itself. In the present case the possession of the mortgagor was continued only about 60 days, and I am not prepared to say that we must necessarily hold the mortgage to be fraudulent alone because the mortgagee delays to take possession for a period of time such as that, and no longer than that. I think if there is no proof of actual fraud, or of an intent to cover up the property for the purpose of hindering other creditors, and if possession be delivered before any rights of third parties have intervened, that from the time of such delivery it may be held to be as valid as if executed at the date of such delivery. As to persons who deal with the mortgagor after the execution of the mortgage, and before its recording, I am of opinion that they may be treated as having dealt upon the faith of his ownership of the goods, he being then in possession. In other words, I adhere to what was said in the case of *Crook's Assignee v. Stuart*, reported in 2 McCrary, 13, 7 Fed. Rep. 800. The doctrine laid down in *Robinson v. Elliott* has never been extended so far as to render void absolutely a transaction such as that shown by the evidence in this case; and the courts do not seem inclined to extend the doctrine of that case further than its facts require. See *Brett v. Carter*, 2 Low. 458; *Miller v. Jones*, 15 N. B. R. 150.

The mortgage I am considering contained a provision authorizing the mortgagee to take possession at any time. There is some proof tending

to show that he abstained for a time from doing so in consequence of a promise of the mortgagor to apply the proceeds of sales to the payment of the mortgage debt. The case is therefore in several respects unlike that of *Robinson v. Elliott*. These propositions being decided, counsel can determine as to how far they affect the several cases growing out of this transaction. I am prepared to say that as to the plaintiffs here in one of these cases—the case of Bierman, Heidelberg & Co.—the proof shows that they dealt with Seymour after the execution and before the recording of the chattel mortgage, upon the faith of his ownership of the stock of goods, and that therefore the mortgage as to them must be held to be void. They dealt with Seymour while he was in possession of the goods. True, their debt had been previously contracted, but on the 2d of November the time for payment was extended, and a new note was taken. At that date Seymour was in possession of the stock of goods, and there was no recorded lien thereon. Following the decision of this court in *Crook's Assignee v. Stuart*, I must hold that as to them the mortgage is void, and that they are entitled to judgment against the garnishee accordingly.

UNITED STATES v. SANDREY.

(Circuit Court, E. D. Louisiana. December 26, 1891.)

IMMIGRATION—DESTITUTE ALIENS—STOWAWAYS ENROLLED AS SAILORS—DUTY OF MASTER.

Where a stowaway, found upon a British vessel soon after leaving Liverpool, is in good faith regularly enrolled as a member of the crew for the voyage to New Orleans and return, his *status* is thereby fixed as a British sailor, and he cannot be regarded as a destitute alien immigrant, so as to charge the master, upon arrival at New Orleans, with the duties and penalties imposed by Act Cong. March 3, 1891, in respect to the immigration and importation of aliens; and the fact that such sailor deserts while in port does not affect the master's responsibility.

At Law. Complaint against S. S. Sandrey for violating the immigration laws. Before the circuit judge as committing magistrate. Rev. St. § 1014.

Wm. Grant, U. S. Atty.

S. Gilmore and John Baldwin, for defendant.

PARDER, J. The affidavit in this case made by Ferdinand Armant, United States commissioner and inspector of immigration, charges that S. S. Sandrey—

"Then being master of the British steam-ship Cuban, from Liverpool, England, brought into the United States, to-wit, to the port of New Orleans, Louisiana, on board said ship, one alien immigrant, who was not entitled to land, viz., — Murray, aged 17 years, who was a pauper, and likely to become a public charge, and was therefore excluded from admission into the United States; and affiant further charges that on the arrival aforesaid of the said alien immigrant on the said steam-ship in the United States, as aforesaid, the said S. S. Sandrey, the commander of the said vessel, unlawfully and negligently did permit the said alien immigrant to land therein at a time and place other than that designated by the inspecting officers of alien immigrants arriving in the United States, in violation of sections 6 and 8 of the act approved March 3, 1891, contrary to the form;" etc.

The facts of the case, as appears by the evidence, are that the steam-ship Cuban, of which the accused is master, is a duly-registered British vessel, sailing under the British flag, now lying in the port of New Orleans; that on the last voyage of the said steam-ship she left Liverpool on the 21st of November, and on the morning of the 23d the chief mate found two stowaways on board of the ship, the man ——— Murray, named in the affidavit, and another, ——— Stanley, both British subjects. It may be noticed that a "stowaway" is one who conceals himself on board a vessel about to leave port in order to obtain a free passage. The said stowaways were reported to the master, and on the following day he put them on the ship's articles, and duly shipped and enrolled them as part of the crew of the steam-ship Cuban for the voyage from Liverpool to New Orleans and return to Liverpool, from which time the men went on duty, and so remained until after the arrival of the ship in the port of New Orleans, where the said ——— Murray deserted, Stanley remaining on board the ship, where he now is on duty as a regular member of the crew. Stanley was about 17 years of age, and Murray was 19. Both were, so far as they had any trade, cleaners of boilers, which is work usually given to boys. They were not persons of means, and, except for the employment as seamen, would be considered destitute persons. After the vessel landed in the port of New Orleans these men were treated as belonging to the crew, and given the usual liberty when not required for duty on board the ship. No capitation tax was paid upon either, nor was any report made of them as passengers. Some days after the vessel arrived the commissioner of immigration visited the ship, inquired into the facts, and decided that the two persons, Stanley and Murray, were aliens belonging to a class of persons whose landing in the United States is prohibited by the act of congress approved March 3, 1891, gave his decision to the officers in charge verbally, and afterwards served written notice upon the master. At that time Murray had already deserted the ship. The master, in his examination, swears to information that Murray has already reshipped on another vessel, and is now *en route* to Liverpool; that Stanley is still on board, is not locked up nor otherwise confined, and is working on board, like any other man, as a member of the crew.

The act of congress approved March 3, 1891, entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," in its first section provides—

"That the following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration other than those concerning Chinese laborers: All idiots, insane persons, paupers, or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor, involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded classes, or to the class

of contract laborers excluded by the act of February twenty-sixth, eighteen hundred and eighty-five; but this section shall not be held to exclude persons living in the United States from sending for a relative or friend who is not of the excluded classes, under such regulations as the secretary of the treasury may prescribe: provided, that nothing in this act shall be construed to apply to or exclude persons convicted of a political offense, notwithstanding said political offense may be designated as a 'felony, crime, infamous crime, or misdemeanor, involving moral turpitude,' by the laws of the land whence he came or by the court convicting."

The object and purpose of the act clearly appear from the title and the section quoted, and may be summarized to be to prevent the importation of aliens under contract or agreement to perform labor, and the immigration of aliens of certain objectionable classes specifically enumerated. The remaining sections of the act relate to the methods and details of accomplishing the aforesaid purpose. It is only the sixth and eighth with which we are particularly concerned in this case.

The sixth section imposes a penalty upon any parties who, in violation of the object and purpose of the act, shall bring into or land in the United States, by vessel or otherwise, or aid to bring into or land in the United States, by vessel or otherwise, any alien not lawfully entitled to enter the United States; that is, bring into or land in the United States any alien under a contract or agreement to perform labor, or any alien immigrant belonging to any of the objectionable classes enumerated in the statute.

The eighth section defines the duties of agents and masters of vessels bringing into the United States alien immigrants, as to reporting the name, nationality, last residence, and destination of every such alien; the duties of inspection officers in regard to the inspection and the examination and detention of such alien immigrants; and gives the inspection officers certain powers as to the administration of oaths, and the taking of testimony touching the right of such aliens to enter the United States; provides for the effect of the decisions of inspection officers touching the right of any alien to land; requires the masters and agents of vessels bringing alien immigrants into the United States to adopt precautions to prevent the landing of such immigrants at any time or place other than that designated by the inspection officers; and then imposes a penalty upon any such officer or agent or person in charge of a vessel who shall knowingly or negligently land, or permit to land, any alien immigrant at any place or time other than that designated by such inspection officers. The section further authorizes the secretary of the treasury to prescribe rules for inspection along the borders; limits the number of inspectors to be appointed; and, further, defines their duties.

As clearly appears, the act deals only with the importation of aliens under contract to labor and alien immigration. It is only with regard to alien immigrants that the act imposes duties upon the masters and agents of vessels, or provides penalties for the non-performance of duties by such masters and agents. An alien immigrant to the United States is an alien who comes or removes into the United States for the purpose of permanent residence. Aliens composing the crews of vessels visiting

our seaports are in no sense immigrants, and, as the review of the statute as above shows, are in no wise affected by the law in question. With regard to them, the said law imposes no duties nor penalties upon the masters and agents of vessels. The case shows that the man Murray, charged in the affidavit to be an alien immigrant and pauper, likely to become a public charge, and not entitled to land in the United States; was, when he came to this port, a duly-enrolled seaman on board of a British vessel, shipped for a voyage from Liverpool to New Orleans, and return to Liverpool. Prior to his shipment he was a stowaway and destitute, and his purpose may have been to emigrate to the United States. But when he was enrolled as a seaman, and signed articles for a voyage from Liverpool to New Orleans and return to Liverpool, his *status* as a British seaman became fixed. He ceased, for the time being, at least, to be a possible immigrant; and with regard to him the master of the steam-ship Cuban, the accused in this cause, was charged with no duties, nor exposed to any penalties, under the act of congress approved March 3, 1891. His desertion after the arrival of the ship at the port of New Orleans in no wise affects the duty or the responsibility of the accused. Murray's legal *status*, if he is now in this country, is not that of an immigrant, but that of a deserter from his ship. We are not dealing with a case where a vagrant sailor has been brought to this country and discharged in a destitute condition, nor with a case where the master of a vessel has connived with an immigrant, within the objectionable classes enumerated, to smuggle him into the country under cover of shipping articles. When such cases arise, it can be determined whether the masters of such offending vessels have rendered themselves amenable to the penalties defined by the act of congress aforesaid. All the circumstances of the present case show that the accused has acted openly and above board, within the line of his duty as master of the vessel, and no wise in violation of the laws of the United States. The complaint is dismissed, and the accused discharged.

UNITED STATES v. BAIRD.

(District Court, D. Washington, N. D. December 12, 1891.)

CHINESE—DUTY OF CUSTOMS OFFICERS—OPPOSING ARRESTS.

The provisions of the Chinese restriction acts requiring the customs officers to prevent the landing from boats or vessels of Chinese who are not entitled to land do not impose upon those officers the duty of arresting Chinese who are already in the United States without right, nor is there any law imposing such duty; and hence an inspector who, without legal process, attempts to make such arrests, acts merely as a private citizen, and one who opposes him therein is not guilty of opposing "any officer" of the customs in the "execution of his duty," within the meaning of Rev. St. U. S. § 5447.

Presentment of J. C. Baird for obstructing an officer of the customs in attempting to arrest a Chinaman.

P. H. Winston, U. S. Atty.

HANFORD, J. The record in this case shows that the defendant has been heretofore arrested on a warrant issued by a United States commissioner, for an alleged violation of section 5447 of the Revised Statutes of the United States, and, after an examination by said commissioner, held to bail for his appearance, at the present term of this court, to answer for said offense. The case is now brought before the court by the following presentment of the grand jury:

"* * * We, the grand jury, desire to report that we have investigated the case of the *United States vs. J. C. Baird*, charged with a violation of section 5447, Revised Statutes, and found the following to be the facts of the case: That Z. T. Holden, then an inspector of customs for the district of Puget sound, was, on the evening of July 26th, 1891, in the town of Wooley, engaged in an attempt to capture certain Chinese laborers who had entered the United States contrary to law, and who were not entitled to be in the United States. That, while so engaged, the defendant, J. C. Baird, seized upon the said Z. T. Holden, and handcuffed him, and interfered with him in the performance of his work. We further find that said Z. T. Holden, at the time he was interfered with, was not acting under the direction of any court of law, nor executing any legal process. We have requested the United States attorney, upon these facts, to prepare a bill of indictment against said J. C. Baird, and he has, in response to said request, informed us that he is unable to find a law covering this case upon the facts presented. We therefore desire to present J. C. Baird to the court for having done the act herein stated, and to obtain the opinion of the court as to whether the facts set forth constitute an offense against the United States.

"D. R. McKINLEY, Foreman of the Grand Jury."

It is one of the fundamental principles of our government that no man can be required to defend against a criminal prosecution in a court of the United States for mere wrong-doing, nor unless the charge against him be the commission of an offense made punishable by a law of the United States. By the division of governmental powers between the several states and the national government the punishment of all such offenses as assaults, batteries, unlawful arrests, and breaches of the peace, committed within a state, belongs to the state. The act which the de-

fendant is charged with having committed is not a crime against the United States because of any injury to Mr. Holden, as a private citizen, nor unless national authority has been opposed, resisted, or defied, and execution of the laws obstructed or made difficult by the ill treatment of an officer. Section 5447 must be understood as having for its objects the prevention of interference with the operations of the government, and protection to its officers in the performance of official duty. The statute, by the phrases "any officer" and "execution of his duty," refers to official character rather than to an individual and to official duty,—that is, some peculiar duty appertaining to an office. By the presentment it appears that Mr. Holden was at the time an officer of the United States, and that he was assaulted, opposed, and interfered with. But his effort to arrest Chinese persons who are not lawfully in the United States or entitled to remain therein, although commendable, was no part of his duty as an inspector of customs. The general laws and the regulations of the treasury department require all customs officers, including inspectors, to keep surveillance of all boats and vessels coming into the United States, and give them power to make seizures of property and arrests for a violation of the revenue laws, laws relating to commerce and navigation, and to the inspection and regulation of vessels. The acts excluding Chinese laborers from coming into the country contain provisions which may be construed as imposing upon these officers the duty of preventing the landing from any boat or vessel of Chinese persons not entitled to land in the country, but the statutes do not make it a duty of these officers to arrest Chinese persons who have been landed, or unlawfully brought in by land, nor give them any power greater than or different from the power of a private citizen. The thirteenth section of an act entitled "An act to prohibit Chinese laborers from coming to the United States" (25 U. S. St. 479) provides—

"That any Chinese person or person of Chinese descent, found unlawfully in the United States or its territories, may be arrested upon a warrant issued, upon a complaint under oath filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court."

By the same section, and also by the twelfth section of the original restriction act, as amended by the act of July 5, 1884, (23 U. S. St. 118,) all peace officers of the several states and territories are invested with the powers of United States marshals under said acts. These provisions not only omit to mention inspectors of customs, but seem to confer all power of making arrests upon other and different officers. Without authority conferred by law, and not acting in obedience to a precept of any court in executing legal process, nor in aid of any officer having authority to arrest the Chinese persons referred to in the presentment, Mr. Holden was not, by his endeavors to make the arrest, executing his duty as an officer of the United States. I do not mean to be understood as saying that Mr. Holden was endeavoring to accomplish an unlawful purpose. In my opinion, as a citizen, he could lawfully arrest Chinese laborers in the act of coming into the United States unlawfully, and detain them until complaints could be made against them, and warrants

issued, but in so doing he was not performing any official function. The case therefore does not come within section 5447 of the Revised Statutes, and I find no statute to meet the case. It is my opinion that this grand jury has no power to indict the defendant, and this court has no power to punish him for the acts of which he is accused.

NEW YORK BELTING & PACKING CO. v. NEW JERSEY CAR-SPRING & RUBBER CO.

(Circuit Court, S. D. New York. December 24, 1891.)

1. PATENTS FOR INVENTIONS—PATENTABLE NOVELTY—DESIGN FOR RUBBER MATS.

The third claim of letters patent No. 11,208, issued May 27, 1879, to the New York Belting & Rubber Company, as assignee of George Woffenden, is for a "design for a rubber mat, consisting of a series of parallel corrugations, the general line of direction of the corrugations in one section making angles with or being deflected to meet those of the corrugations in the contiguous or other sections;" the object being to produce kaleidoscopic, mosaic, and *motre* effects. Held that, as to the specific design, the claim possesses patentable novelty, as the effects produced by the design as a whole have never been realized or approached by any previous arrangement of corrugations.

2. SAME—INFRINGEMENT.

Although the patent shows a square mat having a square central panel traversed by diagonal lines, it is infringed by an oblong mat possessing substantially the same features, excepting that in the central panel, which is also oblong, the diagonal lines are not run from corner to corner, to form acute and obtuse angles, but merely form a right angle in each end of the panel; it being apparent that this was merely a mechanical change necessary to adapt the design to an oblong mat.

3. SAME—ASSIGNMENT PENDENTE LITE—PLEADING AND PROOF.

When, pending a suit for infringement, the patent is assigned, with a reservation of past damages, and on proof thereof the cause is retained for the purpose of recovering such damages, a subsequent reassignment to the complainant cannot be proved under the original bill.

In Equity. Suit for infringement of patent. Decree for an accounting.

B. F. & W. H. L. Lee, for complainant.

A. v. Briesen, for defendant.

COXE, J. This is an action for the infringement of letters patent, No. 11,208, granted to the complainant, as assignee of George Woffenden, May 27, 1879, for a design for a rubber mat. The patent has twice been before the courts. The circuit court held the patent invalid on demurrer. 30 Fed. Rep. 785. The supreme court reversed this decision, in part, holding that the question of novelty should be decided on pleadings and proofs. 137 U. S. 445, 11 Sup. Ct. Rep. 193. A description of the invention will be found in these volumes, and particularly in the report of the supreme court decision, where a diagram of the design appears. The first claim was held void by the supreme court and was afterwards disclaimed by the complainant, but the court said of the second and third claims that they may fairly be regarded as confining the patentee to the specific design described in the specification and drawing. Of these two claims, the third is the narrower. It is as follows:

"(3) A design for a rubber mat, consisting of a series of parallel corrugations, depressions or ridges arranged in sections, the general line of direction of the corrugations in one section making angles with or being deflected to meet those of the corrugations in the contiguous or other sections, substantially as described."

The defenses are lack of patentability, non-infringement, and defective title.

The specification says:

"In accordance with this design the mat gives under the light different effects, according to the relative position of the person looking at it. If the person changes his position continuously, the effects are kaleidoscopic in character. In some cases *moiré* effects, like those of *moiré* or watered silk, but generally mosaic effects, are produced. Stereoscopic effects also, or the appearance of a solid body or geometric figure, may at times be given to the mat, and under proper conditions an appearance of a depression may be presented."

In referring to this feature of the design the supreme court intimates that a new and interesting question is thereby presented. The opinion says:

"It is possible that such a peculiar effect, produced by such a particular design, impressed upon the substance of india-rubber, may constitute a quality of excellence which will give to the design a specific character and value and distinguish it from other similar designs that have not such an effect."

It is true that the court is careful to express no opinion upon this question, and yet it seems improbable that the suggestion would have been made unless the court was impressed with the novel character of the design in this particular. That the square mat, introduced by the complainant, which is conceded by the defendant to be a correct embodiment of the drawing, possesses the kaleidoscopic effect referred to there can be no doubt. Viewed from one position certain sections of the mat appear grey, some have a bluish tinge, others are almost black, and others still have a variegated appearance, varying from a dark, rich, velvety effect in one part, to a light metallic or silvery effect in another. Let the observer change his position and the transformation of the design is instantaneous. What was light before is dark now, and *vice versa*. In one position the mat seems to be all of one color, in another of several different colors, like mosaic or marquetry flooring. There is nothing at all comparable to this in the prior art. The nearest approaches are the rubber stair-plates and bath brushes introduced by the defendant. These unquestionably have some features of the present design, but they do not possess the peculiar effect before alluded to. All of them together could not be so arranged as to suggest the patented design. It has frequently been held that a design patent cannot be anticipated because the separate features of the design are old. If this were otherwise it would be difficult to conceive of a patentable design, for it is an easy matter in all these cases to show that every line, color and object represented was known before. Proof of this character does not defeat a design patent any more than proof that all the separate elements of a combination are old defeats a combination patent. In one case the combination must be new and produce a new result, in the other the design must be new and produce

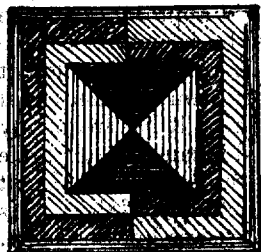
a new effect. It is the impression produced upon the eye by the design which is the test of patentability. If this is new and pleasing it matters not that the various elements which combine to produce this impression are old. The question is not whether the prior art shows anything which looks like sections of the design, but whether it shows the design as a whole. If not, and the design possesses the other characteristics alluded to it is patentable. Tested by this rule I have, with some hesitation, however, reached the conclusion that under the intimation of the supreme court this patent can be sustained.

The question of infringement is also a difficult one. The only drawing represents a square mat. The specification says, however: "A is the mat, which is, as represented, square, although it might be oblong or other desired shape." The defendant's mat is oblong. The elongation of the mat necessarily involved some changes in the contour of the sections. This is particularly noticeable in the central panel. In the patent it is square, made up of four minor sections produced by lines drawn from corner to corner crossing each other at right angles. It is manifest that this square cannot be made oblong without changing somewhat the appearance of the sections. The complainant's expert describes and contrasts the mats, in this respect, as follows:

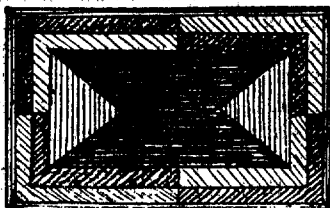
"The mat shown in the drawing of the patent being a square mat is arranged with the diagonal lines running from corner to corner of the central square, the diagonal lines being at an angle of 45 degrees with the two lines at right angles from the intersection of which it starts. The defendant's mat is oblong and the angularity of the diagonal lines with the lines at right angles has been preserved the same as in the patent, but, as the mat is longer than it is broad, these lines cannot, of course, run from corner to corner of the central rectangular section."

The larger section of the central panel of the defendant's mat has a swallow tail at each end instead of presenting the appearance of a Maltese cross as in the patent. The herring-bone border of the defendant's mat is broken four times instead of twice as in the drawing. But the differences and similarities of the two can best be illustrated by placing diagrams of them side by side.

Patent.



Defendant.



Unquestionably the patentee, under the language of the specification, was permitted to embody his design in an oblong mat as well as in a square mat. This is not seriously disputed, but it is said that the ob-

long mat of the patent requires a central field composed of diagonals drawn from corner to corner, the lines crossing as they do on the reverse side of a letter envelope. It is true that the mat could be elongated in this way, but it is also true that it would contain as many departures from the square of the drawing as does the defendant's mat. If a square is stretched out into a rectangle it is very clear that it will no longer look like a square. It is impossible for the central panel of an oblong mat to retain all the characteristics of the central panel of a square mat. If defendant's suggestion is adopted the right angles of the drawing disappear and in their place are substituted two obtuse angles and two acute angles. I am inclined to think, therefore, that the defendant's mat shows the design of the patent, not the exact design of the drawing, for that would be impossible, but the design of the patent as applied to an oblong mat. The mechanic, conversant with such matters, when shown the square mat and asked to convert it into an oblong mat would produce the defendant's mat. An ordinary purchaser who had seen the patented design and who started out with the intention of buying an oblong mat embodying that design, would return with the defendant's mat. All the distinguishing features of the infringing mat are taken from the design. The man who produced the mat evidently had the design before him, his object being to transfer it to an oblong mat, preserving at the same time all the pleasing characteristics of the design.

Prior to the taking of testimony, which began on the 7th of March, 1891, the complainant assigned the patent in suit to an English corporation. At the first hearing the defendant objected to proceeding further on the ground that the suit had abated. No notice having been taken of the objection the defendant subsequently proved the assignment of the patent to the English corporation, together with all damages and profits since June 1, 1890. After this proof had been received a motion was made for leave to file a supplemental bill joining the English company as a party complainant. This motion was denied for the following reasons: The English company had no claim for infringements prior to June 1, 1890. There was no proof or suggestion of infringements since that date. The English company could not maintain an independent action, and, therefore, should not be made a complainant in the pending suit. It was also decided that the court, having obtained jurisdiction, would retain it for the purposes of an accounting. 47 Fed. Rep. 504. The English company immediately after this decision re-assigned the patent to the complainant. Without asking leave to file a supplemental bill, or obtaining the permission of the court in any way, the complainant introduced this reassignment in evidence. The defendant objected upon the ground, among others, that it was incompetent under the pleadings. The defendant having given due notice, now moves to expunge the reassignment from the record.

After diligent search I have been unable to find an authority exactly in point. None is cited. By every analogy it would appear that a title accruing *pendente lite* cannot be given in evidence under the original bill. Again, under the decision last referred to there is some doubt whether

the presence of the reassignment, even if rightfully upon the record, can at all affect the decree. By the assignment to the English company the complainant lost all right to an injunction, and, by virtue of the assignment alone, the English company did not acquire the right to an injunction, and never possessed it. It is argued with force that what the English company did not have it could not assign, and that the complainant took nothing by the reassignment, so far as the decree is concerned, which it did not possess before. It is not necessary, however, to decide whether the reassignment invested complainant with the lost right to an injunction, for the reason that I am constrained to hold that the reassignment is not properly before the court. Should an injunction be necessary hereafter for the protection of the complainant, it will not be difficult upon proper showing, either in this or in another action, to obtain this relief. The complainant is entitled to a decree for an accounting, but, as a disclaimer was filed *pendente lite*, (Rev. St. § 4922,) it must be without costs.

CALIFORNIA ARTIFICIAL STONE PAVING Co. v. STARR *et al.*

(Circuit Court, N. D. California. December 14, 1891.)

PATENTS FOR INVENTIONS—INFRINGEMENT—STATE STATUTE OF LIMITATIONS.

As the constitution of the United States and the legislation of congress have given the national government exclusive control of the subject of patents, state statutes of limitations do not apply to suits for infringement, even in the absence of any national statute of limitations applicable thereto.

At Law. Suit by the California Artificial Stone Paving Company against Mary A. Starr and others for infringement of a patent. Plea of the state statute of limitations, and demurrer thereto. Demurrer sustained.

Edmund Tauszky, for plaintiff.

Parker & Edls., for defendants.

HAWLEY, J., (*orally*.) This is a suit at law to recover damages for an alleged infringement of a patent. Defendants, in their answer, plead the statute of limitations of the state of California. Plaintiff demurs to this portion of the answer, and also moves to strike out the pleas setting up the statute of limitations. The judiciary act provides that the circuit court shall have original jurisdiction "of all suits at law or in equity arising under the patent or copyright laws of the United States." Rev. St. U. S. § 629, subsec. 9. It also provides that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." Rev. St. U. S. § 721. Under this section, is the state statute of limitations applicable to patent cases? This ques-

tion, it seems, has never been decided by the supreme court of the United States. There are, however, numerous decisions in the several circuit courts, but they are not uniform upon the subject. The greater number of the decided cases, and, in my opinion, the weight of reason, is to the effect that the state statutes have no application to such cases. In *Read v. Miller*, 2 Biss. 14, McDONALD, J., in support of this view, said:

"The constitution of the United States has given to the national government exclusive control of the whole subject-matter of patent-rights for new and useful inventions. No state, therefore, can pass any valid law concerning them. It is not any state law, nor even the common law, that authorizes the action under consideration. It is given by the act of congress of July 4, 1836. And this act, as I construe it, gives the United States circuit courts exclusive jurisdiction over the whole subject-matter. No state court can adjudicate upon the question of a violation of a patent-right. Questions touching these rights may incidentally arise in the state courts, and be decided by them. But, I repeat, no state court can try a case like the one now under consideration. The policy of the national government in thus putting the whole subject-matter for new and useful improvements and inventions under the control of congress and the United States courts evidently was to provide a uniform rule concerning the same throughout the United States, so that patentees shall everywhere have the same rights and the same remedies. And this is eminently proper, for the whole subject is one not of local, but of national, concern. But no such policy is deducible from section 34 of the judiciary act. Indeed, that section plainly indicates a contrary policy, for, in regard to the matters which it embraces, it destroys the uniformity of the rules of decision in the national courts, and requires them to conform to the laws of the respective states, however various and contradictory those laws may be. Since, then, no state has any power to legislate concerning patent-rights, and no state court has jurisdiction to adjudicate concerning a violation of them, it can hardly be supposed that a state may nevertheless pass statutes of limitation concerning them which shall control national courts concerning their infringement. It ought not to be presumed that the state legislature, in passing a statute of limitations, ever intended it to extend to patent-right litigations, since such litigation cannot arise in a state court. Nor ought the presumption to be indulged that section 34 of the judiciary act could have been intended to authorize state legislatures to pass statutes of limitation on subjects over which the states have no control. Moreover, it should be noted that section 34 of the judiciary act only makes the laws of the several states rules of decision in the national courts 'in cases where they apply.' Now, it appears to me that these state laws do not apply in cases over which the state governments have no control whatever, and which are under the exclusive control of the general government."

This decision was rendered in 1867. Congress, in 1870, passed an act providing a limitation for the commencement of such suits. This act was repealed in 1874, and there is not now any national statute upon the subject. In 1883, LOWELL, J., in *Hayden v. Oriental Mills*, 15 Fed. Rep. 605, decided that state statutes were applicable to patent as well as other cases. His opinion is by far the ablest delivered in favor of that view; but it is not sustained by the more recent decisions. The authorities upon this subject are nearly all cited in 3 Rob. Pat. § 890, and Walk. Pat. § 477. In *McGinnis v. Erie Co.*, 45 Fed. Rep. 91, in v.48F.no.7—36

the circuit court of Pennsylvania, decided in December, 1890, the judges held that a state statute of limitations is not pleadable in bar of an action at law for infringement of a patent; following the previous decisions in that circuit, and citing the late decisions in other circuits in support of that view. The demurrer is sustained, and the pleas of the statute of limitations will be stricken out.

NEW YORK PAPER BAG MACHINE & MANUF'g Co. v. HOLLINGSWORTH & WHITNEY Co.

(Circuit Court, D. Massachusetts. December 12, 1891.)

1. PATENTS FOR INVENTIONS--INFRINGEMENT--PAPER-BAG MACHINERY.

In letters patent No. 337,965, issued March 16, 1886, to Lorenz and Honiss for an improvement in paper-bag machinery, designed to manufacture continuous tucked paper tubing into paper blanks, with diamond-folded ends, the claim for a reciprocating carriage to support the tubing, and, by its forward and backward movement, to co-operate in regulating the working of other parts of the mechanism, is not infringed by a machine in which the same function is performed by a revolving carriage.

2. SAME.

The claim for pivoted fingers, combined with a coiled spring to distend them, the fingers being designed to enter, while distended, the forward end of the tube, and then move upward and backward through an arc of 180 degrees, carrying the upper fold to a flat table, and completing the diamond-shaped fold, is not infringed by a machine with fingers which, while closed, enter the tube, and then operate merely to lift up the upper fold thereof, while the side folders press in the sides of the tube to the proper shape.

In Equity. Suit by the New York Paper-Bag Machine & Manufacturing Company against the Hollingsworth & Whitney Company for infringement of a patent. Bill dismissed.

Albert H. Walker and Frederick H. Betts, for complainants.

Francis T. Chambers and George Harding, for defendants.

NELSON, J. The only question in this case is one of infringement. The plaintiffs claim that a machine used by the defendants in the manufacture of paper bags is an infringement of their patent. The plaintiffs' patent No. 337,965, issued to Lorenz and Honiss, March 16, 1886, is for new and useful improvements in paper-bag machinery. The patented machinery is designed to manufacture continuous tucked paper tubing into paper blanks with diamond-folded ends. The patent covers various combinations of the following parts, namely, a pair of pivoted fingers combined with a coiled spring which operates to hold them apart, a reciprocating carriage, a presser-plate, two side grippers, and one end gripper. The patent contains five claims, the first of which is for the combination of the fingers with the coiled spring. The others are for different combinations of the various parts, but all contain as elements either the fingers, or the reciprocating carriage, or both. The only elements in the patent which are new are the fingers and spring, and the reciprocating

carriage. The presser-plate and the side and front grippers were well known in paper-bag machinery long prior to the patent. The machine used by the defendants in the manufacture of continuous tucked paper tubing into paper blanks, with diamond-folded ends, contains a presser-plate and side and front grippers. The plaintiffs claim that it also contains devices which are mechanical equivalents for their fingers and spring, and for the reciprocating table.

First. As to the reciprocating carriage. The function of this device in the patent is to support the tubing while being operated upon, and also by its reciprocating or forward and backward movement, to co-operate in regulating the proper working of the various parts of the mechanism. All this in the defendants' machine is done by a revolving carriage. The plaintiffs insist that these two devices are substantially the same, since the result is the same. But the plaintiffs are clearly excluded from this contention by the limitations of their patent. If the patentees intended to claim as part of their invention a revolving as well as reciprocating carriage, they were bound to state it distinctly in their patent. No hint of such an intention is to be found there. On the contrary, the language of the specification limits the invention with scrupulous exactness, to a reciprocating movement of the carriage, and no other meaning can be forced from it. The revolving carriage is clearly not an infringement of the claims of the patent which contain as an element the reciprocating carriage.

Second. As to the pivoted fingers combined with the coiled spring. Their operation in the plaintiffs' mechanism is this: As the tucked paper tubing is fed along under the feed-rolls over the surface of the reciprocating table, and as the under-fold of the tube is seized and held down by the side and front grippers, the pivoted fingers, extended by the coiled spring, enter the interior of the tube at its forward end, and are then thrown upward and backward over an arc of 180 degrees, carrying along the upper fold until it is laid flat on the table. This operation completes the diamond-shaped fold. The fingers are then withdrawn, the coiled spring yielding sufficiently to allow this to be done without lacerating the paper. Now, as I understand this complicated mechanism, the fingers of the defendants' mechanism are something quite different. They have no coiled spring corresponding with that of the plaintiffs. When they enter the tube, they are not distended, but closed. They do not throw back the upper fold, nor take any direct part in the shaping process. Their office is merely to raise up the upper fold of the tube preparatory to the action of the side wings or folders, which by turning inward, and pressing upon the sides of the tube, perform their part in giving the desired shape to the fold. This is clearly something wholly different from the operation of the plaintiffs' fingers, which, with the grippers, act directly in giving the shape. The only thing that appears to be common to the two devices is that both enter the interior of the tube at its forward end, and that is no part of the patent. No infringement of the patent is shown by the use of the fingers in the defendants' machine. Bill dismissed, with costs.

THE PARTHIAN.

THE AYR.

BOSTON & PHILADELPHIA S. S. Co. v. SCOTT, (two cases.)

(Circuit Court, D. Massachusetts. November 28, 1891.)

ADMIRALTY APPEALS—QUESTION OF FACT—CONFLICTING EVIDENCE.

On appeal in admiralty, the circuit court will not reverse the decision of the district judge on a question of fact depending upon conflicting evidence, unless it clearly appears to be against the weight of evidence.

In Admiralty. Libel by Nathaniel C. Scott against the steam-ship Parthian for damages for a collision with the schooner Ayr, and cross-libel by the Boston & Philadelphia Steam-Ship Company as owners of Parthian against the Ayr. Decree in the district court for Scott against the Parthian. The steam-ship company appeals. Affirmed.

Shattuck & Munroe, for appellant.

C. T. & T. H. Russell, for appellee.

COLT, J. These two cases are cross-libels involving the same collision between the steam-ship Parthian and the schooner Ayr, and they come here on appeal from the district court. The cases turn wholly upon questions of fact concerning which the evidence is conflicting. The district judge, having the advantage of seeing the witnesses and judging from their appearance, ordered a decree in the first case in favor of the libellant, and against the steam-ship Parthian, in the sum of \$1,750.15, damages, and costs of suit, and dismissed the cross-libel. It is the established rule of this court that it will not reverse the conclusion reached by the district court upon a controverted question of fact, where the evidence is contradictory, unless it clearly appears to be contrary to the preponderance of evidence. *The Grafton*, 1 Blatchf. 173; *The Sampson*, 4 Blatchf. 28; *The Florida*, Id. 470; *The Sunswick*, 5 Blatchf. 280; *Guimaraes' Appeal*, 28 Fed. Rep. 528; *Levy v. The Thomas Melville*, 37 Fed. Rep. 271. Upon a review of the testimony, I am satisfied that the decision of the district court was correct, and therefore the decrees are affirmed.

THE ALBANY.

POST v. BOSTON & PHILADELPHIA S. S. Co.

(Circuit Court, D. Massachusetts. November 30, 1891.)

1. APPEAL IN ADMIRALTY—REVIEW BY CIRCUIT COURT—QUESTION OF FACT.

On appeal in admiralty the circuit court will not reverse a decision of the district judge upon a question depending on conflicting testimony, unless it clearly appears that the decision was against the weight of evidence.

2. SAME—AMOUNT OF SALVAGE.

Nor will the circuit court interfere with the amount of salvage allowed, unless it is strikingly out of proportion to the service or damage.

In Admiralty. Libel by the Boston & Philadelphia Steam-Ship Company against the coal-barge Albany for salvage services. Decree by the district court for \$4,000. 42 Fed. Rep. 64. Aaron Post, claimant, appeals. Affirmed.

Eugene P. Carver, for claimant, appellant.

Shattuck & Munroe and L. S. Dabney, for libellant.

COLT, J. On an appeal in admiralty to the circuit court involving questions of fact dependent upon conflicting testimony, the decision of the district judge, who has had the opportunity of seeing the witnesses and judging from their appearance, should not be reversed unless it clearly appears that the decision was against the weight of evidence. *The Grafton*, 1 Blatchf. 173, 178; *The Sampson*, 4 Blatchf. 28; *The Florida*, Id. 470; *The Sunswick*, 5 Blatchf. 280; *Levy v. The Thomas Melville*, 37 Fed. Rep. 271; *Guimaraes' Appeal*, 28 Fed. Rep. 528. Nor will this court interfere with the amount of salvage allowed by the district court, unless it is strikingly out of proportion to the service or damage. *The Narragansett*, 1 Blatchf. 211; *The Hope*, 10 Pet. 108, 119; *Cushman v. Ryan*, 1 Story, 91; *The Yankee v. Gallagher*, 1 McAll. 467, 479. I have carefully examined the record in this case, and I find no sufficient ground for disturbing the conclusion reached by the district judge. Though the amount awarded, —\$4,000,—was large, I do not think, under the circumstances, it was excessive. *The Mary N. Hogan*, 30 Fed. Rep. 381; *The Lahaina*, 19 Fed. Rep. 923; *The Benison*, 36 Fed. Rep. 793.

The decree of the district court is affirmed.

THE WILMINGTON.

WOOD v. THE WILMINGTON.

(District Court, D. Maryland. October 25, 1880.)

1. ADMIRALTY—MARITIME CONTRACT—CHARTER OF CANAL-BOAT FOR USE IN HARBOR.

A person engaged in the business of furnishing to the grain elevators in the port of Baltimore barges suitable for carrying grain to be used principally for storage when the elevators were full, and incidentally to carry the grain to ships loading in the harbor, chartered a canal-boat for 60 days, agreeing to pay for the first calking thereof, the master thereafter to keep her in thorough repair, and to man and furnish her with all appliances. The purpose for which she was to be used was understood by both parties, but was not expressed in the charter-party. *Held*, that this was a maritime contract.

2. SAME—STIPULATION FOR CONTROL—LIABILITY IN REM.

Notwithstanding that the charterer had control of the boat for the period of the contract, the boat was liable *in rem* to him for an injury to the cargo caused by the master's failure to keep her in thorough repair.

3. SAME—LEAKING—EVIDENCE OF UNSEAWORTHINESS.

Before the boat was used, her deck was recalced at the charterer's expense, which the master said was all the repairs she needed. After a short period of use, she was found to be leaky, and rejected, whereupon the master took her away, had her repaired, and brought her back, saying he had found the leak, and fixed it. She was again loaded, and shortly after sprung a leak which caused an injury to the cargo. She was then taken to a dry-dock, where the oakum was found to be out of her seams in several places. *Held* sufficient to show that the injury was due to a breach of the agreement to keep her in thorough repair, and she was therefore liable for the damages.

In Admiralty. Libel by John Wood against the canal-boat Wilmington.

MORRIS, J. The libellant, Wood, made a contract for the use of the canal-boat Wilmington, which is as follows:

"CHARTER-PARTY.

"1, John Wood, on this 19th day of July, 1880, charter from Dominick Magrudy the boat known and called the Wilmington, (of which the said Magrudy is master and owner,) for the term of sixty days from date. The said John Wood agrees to pay the said Magrudy the sum of two hundred and fifty dollars for the above-named sixty days. The said John Wood agrees to pay for the first calking of the said boat, after which the said Magrudy agrees to keep said boat in thorough repair, and to man and furnish her with all appurtenances."

The testimony shows that the libellant's well-known business was to furnish to the grain elevators in the port of Baltimore barges suitable for carrying grain, which they needed when the elevators were full, and which they used principally for storage, and incidentally to carry the grain to ships which they desired to load in different parts of the harbor. This was the purpose for which the barge was to be used in the present case, and was well understood by both parties. The owner of the barge lived in Philadelphia; but the master of the barge, who had brought her to Baltimore, had authority to make the contract. Under this contract her deck was recalced at the libellant's expense, which the master said was all the repairs she required. She then was twice loaded with

grain; which she carried across the harbor and discharged into steamships. Then she was loaded at one of the elevators, and lay about 10 days, when she began to leak. The grain was taken out of her, uninjured; and her master was told she would not answer, as she was too leaky to carry grain. The master then took her away, had repairs put upon her, and brought her back, saying to libelant that he had found the leak, and fixed it, and now the boat was all right. She was again loaded at one of the elevators, and moved near to another, and there lay eight days, when she sprung a leak in the night-time and damaged her cargo very considerably. It is for this damage, which the libelant had to make good to the elevator company, that he brings this libel against the barge.

After the grain was taken out of her, the master had her hauled on the dry-dock for repairs, when it was found that the oakum was out of her seams in half a dozen places, and he was obliged to have her entirely recalked and repaired. By the contract it was agreed by the master that the boat should be kept in thorough repair; and, from all the testimony, I have no difficulty in finding that the damage resulted from a breach of this agreement. Although the contract recites that Dominick Magrudy was master and owner, he was in truth master only, and Mrs. Ann Magrudy, of Philadelphia, was the owner. She makes claim to the boat; and, besides defenses to the merits and facts of libelant's claim, she denies the jurisdiction of this court to take cognizance of the case, and denies the libelant's right to maintain a proceeding *in rem*. It is now, however, I think, quite well settled that canal-boats, lighters, barges, floating elevators, and similar floating contrivances, used in harbors as instruments of commerce, are, in like manner as sea-going vessels, subjects of admiralty jurisdiction, and that contracts with regard to their employment and repair are maritime contracts, and matters of admiralty cognizance. *The Kate Tremaine*, 5 Ben. 60; *The W. J. Walsh*, Id. 72; *The E. M. McChesney*, 8 Ben. 150; *The Floating Elevator Hezekiah Baldwin*, Id. 556; *The Northern Belle*, 9 Wall. 526; *Edner v. Greco*, 3 Fed. Rep. 411. Under the contract in this case, the canal-boat could have been used for any of the purposes for which such a vessel is suitable; and she was in fact used in two instances to carry grain across the harbor. The fact that the principal use to which it was expected she would be put, and for which she actually was used, was to hold grain on storage until the elevators were relieved, does not, in my judgment, alter the rights of the parties. In *Reppert v. Robinson*, Taney, 498, it is said:

"The manner in which the vessel is actually employed cannot affect the question of jurisdiction. It depends upon her character. If the repairs fitted her for navigation of the sea, the contract was maritime; and it does not rest with the owner to confer or take away admiralty jurisdiction at his pleasure by the mode or trade in which he afterwards employed her."

The objection to the libel most strongly urged is to its character as a libel *in rem*. It is urged that a contract such as the present one makes the libelant the owner of the boat during the term of the contract; that

she was hired to him absolutely for 60 days; that he was to have complete control, possession, and command of her; and that, as under such a contract the owner would have no lien on the cargo for the hire, the charterer should have no lien on the vessel for damages resulting from her unseaworthiness, or other breach of the charter by the owner. That where the charterers have the possession and control of the vessel the owners have no lien for their hire, is indeed settled. *Drinkwater v. The Brig Spartan*, 1 Ware, 149. The parties in such case have voluntarily entered into a contract, the effect of which is held to be to remit the owner to the personal responsibility of the charterer. The charterers have a lien on the cargo, and to allow a lien to the owner, also, might be to endanger the property of innocent shippers, having no notice of the contract. But the rule of the general maritime law is that every contract made by the master, within the scope of his authority, binds the vessel, and gives the creditor a lien on it for his security. *The Phebe*, 1 Ware, 271; *The Paragon*, Id. 322. And the exceptions to this rule are not to be extended unless for imperative reasons. There is high authority for saying that even where the whole vessel is demised, or let to hire, a shipper may have a lien on the vessel. In *The Phebe* it was held that the shipper might proceed against the vessel notwithstanding she was let to a hirer who was to have sole control of her, and notwithstanding the shipper would have no remedy *in personam* against the owner. *The Phebe*, 1 Ware, 271; *The William & Emmeline*, Blatch. & H. 71; *The Freeman*, 18 How. 182. I can see no sound reason why the present case should be held to be an exception to that general rule, inherent in the maritime law, by which whoever deals with the master, within the scope of his authority, is entitled to look to the ship as his security; and I have been referred to no case which so decides.

In this case the master knew better than any one the age and condition of his boat, and her fitness to carry grain without injuring it. He undertook to have the repairing done to make her fit after she had once sprung a leak. He was to remain on board of her, to watch her and her cargo, and keep her wells free of water. He had expressly stipulated with the libellant to keep her in thorough repair, and I fail to see why the boat should not be held liable *in rem* to the libellant for damages to a cargo resulting from a breach of this stipulation, which cargo the libellant, relying on this stipulation, had procured for her, and which damage he was answerable for, and has paid.

Upon the theory that this was an absolute demise of the boat, and that the master was in the employment of the charterer, and not of the owner, it is contended that the owner is not responsible for the neglect and defaults of the master in allowing the leak to get such headway as to injure the grain. But the master, who was offered as a witness by the respondents, and not by the libellant, denies that he was negligent, and declares that he was constantly on board, diligently attentive, morning and evening, to pumping the boat, and states that, when the leak started, it gained so rapidly that no exertions could stop its gaining. Therefore, even though he is regarded as the servant of the libellant, the respond-

ents' testimony acquits him of fault. There is no contention, however, but that when the master made the contract, and stipulated to keep the boat in thorough repair, he was acting on behalf of the owner, and within the scope of his authority, and also that he was so acting when, the boat having been once rejected as leaky, he took her to be repaired, and subsequently returned her, saying she was all right, and ready for loading. The owners of barges to be used for grain have been held by the admiralty courts very strictly to the duty of keeping their boats tight, strong, and in every way fit for the purpose for which they are used; that is to say, so that the water shall not reach the grain. The supreme court has said that, if they are incapable of this, they are not seaworthy, and that there is no other test. *The Northern Belle*, 9 Wall. 526; *Kellogg v. Packet Co.*, 3 Biss. 496. In this case the whole purpose and meaning of the stipulation that the owner should keep the boat in thorough repair was nothing more nor less than that, while subjected to only the ordinary risks of her employment, she should not so leak as to injure her cargo.

I pronounce in favor of the libellant; but, as the testimony with regard to the loss on the wet grain was not entirely satisfactory, unless the parties can agree on the amount, I will send the case to a master to compute the damages. I think it should be shown, with more accuracy than was done at the hearing, how much the grain which was wet was depreciated in value.

THE ELLA.

FRAME v. THE ELLA.

(District Court, E. D. Virginia. March 29, 1880.)

1. MARITIME CONTRACT—WHAT CONSTITUTES—LAUNCHING STRANDED VESSEL.

A contract for launching a vessel, where the vessel has been carried a quarter of a mile up the beach by a storm, is a maritime contract, for which the vessel is liable *in rem*.

2. CONTRACTS—DELAY IN PERFORMING—WHEN UNREASONABLE.

A schooner of 160 tons having been carried about a quarter of a mile up the beach by a storm, the master, on September 1st, contracted with a landsman experienced in moving houses to launch her for \$1,000, to be paid when the launching was completed, and not before. The contractor promptly began work, but in several weeks had only moved her about twice her length. He then abandoned this plan, and hired a dredge to dig a canal up to her, which worked at intervals for some time, and then quit. On December 5th the dredge was again hired, and by December 22d had finished the canal up to the schooner's stern. After an unsuccessful effort at launching, nothing more was done until January 4th, when the master notified the contractor that, unless the work was completed in one week, he would terminate the contract. On the expiration thereof, notice was given that other persons had been engaged to finish the job. With the new employees the master succeeded in launching the schooner by March 9th. *Held* that, in view of the time consumed by the latter, the delay of the original contractor was not unreasonable, and he was entitled to recover the reasonable value of his services.

3. SAME—FALSE REPRESENTATIONS.

The fact that the contractor agreed to "launch the schooner," and to "furnish all materials, labor, and implements necessary to launch" her, did not imply that he

was an experienced wrecker, or that he possessed the machinery, dredges, etc. that might be found necessary.

4. CONTRACT FOR SALVAGE—LIBEL *IN REM*.

An express contract for salvage services does not bar a libel *in rem* for compensation.

In Admiralty. Libel by John Frame against the schooner Ella for services performed under a contract to launch her, after being beached by a storm. Decree for libelant.

W. G. Elliott, for libelant.

Ellis & Thom, for respondent.

HUGHES, J. By the extraordinary storm of August, 1879, the schooner Ella, of Newcastle, Me., was carried 1,200 to 1,300 feet beyond the ordinary water's edge, and beached high and dry on the shore of the Elizabeth river, near Norfolk, far beyond the reach of the tides. The owner's agent rejected the offers of the Bakers, of this city, experienced wreckers, to launch the vessel for \$1,200; and contracted at \$1,000 with a landsman, John Frame, the libelant in this suit, who had had some experience in moving houses. There was a written contract, at the price named, dated on the 1st of September, 1879, in which the libelant stipulated to "launch the schooner," and "to furnish all material, labor, and implements necessary to launch" her, and that the work of "launching" should be commenced as soon as practicable, and without unnecessary delay. The agent contracted to pay for this service \$1,000 as soon as the vessel should be placed in deep water; and that he should not be liable to pay any portion of the sum until the schooner was placed in deep water. No time was agreed upon for executing the work; the libelant stating in evidence that he was unwilling to bind himself to any limited time. The work was promptly begun about the 3d September, and the vessel was moved in a few weeks about the distance of twice her own length; she being a schooner of 160 tons. Then the plan of moving her over the ground seems to have been abandoned. It was determined, instead, to dredge a canal from the channel up to the place where the vessel then lay. For this purpose the dredge of one H. E. Culpepper was engaged, which went to work at \$50 a day, and worked on at intervals until she had earned \$351. A good deal of delay seems to have been caused by the necessity of waiting for this dredge. On the 5th of December the dredge was again hired; Frame and Condon, the master of the Ella, uniting with Culpepper in a written contract, by which they pledged the lien of the vessel for the \$351 already earned, and for the wages to be earned. Under this arrangement the dredge again went to work, and by the 22d of December had run the canal up to the stern of the schooner where she then lay, and then knocked off from work, though it seems that a canal was dredged further on along one side of the schooner at some time or other. Attempts were made to slide the vessel sideways into this lateral canal, but they did not succeed. Then it was attempted to drag the vessel astern into the main canal, but the hawser used by Frame broke more or less often, and that

effort failed. Nothing seems to have been done by Frame after the 22d of December up to the 4th of January, 1880, which was probably due to the holidays. On the last-named date, Condon told Frame that, if he did not complete his job in a week from that time, he would terminate the contract. On the 11th January Condon gave Frame a written notice that he had employed other persons to finish the work. Condon, with his new employes, the Bakers, went to work; and by cutting a canal on the other side of the vessel from that on which Frame had cut one, and by the use of chains and other appliances, succeeded in launching the vessel on the 9th of March; that is, after the lapse of about two months from the time when Condon took the work out of Frame's hands. Condon paid the Bakers for the work done by them \$600. A libel was filed by Culpepper against the schooner for the dredging done by his dredge, in which he claimed \$750, including the amount of \$351 due for the first service, which has been named. This claim and cost of suit was settled out of court by Condon, and the libel dismissed; the court costs in which being about \$50. Frame contends that \$200 of this \$750 was not justly due, and that Condon should not have allowed it. Frame now brings this libel, vouching his contract of September 1st, and claiming the \$1,000 named therein, or else such just compensation for his services as may of right be adjudged to him. A note has been filed by counsel for Condon since the argument at bar, contending that, as this is a claim for salvage, the libellant barred his right to sue *in rem* by entering into a special express contract for services.

There is nothing in the point made by the master's counsel. In some old cases it has been held that a special or express contract with the owners, fixing the compensation to be paid for salvage, was a bar to a libel *in rem*. But they have been overruled by more modern cases; and, except as to contracts for fixed sums payable "at all events," such is no longer the law. The point was settled by the United States supreme court in the case of *The Camanche*, 8 Wall. 448, and the ruling there has been followed by several cases in the United States courts. Desty's Shipping and Admiralty is not, and does not profess to be, an authority itself; it is an index of all decisions in admiralty, some of which are authority, and others of which are overruled cases. The contract in the case before me, as I have said, was in terms a contract for launching. It was so in fact. The repairer of a ship still on the docks may libel her, either while there, or after she has been launched. Benedict says that towing or "otherwise moving" a vessel of commerce is a maritime contract, within the cognizance of admiralty. A leading case on this subject, and an early American case, is *Read v. The Hull of a New Brig*, 1 Story, 244. The present case is indisputably within the admiralty jurisdiction.

I come, therefore, to consider it on the merits. The claim is resisted by the master of the schooner, Condon, on two grounds: (1) On the ground that the contract was forfeited by Frame by his failure to perform the job in a reasonable time; and (2) on the ground that Frame was without skill in the business he undertook, and, furthermore, was

not provided with the materials and implements necessary to the execution of his contract to furnish them. Condon also insists that he lost at the rate of \$300 a month for all the unnecessary time that was spent by Frame about the work he undertook to do. As to this last objection, no cross-libel has been filed setting up this claim. It is not a matter put in issue by the pleadings in the case, and I do not think this specific claim is properly before the court for adjudication. But, even if it were, it would depend entirely upon the decision of the question of unreasonable delay, which I am to pass upon.

Returning to the more regular grounds of defense made by Condon, and first to that of Frame's alleged dilatoriness in completing his work: It cannot be denied that Frame was bound to perform it in a reasonable time. The fact that no time was stipulated for, in a contract concerning the launching of a vessel of commerce, into which time always enters as a most important element of consideration, seems to indicate that neither party deemed it practicable to fix a time, and that the period to be allowed was left open to the determination of circumstances. I should have been disposed, nevertheless, to think the delay of four months quite unreasonable and fatal, but for what occurred after Condon discharged Frame, and undertook the job himself. Frame had effected the removal of the schooner over the ground some two lengths, and thereby shortened the distance necessary to be dredged, so as to save, according to Capt. Baker's testimony, six or seven days' work of the dredge. He had also dredged a canal from the water channel some thousand feet to the stern of the schooner, and extended it along one side of the schooner. He had thus accomplished most of the work necessary to the launching of the vessel at the time he was discharged. Not much, if any, more than 100 additional feet of dredging remained to be done when Condon took charge. Yet two months elapsed after Condon set to work before he completed the job. If these two months were not an unreasonable time within which Condon did the remaining work necessary, it does not seem to me that four months were unreasonable for the much more considerable work that Frame had directed. The work was of a character to be attended by delays, and I do not see that the delays which attended what was done in the four months are beyond proportion with those which attended what was done in the two months when Condon had direction, under circumstances creating the strongest incentives to exertion and expedition. There is the further consideration that Condon was in attendance at the schooner during the entire period of Frame's control, and does not, from the evidence, seem to have entered personal protest against the delay in any form, or even made complaint to Frame himself, until the 4th of January. As late as the 5th December he sanctioned a proceeding of Frame by joining in the contract with Culpepper for the second use of the dredge, which recognized the original contract, and continued it in operation as long as the dredge should be employed, which was until the 22d December. This acquiescence and participation by Condon in what Frame was doing certainly affords a strong implication that there was no delay before

that time to justify the forfeiture of his contract. Considered in connection with Condon's subsequent failure for two months to get the vessel off, when comparatively little remained to be done, I do not think there was such delay on the part of Frame as authorized a summary and arbitrary abrogation of the contract upon a week's notice. Solemn contracts cannot be set aside by a single party to them upon grounds so inconclusive. If Frame had himself thrown up his contract, he would have been bound by his contract, and could not have recovered any remuneration for his work and labor. But in this case it is Condon who terminates it, and it does not accord with the spirit of a court of admiralty, which is averse to the exaction of forfeitures and penalties, to allow him, by his own arbitrary act, to fix a forfeiture upon the other contracting party.

The other ground of defense is that Frame had no skill as a wrecker, and did not own the materials and implements necessary to the performance of his undertaking, which he contracted to furnish. There is no proof, and it is not a fact, that Frame held himself out as a professional wrecker. The evidence indicates, rather, that Condon knew he was a landsman, and that Condon employed him by reason of his having had some experience as a mover of houses on land. It is quite true that a man who undertakes work for a price impliedly stipulates that he has the requisite skill for its successful performance. But this rule is rarely, if ever, enforced, except in respect to professional skill, and that of experts in the mechanical trades and crafts. It does not apply to mere laborers, or to employments non-professional, and not within the mechanical trades. The launching of a vessel stranded by a phenomenal storm a quarter of a mile from the water's edge cannot be held to fall within the experience of any particular profession or craft, and is as exceptional a work as can well be imagined. I do not think that Frame can be held to have contracted impliedly with Condon that he had any experience or special skill in the art and mystery of moving ships over the land. The stipulation in the contract, that Frame should furnish the materials and implements necessary to the work undertaken, bound him to defray the expense of procuring and using those materials and implements, and was not a false holding out of the idea that he actually owned and possessed them. Contracts of the sort do not imply the ownership of such appliances. Men of enterprise often contract to do work requiring the use of herculean machinery, immensely costly, which they do not own. They depend for procuring such materials and implements very often on naught but the credit of the contracts which they enter into. If in every instance they were held to own or to possess sufficient personal credit for procuring them, then men of enterprise alone, and of no capital, would be unable to enter into any of the great operations of modern times, and the most important of these undertakings could not be prosecuted. The hiring by Frame and Condon of Culpepper's dredging-machine the second time was upon the credit of Frame's original contract, which itself was a lien upon the schooner, and Condon's joining in it attested that he considered the contract to be then in force

and binding upon the vessel, and would continue so until the dredging for which it provided should be performed, *i. e.*, until the 22d December; for otherwise he would not have signed the contract. I cannot agree that Frame's contract to furnish all the materials and implements necessary to the launching of the schooner implied that he owned, and could continually command, a dredge, or even that he would have one ready for use on every particular day on which it could be used. It is clear from the tenor of the contract that each party contemplated that the schooner was to be got off by "launching." Dredging was not in the minds of either party. Nor does it seem to have come into their minds until after the lapse of several weeks in futile attempts at launching.

On the whole case, I think Frame is entitled to a just compensation for whatever effectual work he did for the schooner. He would be entitled to compensation for the dredging done by Culpepper; but, as Condon has paid that debt, it cannot now be awarded to him. He is also entitled to a proper compensation for moving the vessel from the spot where he found her to that up to which the canal was dredged. I could not allow his actual expenditures in this part of his work. He may have spent double what it ought to have cost. I think the best way of getting at what this service was worth will be to allow him what the dredging of the canal up to where the vessel originally lay would have cost. Capt. Baker says that that distance would have required six or seven days' dredging. This at \$50 a day, or \$300, is what I will allow. A decree may be taken for \$300, and \$61.04 costs.

MULLER v. SPRECKELS.¹

(District Court, E. D. Pennsylvania. October 20, 1891.)

1. CONTRACT BY MASTER OF VESSEL—VALIDITY.

An agreement by a charterer to give the master of a vessel a drawback in consideration of his permitting the stevedoring to be done by him at a higher price than it could have been done by other parties is void.

2. CHARTER-PARTY—RIGHTS OF CHARTERER TO UNLOAD—COMPENSATION.

A ship contracted for 35 cents a ton for stevedoring a cargo of sugar, which was a fair compensation; the charterer himself assumed the stevedoring, charging 45 cents a ton. *Held*, as the right to do the stevedoring was the ship's, and was not given to charterers by a charter-party providing that the "ship to be addressed to * * * charterers or their agent at port of discharge for custom-house business on the usual terms," the charterer is not entitled to more than the service would have cost the ship.

3. WHARFAGE—LIABILITY OF VESSEL.

Where a vessel, to make the delivery required by the terms of the charter, is compelled to enter a dock, and for this purpose enters the dock of the charterer, she is liable to him for the ordinary charges for such accommodation.

4. SAME—CUSTOM.

A charge made for the use of a dock, equal to the usual wharfage fee, where a vessel enters it, and excludes by her presence others from the use of the wharf, al-

¹ Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

though not using the wharf herself, is a recognized usage of the port of Philadelphia, and vessels are held to a knowledge thereof.

5. DELIVERY OF CARGO—CLAIM FOR SHORTAGE.

Where a paragraph of a bill avers delivery of "the whole cargo taken on board," and the answer acknowledges that the paragraph containing this averment is true, a claim for shortage of cargo cannot be allowed.

6. ENTRY AT CUSTOM-HOUSE—FEES OF CHARTERER'S AGENT.

Although making entry was by charter-party the duty of the charterer's agent, yet, if he be informed before doing so that entry has been made, he will not be allowed for making it a second time, nor for the services of a tug in making it.

7. SAME.

Where a charter-party confines the duties of a ship's agent to "custom-house business" he is not the general representative of the ship, and is not entitled to an "attendance fee."

In Admiralty.

Libel by Victor H. Muller, master of the steam-ship *Eugenie*, against Claus Spreckels to recover freight. The gross freight was \$7,587.72, which had been paid less the following deductions: Entrance fee, \$5; custom-house fees, \$1.40; tug-boat services delivering orders, \$2; wharfage, \$225; stevedore, \$1,424.61; advertising, \$5.95; stationery, etc., \$10; "attendance" fee, \$50; commission, \$190.82; short delivery, \$42.07.

John Q. Lane, for libellant.

Frank P. Prichard and John G. Johnson, for respondent.

BUTLER, J. The libel is for freight, under charter-party—for carrying sugar. The amount earned is \$7,632.80. The charter provides that "the ship shall pay charterer's agent at port of discharge a commission of two and a half per cent. on gross freight," and that the ship "shall be addressed at the port of discharge to the charterer or his agent for custom-house business, on the usual terms." The cargo was to be delivered at Philadelphia, "along-side store or into craft or steamer at wharf, pier, or on cars, always afloat," as ordered. On the ship's arrival controversy arose respecting the appointment of an agent, and the employment of stevedores. As we have seen, it was the charterer's right to appoint an agent, and the duty of unloading was on the vessel. The charterer, Spreckels, appointed Hempstead & Co. and desired the employment of his own stevedores, at 45 cents per ton; while the master was solicitous for the appointment of Wesenberg & Co. as agents, and selected his own stevedores—contracting to pay 35 cents per ton. An effort was made to reach an agreement on the subject, and several interviews between the parties occurred. The testimony produced is too contradictory to prove the allegations of either side. The libellant sets up an agreement for the appointment of Wesenberg & Co.; and the respondent an agreement that his stevedores should be employed at 45 cents per ton. The burden of proof is on the party setting up the agreement; and in view of the contradictory character of the testimony the written contract shown by the charter must prevail. The fact that the charterer selected an agent, and throughout the transaction insisted on his recognition by the ship, is inconsistent with the allegation that he agreed to the appointment of Wesenberg & Co.; and the fact that the

ship employed stevedores at 35 cents per ton is equally inconsistent with the allegation that she agreed to accept Mr. Spreckels' stevedores at 45 cents. If it is true as alleged, that she did this in consideration of an agreement to pay the master and Wesenberg & Co. a drawback of \$50 each, the transaction should not be recognized. Such attempts when proved should subject masters and their agents engaged therein to severe punishment. The statement by respondent's counsel that the master admits the alleged agreement to employ these stevedores, is not sustained by the evidence, as I understand it. It is true that he does not say that such an agreement was coupled with an understanding that Wesenberg & Co. should have the agency. It would be unjust to wrest the admission from its connection, and thus use it against him. There is nothing in the evidence, therefore, to justify a departure from the terms of the charter in ascertaining the rights of the parties. By this instrument, as we have seen, Mr. Spreckels' agent was authorized to transact the ship's custom-house business, making the usual charges and disbursements on that account, and is expressly given a commission of 2½ per cent. on the gross amount of freight. The right to employ stevedores was the ship's; and Mr. Spreckels, who assumed the exercise of it, is entitled to no more than the employment would have cost her. As before stated she contracted to have it done for 35 cents; and this the master and Mr. Moe say was a fair compensation. The master's further statement, as well as that of Mr. Wesenberg, that the service ought to have been performed for less, under their construction of the charter, I do not consider entitled to any weight in view of the facts just referred to.

The freight earned, as we have seen, was \$7,632.80. Of this \$5,675.95 were paid to the ship's owners directly by Hempstead through draft. Of the balance \$225 has been withheld as compensation for wharfage. It is objected that the vessel was not compelled to provide a wharf, and that this charge is therefore improper. To make the delivery required by the charter however, it was necessary to enter the dock connected with the wharf. Although this was the private wharf of Mr. Spreckels, the testimony shows that wharfage is always charged under such circumstances, and justifies a conclusion that no difference exists as regards the charge where the wharf is not used if the dock is. The vessel's presence excluded its use by others, and the charge is consequently the same as if it were employed. Such is the usage of this port and the ship must be held to a knowledge of it. Mr. Spreckels testifies that the amount claimed is the usual charge, and there is no suggestion that it is excessive. The sum of \$42.07 retained for shortage of cargo, cannot be allowed. The answer expressly admits receipt of the entire amount shipped. The third paragraph of the libel avers delivery of "the whole cargo taken on board" and the answer says "the averments of the third paragraph of the bill are true." Besides I find nothing in the evidence to sustain the allegation. The sum of \$190.82 retained as commission on freight is distinctly authorized (as we have seen) by the charter. The sums of \$5 and \$1.40 fees for entrance at the custom-house should not

be allowed. While the duty of making entrance devolved upon the charterer's agent, the charterer was informed in advance that the entry had been made, and he should not therefore have incurred the expense of making it a second time. The service of a tug for which \$2 is charged was, as I understand, required only in making the entry, and should be disallowed. The \$5 charge for advertising should not be allowed; and the same must be said of \$10 for stationery, etc. Nor do I see anything in the evidence to justify the charge of \$50 "for attendance fee." The duties of this agent were confined to "custom-house business." He was not the general representative of the ship, and there is nothing in the evidence to show any connection between this business and the charges here referred to. Settlements for the freight, after making the deductions allowed, should have been made with the master or his agent. The payment however, to the owners to the extent made, should under the circumstances be credited to Mr. Spreckels. A decree may be prepared accordingly.

THE F. E. SPINNER.

UNION DRY-DOCK CO. v. THE F. E. SPINNER.

(District Court, N. D. New York. December 29, 1891.)

MARITIME LIEN—SALVAGE—EVIDENCE.

On a libel *in rem* against a vessel for the value of a chain used in raising her from the bottom of a river, it appeared that the libellant contracted by telegraph with a tug company to sell it the chain, and that he delivered the chain to a tug sent for it. He had no communication with the owners or master of the vessel, and there was nothing to show that he knew for what purpose the chain was wanted, except his testimony that he "supposed" and "inferred" that it was for raising the sunken vessel. Six weeks after delivering the chain he wrote to the tug company referring to "our agreement," and proposing to draw for the price of the chain. *Held*, that there was no evidence to support either a maritime lien for supplies furnished or for salvage upon the vessel raised.

In Admiralty. Libel *in rem* by the Union Dry-Dock Company against the F. E. Spinner.

The libel alleges that on September 17, 1885, the libellant furnished and delivered 1,480 feet of steel chain, worth \$863, to the steam propeller F. E. Spinner, at the request of her master and owners. That the libellant relied upon the credit of the vessel as well as that of the owners and master, and would not have furnished the chain except upon the credit of the vessel. That by reason of these facts the libellant acquired a lien upon the vessel for the value of the chain. The answer of the owner of the Spinner denies every allegation of the libel which seeks to charge the vessel with liability. On the 10th of September, 1885, the libellant received the following telegram:

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"DETROIT, Sept. 10th, 1885.

"To Capt. M. M. Drake, Supt. Union Dry-Dock, Buffalo, N. Y.: Want to buy eight or nine hundred feet two inch chain; understand you have it. What's your best price and terms? Answer quick.

"DETROIT TUG AND TRANSIT CO."

This was followed by various telegrams and letters, which culminated in an agreement between the libelant and the Detroit Tug & Transit Company as evidenced by the following telegrams:

"BUFFALO, Sept. 16, 1885.

"Detroit Tug & Transit Co., Detroit, Mich.: I will deliver to the tug you name on her arrival here the chain you speak of. My understanding is that you are to have this chain with the option of purchasing it, decision to be made and communicated to me by November first, at a price of forty dollars per ton, or you are to have it for forty-five days at a rental of five hundred dollars. Decision to be made as above, chain to be taken here without cost to us and returned here on same terms, if you choose to have it on rental, damage if any to be made good by you. All the above conditioned on my receipt from you at once of a telegram accepting above terms.

"W. BULLARD."

On the same day the following answer was received:

"DETROIT, MICH., Sept. 16, 1885.

"W. Bullard, Buffalo: Your telegram received; we accept terms and conditions stated therein about chains.

"DETROIT TUG & TRANSIT CO.,

"S. A. MURPHY."

Mr. Bullard was the general manager of the libelant at Buffalo. Prior to the first telegram of September 10, 1885, the Spinner was lying sunk in the Sault Ste. Marie river. The chain was delivered on board a tug sent by the Detroit Tug & Transit Company to Buffalo for that purpose, and was used in raising the Spinner by the International Wrecking Company, which company had a contract to raise her with the insurers, to whom the wreck had been abandoned.

After the propeller had been raised, and on the 3d of November, 1885, the following letter was sent by Mr. Bullard:

"BUFFALO, N. Y., Nov. 3, 1885.

"Mr. S. A. Murphy, Prest. Det. Tug & Trans. Co., Detroit, Mich.—DEAR SIR: By terms of our agreement of Sept. 16th you were to communicate to me by Nov. 1st your decision as to whether you would pay rental of \$500 for 45 days' use of steel chain loaned you or whether you would purchase same at \$40 per ton. I have heard nothing from you in regard to the matter. Can I draw on you at sight for the value of the chain at the agreed price named above?

Yours, truly, W. BULLARD, Gen'l Mgr."

This letter was never answered. The chain was not returned or paid for.

Josiah Cook, for libelant.

Sherman S. Rogers, for respondent.

COXE, J. The libel cannot be sustained for salvage. There is neither allegation nor proof of a salvage service. The action is *in rem* to recover

of the Spinner \$863, the value of a chain furnished, as the libelant alleges, for the use and on the credit of the vessel and at the request of her master and owners. In order to recover the libelant must prove these allegations. It has wholly failed to do so. The contract was negotiated by telegram and letter. The master and owners of the vessel were not connected with it in any way. The only parties were the libelant on the one side and the Detroit Tug & Transit Company on the other. The latter company hired the chain for 45 days, agreeing to pay \$500 rental with an option of purchase at \$40 per ton if accepted prior to November 1st. There is not the slightest allusion to the sunken propeller from one end of the correspondence to the other. There is nothing therein to indicate that the libelant knew for what purpose the chain was intended. The two persons who represented the libelant in the negotiations, Capt. Drake and Mr. Bullard, testify that they "supposed" and "inferred" that the chain was to be used in raising the propeller, but neither of them says that it was furnished to the propeller "at the request of her master and owners and upon the credit of said vessel;" neither of them says that there was an intent on the part of the libelant, at any time, to hold the vessel responsible. Indeed, it appears that, six weeks after the delivery of the chain, the libelant still looked for payment to the tug and transit company, and to no one else. On the 3d of November, the libelant, addressing the tug and transit company, refers to "the terms of our agreement" and proposes to draw at sight for the value of the chain.

The contract is too plain to require a resort to inferences drawn from extraneous considerations; but were presumptions necessary or permissible it might be pertinent to inquire whether it is likely that the libelant intended to part with valuable property upon the credit of a foreign bottom, lying as an abandoned wreck, under 138 feet of Canadian water, 500 miles from Buffalo. The fact that individuals interested in the vessel were also connected with the tug company and the wrecking company does not avail the libelant. The evidence shows an agreement between the libelant and the tug company as clear and unmistakable in terms as can well be imagined. A finding that the libelant parted with its chain on the credit of the propeller or with intent to look to her in any contingency for payment, would be wholly unsupported by the proof. It is to be regretted that the libelant has lost its chain, but this is a result which usually follows where an irresponsible party has been trusted.

The libel is dismissed, with costs.

THE D. B. STEELMAN.

(District Court, E. D. Virginia. November 8, 1880.)

1. MARITIME LIENS—VESSEL OWNED BY WIFE—FURNISHINGS BY HUSBAND.

When a half interest in a vessel is owned by a married woman residing in the District of Columbia, where she is permitted by law to hold property in her separate right, free from the control and obligations of her husband, the husband is entitled to a lien on the vessel for funds and supplies furnished, and expenses incurred upon her, when his claim is proved in the usual way.

2. SAME—PARTIAL PAYMENTS—APPLICATION.

When advances are made and lumber, etc., furnished to a vessel at various times during a period of about two months, but all during one stay in port, and as part of one transaction, and the account embraces some items which have the force of maritime liens, and others which do not, a cash payment will be applied in discharge of the latter, and the lien of the former will be preserved.

3. SAME—WAIVER OF LIEN—TAKING NOTES.

The taking of notes payable in two, three, and four months, for advances made and materials furnished to a vessel, does not of itself operate as a waiver of the maritime lien.

4. SAME—TAKING MORTGAGE.

Nor is the maritime lien waived by taking a mortgage on the vessel to secure such notes. *The Ann C. Pratt*, 1 Curt. 340, and *The Swallow*, 1 Bond, 189, distinguished.

5. SAME—LIENS UNDER STATUTE.

Revised Code Md. art. 87, §§ 44-48, giving a lien on vessels used on Chesapeake bay on filing in the county court a verified statement of the claim, and providing that the act shall not entitle the claimant to preference over creditors secured by prior mortgage, abrogates the maritime lien for materials furnished in Maryland; and a lien secured under its provisions is subordinate to a claim secured by a prior mortgage on the vessel.

In Admiralty. Libel *in rem* for wages. Decree for libelants and claimants.

Walke & Old, for mortgagee.

Sharp & Hughes, Ellis & Thom, and *White & Garnett*, for petitioners.

HUGHES, J. The schooner D. B. Steelman, of Baltimore, Md., has been libeled in this court by three of her seamen; and sundry materialmen and other claimants have filed petitions setting out claims against the vessel. By general consent the vessel has been sold, and the proceeds paid into the registry for distribution. These are insufficient to meet all the claims. Of course the first charge against the fund is the costs of this suit. Next in order of priority are the claims of the seamen. They were hired by the month in Baltimore; and, as the vessel laid up in this port without finishing her voyage, they must be paid their wages for the time claimed, and \$1.50 each for their passage back to Baltimore.

The vessel was owned by J. Hexter and his sister, Mrs. Silverberg. Under the laws of the District of Columbia, where Mrs. Silverberg lives, married women may acquire and hold personal and real property in separate right, free from the control or obligations of their husbands. Her half of this vessel is thus held and owned by Mrs. Silverberg, as is shown by the schooner's custom-house papers, issued by the collector of Baltimore. One of the claimants by petition in this case is Silverberg,

who claims expenses incurred in repairs upon this vessel, and in funds and supplies furnished her. I see no reason why this claim should be denied. It is proved in the usual way, and is admitted to be just and correct by the other half-owner, Mr. Hexter. It cannot therefore be invalidated by the mere fact that the claimant is the husband of a half-owner. It must be paid *pari passu* with other claims of like dignity. It seems that the petitioner McCullough, in March and April last, furnished lumber and money for repairs upon the vessel to the amount of about \$635, of which he received \$300 in cash, and took notes at 60 days, 90 days, and 4 months for the balance. The items making up the total of the account which he files with his petition bear date from February 10, 1880, to April 5; and it is claimed by adverse counsel that the payment of \$300 made to him by Hexter, an owner, should be applied to the discharge of the earliest of those items. This would leave among the items of later date some which have not the force of maritime liens. There was but one refitting and repairing and supplying of this vessel by McCullough, which was during a single stay of the vessel in this port, and his advances to her were made with reference to the total charges incurred on that occasion. The cash payment which he received must therefore be presumed to have been paid and received in liquidation *pro tanto*, first, of the items which had not the force of maritime liens, and then of those which had. Any other rule of application would be contrary to reason, and be grossly inequitable.

Besides executing three notes for the balance of \$335 due upon McCullough's advance, Hexter executed a mortgage upon his half of the vessel to secure the amount of the notes. The principal question arising in the present case is whether McCullough, by taking the notes, and especially by also taking this mortgage, waived his maritime lien upon the vessel, and thus falls behind the other material-men in the order of payment. I think it may be assumed as settled law that the taking of a note by a material-man in evidence of his claim for supplies, for such a short time as 60, 90, or 120 days does not of itself amount to a waiver of his maritime lien upon the vessel supplied. *The Nestor*, 1 Sum. 73. The only open question is whether the taking of a mortgage on the vessel securing this note is a waiver. It is settled law that a mortgage is to be treated, not as the debt, but as a mere incident of it; not as the principal thing, but as the mere accessory. 1 Jones, Mortg. § 11; *Carpenter v. Lougan*, 16 Wall. 271; and see 22 Alb. Law J. 377. If a mortgage be thus but an accessory and incident of the note, and the note itself does not displace the maritime lien upon the vessel, then the mere fact of taking a mortgage does not operate as a waiver of the maritime lien. If, however, the taking of the mortgage be attended by acts inconsistent with the lien, or prejudicial to other maritime creditors, (for instance, if the credit given by it be so long as to make the claim it is intended to secure stale, in the sense of the maritime law,) or if the execution of the mortgage be in manner such as to make it conflict with the rights of maritime creditors whose claims are of equal dignity with that secured by the mortgage, then it would be inequitable to allow to the mortgagee

the benefit of two remedies against the ship, and his taking the mortgage would be held as waiving the maritime lien.

I see nothing in conflict with this view in the cases of *The Ann C. Pratt*, 1 Curt. 340, and *The Swallow*, 1 Bond, 189, cited by adverse counsel. In the case of *The Ann C. Pratt*, which belonged to Frankfort, Me., there was a loan of money on a bottomry bond while the vessel was at St. Thomas, during a voyage to the West Indies. It was in proof that the lender was unwilling to furnish funds except on a bottomry bond, or to deal upon any other footing than a contract of bottomry, and that both parties contracted solely with reference to such a bond. The lender of money upon a bottomry bond takes a very different risk from that of a material-man who furnishes supplies, and he charges for this risk a very high remuneration, so that the lien of a bottomry bond is in terms and in its character so inconsistent with the ordinary maritime lien as to operate as a waiver and displacement of the maritime lien. The decision of Justice CURTIS in the case of *The Ann C. Pratt* is based on this difference, and exclusively on this difference under the express contract of the parties in the case; and it is to be remarked that, in rendering this decision on special grounds, Mr. Justice CURTIS reversed Judge WARE, one of the soundest maritime jurists known to the American admiralty judicature. The case of *The Swallow*, 1 Bond, 189, was decided in Ohio, where the statute law of the state gave to material-men a remedy by attachment in the state courts against vessels which they credited. The state law provided a different order of priorities in these suits from that of the admiralty law for claims against vessels. In the case of *The Swallow*, several creditors had pursued their remedy against the vessel in the state court to judgment, and had obtained by that means all that could be awarded them under the state law by the state court. There was afterwards a libel in admiralty brought by different claimants against the same vessel. The fund arising from the sale of the vessel under the admiralty decree was sufficient to pay off the claims of the libelants, and to leave a surplus for distribution among claimants, some of whom claimed, and some of whom could not claim, maritime liens. Among those who asserted claims by maritime liens to the surplus were some who had originally valid maritime liens for supplies and repairs, but who, instead of enforcing their claims in the admiralty court, and insisting on their maritime liens, had proceeded in the state court under the water-craft law of the state of Ohio, and obtained judgment in that forum. It was held that the pursuit of a maritime claim in a state court was a waiver of the maritime lien; that this lien, having passed into the judgment of the state court, had been thereby waived and lost, it being clearly consonant with reason and the analogies of the law that, if a party having an undisputed maritime lien voluntarily waives it by seeking another remedy incompatible with it, he cannot be reinstated in his original right. *The Superior*, Newb. Adm. 176, which was cited by the court.

The case at bar is quite different in character from that of *The Ann C. Pratt* and *The Swallow*. It is not the case of libel on a bottomry bond.

It is not the case of a voluntary abandonment of the remedy in admiralty for a resort to the inconsistent and different remedy of attachment and personal judgment in a state court. Nor in this case has there been a sleeping by the claimant upon his mortgage so long as to allow his claim to grow stale, to the prejudice of the rights of maritime lien creditors whose claims are fresh. I hold that the mere taking of a mortgage is not of itself a waiver of the maritime lien, and that there is nothing in this mortgage, or the conduct of the mortgagee, to displace or waive the maritime lien of McCullough for advances and materials furnished to the vessel.

As the schooner belongs to Maryland, the claim of Joseph H. Johnson, a citizen there, for repairs done in that state, is not a lien, except under the terms of the law of Maryland relating to that subject, which is as follows, (Rev. Code Md. art. 67, § 44; Act 1865, p. 119:)

"All boats or vessels of any kind whatsoever belonging in this state, or used or intended to be used on the waters of the Chesapeake bay or its tributaries, the Chesapeake and Ohio canal, and other waters of this state, shall be subject to a lien; and bound for the payment thereof as preferred debts, for all debts due to boat-builders, mechanics, merchants, farmers, or other persons, from the owner, master, or captains, or other agents, of such boats or vessels, for materials furnished or work done in the building, repairing, or equipping the same."

Section 45. "No person shall be entitled to a lien unless he shall, within six months from the commencement of the building, repairing, equipping, or refitting of such boat or vessel, deliver to the clerk of the circuit court of the county where such building, repairing, etc., was done, or the superior court, if done in the city of Baltimore, an account or statement, certified by the oath of the claimant, * * * setting forth the names of the claimant and debtor, and, if the debt was not contracted by the owner, but by his agent, the name of such agent, the name or other certain description of the boat or vessel, and the place where built, repaired, etc., and the particulars or items of the claim or debt."

Section 47. "Such boat or vessel, against which an account or statement shall be filed under this article, shall be subject to a lien for the debt and costs justly chargeable against it for two years from the day on which the account or statement shall be filed, and no longer."

Section 48. "The lien given by this article shall not entitle the claimant to preference over creditors or claimants secured by mortgage or bill of sale properly executed and recorded before the claim to be secured by such lien shall have accrued."

The claim of Johnson, as to the half interest in the vessel upon which McCullough has a mortgage, ranks under this law after or behind the mortgage; but, as to the half interest in the vessel on which there is no mortgage it must be paid *pari passu* with the claims of other material-men, including McCullough. This difference in the manner in which the Maryland claim ranks, as to the different half interests in the schooner, makes it necessary that the commissioner shall divide each of the claims of the material-men into two parts. As to the first half of these several claims, (the first half of the Maryland claim being wholly displaced by the mortgage,) they must be paid the percentage which half the fund subject to distribution will permit; I believe, about 95 per cent. As to

the other halves of these several claims, including half of the Maryland claim, they and it are to be paid in the percentage which the half fund for distribution bears to the aggregate amount of them; I believe, about 74 per cent. I will sign a decree allowing the amounts indicated.

THE TORGORM.

CHAMBERLAIN v. THE TORGORM.

(District Court, D. South Carolina. September 25, 1891.)

1. SHIPPING—BILL OF LADING—NOTICE.

Certain cotton was delivered to a railroad company under a through bill of lading to Germany, the bill stating that it was to be delivered at Charleston, "to the ship T., or to some other steam-ship company or line, or vessels chartered thereby." *Held*, that this bill did not constitute notice to the owner or the railroad that the T. was under a charter-party, and, in the absence of actual notice, the railroad company was not bound to accept from her a bill of lading with the additional qualification, "Other conditions as per charter-party."

2. SAME—POSSESSION OF CARRIER—RIGHT TO SUE.

The cotton having been placed on board the T. immediately on its arrival, according to the usage of the port, the railroad company, by virtue of its right to possession as bailee, could maintain a libel against the vessel to recover the goods upon the master's refusal to sign the bill of lading except with the additional qualification.

In Admiralty. Libel by Daniel H. Chamberlain, as receiver of the South Carolina Railway Company, against the British steam-ship Torgorm, to recover possession of 52 bales of cotton. Decree for libellant.

I. N. Nathans, Mitchell & Smith, and Brawley & Barnwell, for libellant.

I. P. K. Bryan, for claimant.

SIMONTON, J. In April last, B. B. Ford & Co. shipped from Atlanta to Bremen, in Germany, 52 bales of cotton, marked "S. A. S. A." The cotton was delivered to the Georgia Railroad Company, and was carried under a through bill of lading. The words of this bill bearing upon the issues of this case are:

"To be transported by the Georgia Railroad Company to its station at Augusta, Ga., and there to be delivered to the next connecting rail or water carrier, being lightered, ferried, or carted at owner's own risk, if necessary; and thence to be transported by such connecting carrier or carriers via the port of Charleston, South Carolina, to the port of ———, and there to be delivered, being lightered, ferried, or carted at owner's risk, to the ship Torgorm, or some other steam-ship company or line, or to vessels chartered thereby; to be transported by such steam-ship company, or by steamer or steamers of such company or line or charterer to the port of Bremen, Germany, there to be delivered unto order, or to his or her assigns."

The cotton reached Augusta, and came into the possession, under the terms of the bill of lading, of the South Carolina Railway Company, of which libellant is receiver. It was brought to Charleston, and was deliv-

ered by the libellant to the Torgorm via the East Shore Terminal Company, whose track connects the depot of libellant with the dock at which the Torgorm was lying. As soon as the cotton reached the side of the Torgorm it was put on board, and in a very short time thereafter she hauled out into the stream. The mate's receipts given for the cotton on delivery stated that it was received "subject to the conditions of the charter-party." When the clerk of the East Shore Terminal Company handed these receipts to the agent of the South Carolina Railway Company, he took them to the office of the ship's broker, in order to have them exchanged for master's receipts or bills of lading. He prepared himself with bills made out in the usual form,—clean bills, excepting that across their face were words used in the through bill, "Railroad copy not negotiable." The master refused to sign any receipt or bill of lading unless these words were first inserted: "Other conditions as per charter-party." The libellant positively refused to consent to this, and the master persisted in requiring it. The libellant thereupon demanded the redelivery of the cotton. This being refused, this libel was filed. The shippers of the cotton, as well as the libellant and his agents, were ignorant of the existence of any charter-party between the shippers and any one else and the Torgorm. Nor did they have any other reason to believe that she was not a general ship, save such as the through bill of lading disclosed. The libel seeks the redelivery of these 52 bales. The answer sets up these positions: That the Torgorm took in her cargo, including these 52 bales, under a charter-party with the Charleston Exporting & Shipping Company, of which William Fatman is manager; that the shippers of this cotton were aware of this charter-party at and before the date of the delivery of the cotton to the Torgorm; that libellant is neither the owner nor the shipper of the cotton.

The shipper of the cotton denied all actual knowledge of any charter-party, or any knowledge except such as the bill of lading disclosed. On receiving the bill he negotiated a draft on the cotton, and indorsed and attached the bill to it. We have to deal with the rights of the libellant. His rights are measured by his duties. His duties are fixed and defined by the through bill of lading. His obligations are to the holder of this bill, made to order, and negotiated. Any variation of this contract would be at his peril. Under the bill of lading he undertook to carry the cotton from Augusta, and to deliver it to the Torgorm, another carrier; to deliver it precisely as he received it,—that is to say, under the terms of the bill of lading, and none other. The master of the Torgorm proposed to insert the words, "Other conditions as per charter-party." If the through bill of lading—the contract under which libellant delivered and the Torgorm received this cotton—already contained these words or their equivalent, the demand of the master was unnecessary. If it did not, then the master had no right to demand, the libellant had no right to make, any change in the terms of the contract. The learned counsel for the respondent, whose arguments command and receive the careful consideration of the court, insists that the bill of lading gives notice of a charter-party. The language has been quoted. The

cotton is to be delivered primarily to the Torgorm, but, if not delivered to the Torgorm, then to some other steam-ship or company, or (another alternative) to vessels chartered thereby, to be transported by the mode selected,—that is, either by the Torgorm, or by steamers of a line selected in lieu of her; or if neither of these be done, then by the charter of other vessels. It is clear that a charter is not contemplated except upon the contingency that the delivery is not to the Torgorm. Now, the fact being established that the libelant himself and his agents had no knowledge of the existence of a charter-party, and the through of lading did not put him on the inquiry, if he had inserted the words demanded by the master he would have added a new condition to the contract of carriage. This he had not and could not have had any right to do. He was entitled on delivery to a simple declaration of that fact. He could not have demanded more. He could not be compelled to take less than this. It was urged with great force that this cotton was really the property of William Fatman, who had made the charter-party for his company. It was more than suggested that this suit was a skillful device to protect him from a just claim. Assuming that this be so, (it is due to Mr. Fatman to say that the evidence does not sustain it,) it cannot affect the right of libelant. If there be any claim on the part of the ship against the charterer, the master cannot force libelant into the controversy, or make him his instrument in enforcing his claim. With the cotton in his possession, he could enforce any lien he may have had. He did not need any new condition inserted in the contract by the libelant. Such being the right of the libelant, has he taken the proper course of securing it? He is not the shipper, nor is he the owner,—the absolute owner,—of the cotton. But he is the bailee, with a qualified ownership, and intrusted with the possession for the purpose of making delivery according to the bill of lading. Until so delivered, he can claim the possession of the cotton, and maintain an action for it. If the cotton went out of his possession by fraud or mistake, the possession would be restored to him. The libelant would not have delivered this cotton if the conditions insisted upon by the master had been made known to him in advance. He cannot now be prevented from regaining possession, when it is sought to interpolate these conditions, after a delivery made in good faith, and according to the usage of the port. *Peek v. Larsen*, L. R. 12 Eq. 378; *Macl. Shipp.* 352; *Story*, Ag. § 398; *Add. Torts*, p. 562, § 540; *The W. A. Morrell*, 27 Fed. Rep. 570. The libelant is entitled to a decree. It has been stated by counsel for respondent, however, that pending this suit the cotton in question has reached Bremen, and has been delivered to and accepted by the holder of the through bill of lading. This being so, it will protect libelant, and will certainly diminish the money claim. Let a reference be held, in which the inquiry will be as to the fact, circumstances, and terms of this delivery.

UNITED STATES v. GUESS.

(District Court, E. D. Louisiana. December 23, 1891.)

SHIPPING REGULATIONS—INSPECTION—PASSENGERS.

Where the wife and neighbors of a tug-owner go upon the tug during a trial trip, merely to witness the test of her machinery, they are not passengers, within the meaning of the statute requiring passenger boats to be inspected and licensed; and the owner is not liable to the fine imposed by Rev. St. U. S. § 4499, for navigating any vessel contrary to the shipping regulations.

In Admiralty. Libel of information against C. M. Guess to recover a penalty for carrying passengers on a steam-tug not inspected or licensed to carry passengers. Libel dismissed.

Wm. Grant, U. S. Atty.

E. Sabourin, for defendant.

BILLINGS, J. This case is submitted on the libel of information, and the answer and the affidavits and depositions taken under a commission. The suit is for a penalty of \$500 for a violation of the Revised Statutes, in this: That the steam-tug of the defendant, the *Black Prince*—

"Being an American vessel propelled by steam, and not being a public vessel of the United States, or of any other country, and not being a ferry-boat or a boat propelled in whole or in part by steam for navigating canals, was engaged in navigating waters of the United States which are common highways of commerce, and open to general and competitive navigation, in that, while navigating as aforesaid, she did carry as passengers, not having then and there been inspected and licensed as a passenger steam-boat, and not having a certificate from any board of local inspectors of steam-vessels of approval of said vessel and her equipments, as proper for such service, contrary to the form of the statute."

It is to be seen that the *gravamen* of the charge in the information is that the defendant, as owner, had violated the statute, in that, while navigating his vessel, he had carried passengers upon a steam-tug without a certificate of inspection. The only point presented is whether the steam-tug did carry passengers. The proofs adduced by the libellant's depositions, and by the answer of the defendant and his affidavits, contain no conflict of evidence. They all show that the steam-tug *Black Prince*, in the summer of 1890, had to be laid up for extensive repairs; that after they were made and completed, solely with a view "to test the machinery, and to ascertain if it worked satisfactorily," the defendant, the owner of the boat, raised steam, and steamed down the Bayou Teche, from New Iberia to Jeanerette and back, a distance of 10 miles each way; that the time occupied in going and returning was about four hours; that the persons described in the information as passengers were the wife and neighbors of the owner, who had no purpose in being on board, except to accompany the owner in his effort to see the working of the repaired machinery. There is no proof that there was any commercial purpose intended or accomplished, or any transportation as travelers, in

this movement, either on the part of the owner or the guests who are charged in the information to be passengers.

The language of the libel conforms to that of the statute, (Rev. St. § 4499,) and avers or charges that the *Black Prince*, being, *i. e.*, "was navigated;" the language of the statute being, "if any vessel, propelled in whole or in part by steam, be navigated." Could it be said that this steam-tug, making this four-hour trip, landing nowhere, having no commercial communication with any point, except that of starting, and no purpose in the movement save to test the machinery of the boat, was being navigated so as to include her within the rules of navigation which are made by congress under the power to regulate the interstate and foreign commerce? It seems to me the whole movement of vessels and people on board in its object prevents these persons from being considered as passengers, within the meaning of the law. The case of *Hartranft v. Du Pont*, 118 U. S. 223, 6 Sup. Ct. Rep. 1188, is relied upon by the United States. But the Repauno in that case had been used by the plaintiff to transport himself, his superintendent, and sometimes nine workmen to and from their place of work. The transportation in that case was as truly within the sphere of commerce, and the navigating was as truly commercial navigation, as if the persons conveyed had been carried for hire by a common carrier. But in *Transportation Line v. Cooper*, 99 U. S. 78, the supreme court, without giving any reason, held that a canal-boat laden with coal for transportation, having on board the master with his family, is not a barge carrying passengers, within the meaning of section 4492, Rev. St., which requires such a barge, while in tow of a steamer, to be provided with "fire-buckets, axes, life-preservers, and yawls." The case most nearly resembling this is *The Joshua Leviness*, 9 Ben. 339, in which it was held that a voyage from City Island to New York, made by a vessel just constructed, to enable her to be inspected, is not a violation of the navigation laws. In *Gibbons v. Ogden*, 9 Wheat. 1, the court assert the supreme authority of congress under the constitution to regulate interstate and foreign commerce, and that commerce includes navigation. The object of this statute, which (volume 3, p. 488) is entitled "An act regulating passenger ships and vessels," is to put into force the provision of the constitution authorizing congress to regulate commerce. The statute begins and ends with its object; and since this movement of the *Black Prince* was merely for the testing of her machinery, occupying four hours, without any commercial object, and the persons on board were the wife and neighbors of the owner, who, without landing, were carried to and fro, and with no object except as witnesses of the state of his vessel's machinery, the use of the vessel is not such navigation as brings it within the prohibitions and penalties of title 52, c. 2, Rev. St., which are but a re-enactment of the statute above referred to. It is rather a use to see if she is ready for navigation under the statute. It may be said that this view may open the door to the violation of the statute. The answer to this is that the true and proper way to enforce a statute is not by straining its meaning, but, by a firm application of its terms, to pro-

mote the attainment of the object with which it was enacted, carefully scrutinizing each case, including and excluding in and from its operation as it is manifest congress must have intended. Let, therefore, the libel be dismissed.

EARNSHAW v. McHOSE *et al.*¹

(Circuit Court, E. D. Pennsylvania. November 10, 1891.)

1. CHARTER-PARTY—DESPATCH MONEY.

A contract provided that the plaintiff should sell, and the defendants buy, iron ore at named prices, and stipulated that these prices "were based on an ocean freight rate of 12s. a ton," all freight over that sum to be added to, and all freight less than that sum to be deducted from, the invoice price. Plaintiff chartered a vessel at that rate, agreeing with it in the charter-party for £15 dispatch money and £30 demurrage for each day to be saved from or exceeding the number of days allowed for loading or unloading. Despatch money was deducted from the amount paid for freight, which defendants claimed should be deducted from the invoice charge. *Held*, in the absence of any unusual expenditure by plaintiff to secure despatch, the despatch money was merely a deduction from the freight, and belonged to defendants.

2. SAME—COMMISSIONS.

Commissions paid by stevedores and charterers for securing them the ship's unloading was not such a deduction from the freight as belonged to defendants under the contract.

3. PLEADING AND PROOF—VARIANCE—OBJECTIONS WAIVED.

Where a set-off has been given in evidence, though inadmissible under the pleadings at trial, it is too late, on motion to reduce verdict, to raise the point for the first time.

At Law.

Assumpsit by Alfred Earnshaw against Isaac McHose & Sons to recover on \$56,000 as the agreed price of iron ore sold and delivered by the plaintiff to defendants in accordance with contract, which provided, *inter alia*:

"Price to be at the rate of seven dollars and seventy-five cents (\$7.75) per ton of 2,240 pounds for the mined ore, commonly known as 'Marbella Lump,' and seven dollars and thirty-five cents (\$7.35) for the sand ore, commonly known as 'Marbella Sand,' when loaded in cars on this side. *Freight Rate.* The above prices are based on an ocean freight rate of twelve shillings per ton. All freight over twelve shillings to be added to the invoice as part of the price of the ore, and all freight under twelve shillings to be deducted from the invoice."

To fulfill this contract, Earnshaw chartered a steam-ship under a charter-party which provided, *inter alia*, after naming 40 days to be allowed for loading and unloading:

"Despatch money at the rate of fifteen pounds per day of 24 hours for any time saved in loading ^{and} or discharging, payable by the ship to shipper at loading port, charterer at discharging port, as charterer may elect. Demurrage

¹ Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

over and above the said lay-days at the rate of thirty pounds per day of 24 hours, except in case of any unavoidable accidents which may hinder the loading or discharging."

McHose & Sons claimed that any sums of despatch money paid the shipper or charterer was to be deducted from the amount payable by them to Earnshaw, and also that a deduction should be made of all "stevedores' commissions;" and the court having refused the plaintiff's point that "the defendants are not entitled to any deduction on account of despatch money or commissions received for stevedores," it was agreed that the jury find a special verdict stating how much, if any, they allow to or credit defendants, in arriving at a verdict, on account of the rebates or allowances on freight for despatch money; and that upon a motion for a new trial, if the court shall be of opinion that defendants, as matter of law, are not entitled to such allowance or credit, the verdict may be amended or modified by the court in accordance with such opinion, saving to either party the right to except to such opinion of the court with the same effect as if it had originally been embodied in the charge, and the jury had found the verdict as finally amended or modified by the court. The court may modify the verdict as to amount of allowance for above reasons, if it shall be ascertained that the figures of the defendants are incorrect. Under this agreement the jury rendered a special verdict allowing defendants credit for dispatch money, \$13,926.74. In this amount was included despatch money for cargoes under similar contracts. There had been no plea of set-off. Motions to increase and to diminish the verdict.

Richard C. McMurtrie and R. P. White, for plaintiff.

John G. Johnson, (Frank P. Richard, with him,) for defendants.

BUTLER, J. The plaintiff's rule is based on an alleged error in answering his first point. To justify interference, the error should be plain. If it is not, the question should be left to the court of appeals.

Whether the credit claimed on account of freight should be allowed depends on the construction of the freight clause in the contract in suit. In the absence of usage—of which there is no evidence—governing the construction, the court believed, on the trial, that the freight contemplated was the usual rate paid at the dates of shipment. About this there is not, probably, room for serious doubt. What doubt exists, grows out of the method of determining and stating the charter rates. A sum is specified, based on the length of time required by the service, supposing a given degree of despatch to be used in loading and unloading, with provision for deduction or allowance if the despatch is greater, and increase if it is less. Thus three rates are, substantially, named, calculated on the supposed number of lay-days required. The court believed the smaller sum to be the rate contemplated by the contract, in view of the time occupied; that it was the rate for the service rendered; that if the greater number of days had been required the larger sum would have governed—demurrage belonging to the category of freight;

that, if unusual exertion or expenditure had been made to obtain the earlier despatch, this should be compensated. The evidence showed it had not, the despatch being no quicker than is common in such cases. This construction seemed to be required, not only by the terms of the contract, but by its spirit. It seemed reasonable to believe that the parties dealt on the basis of the ore's cost to the plaintiff and the demand for it; that his profits were thus secured, and that, as the cost of transportation was then unknown, this was provided for by the clause in question, which had no other object. It seemed improbable that the parties contemplated the plaintiff's receipt of a large additional sum, by charging the defendants so much more on account of freight than was expended. Such was the court's impression at the trial. The credit claimed on account of "stevedores' commissions" paid the plaintiff, did not seem to fall within the terms of the contract, nor so directly within its spirit as to justify this claim. After full consideration of what was urged in support of the rules, it is sufficient to say that we are not convinced that the instruction was erroneous. The rules are therefore dismissed.

The plaintiff has also made the point that so much of the claim on account of freight as relates to the Campinil and Alvito ores delivered under similar contracts is inadmissible under the pleadings. The point, however, comes too late. If it had been made at the trial a plea of set-off might have been entered. The evidence was admitted without objection on this ground. The plea might still be entered, we think, if necessary to sustain the verdict.

THE IRA B. ELLEMS.

OTIS MANUF'G CO. v. THE IRA B. ELLEMS.

(Circuit Court, E. D. Louisiana. December 22, 1891.)

1. SHIPPING—CHARTER-PARTY—CONSTRUCTION.

Under a charter-party which provides that the charterer shall furnish a cargo of logs, "to be delivered along-side, and held at charterer's risk and expense," the charterer is not entitled to damages for the loss of logs delivered along-side, but carried away by reason of negligent mooring.

2. ADMIRALTY—EVIDENCE—EX PARTE DOCUMENTS.

The official documents of the officers of a foreign nation having jurisdiction of a port of lading, containing what purports to be a protest by a charterer against the action of the vessel, and depositions in support of the facts alleged in such protest, being *ex parte*, are not admissible to establish a controverted fact.

3. SHIPPING—LIEN FOR FREIGHT.

The refusal of a master to deliver a cargo until security is furnished for the freight gives no right of action to the charterer, as the cargo is subject to a lien for freight.

In Admiralty. On appeal from the district court. Libel by the Otis Manufacturing Company against the schooner Ira B. Ellems for damages for breach of a charter-party. Decree for defendant.

W. S. Benedict, for libellant.

O. B. Sansum, for claimant.

PARDEE, J. The charter-party expressly states that the second party (the Otis Manufacturing Company) "doth engage to provide and furnish the said vessel a full and complete cargo of mahogany, and (or) cedar logs, under and on deck, to be delivered along-side, and held at charterer's risk and expense." This stipulation defeats the claim advanced by libellant for damages for loss of logs delivered along-side of the vessel, but carried away and lost by reason of negligent fastening and mooring. The evidence in the case is clear to the effect that the vessel, having previously obtained her clearance papers, reported for cargo according to contract; that the libellant's agent furnished cargo at various times until the vessel was nearly loaded, when, on the loss of a raft of logs by reason of negligent mooring to the ship, the agent notified the master that he had no more cargo to deliver, and was "ready to finish up;" and that the master tendered bills of lading, which were refused by the agent. And there is no evidence in the record to the contrary. This puts an end to the libellant's claim "that in contravention of law, good morals, and proper conduct, and in fact, said vessel, after having been partially loaded under said charter-party, ran away from said port of Tupilco, without signing proper papers or delivering any bills of lading under said charter-party." The official documents from the customs and other officials from the republic of Mexico, having jurisdiction of the place of lading, offered by the libellant, containing what purports to be a protest made by libellant's agent, and the deposition of certain witnesses in support of the facts alleged in the protest, being *ex parte*, are not admissible in evidence to establish any controverted fact, and are not, of themselves, even if admissible, sufficient in substance to contradict the sworn testimony offered by claimants on the hearing of this case. The fact that the master of the vessel demanded security for freight before delivering cargo gives rise to no cause of action on the part of the libellant. The master, under the contract and under the law, having a lien upon the cargo for the payment of freight, was authorized to refuse delivery until the freight should be secured or satisfied. The trouble with libellant's case is that, while on paper he has made serious charges, and set forth sufficient grounds of damage, he has utterly failed to establish the same by competent evidence. The decree in the district court could not have been other than as given, and a decree to the same effect must go upon the appeal.

MCDONALD *et al.* v. HOPE MIN. Co.

(Circuit Court, D. Montana. November 16, 1891.)

1. REMOVAL OF CAUSES—TIME OF FILING PETITION—DEMURRER.

As the removal act requires the petition to be filed at or before the time "defendant is required by the laws of the state" to answer, the filing of a demurrer, instead of an answer, as allowed by Comp. St. Mont. p. 81, § 87, does not enlarge the time for filing the petition; for the allowance of an answer after demurrer is within the discretion of the court, and is not in accordance with any provision of law.

2. SAME—RULE OF COURT.

The time allowed by the court for answering, after the overruling of such demurrer, is not "the time * * * defendant is required * * * by a rule of the state court * * * to answer," within the meaning of that clause of the removal act; for that has reference only to jurisdictions where the time to answer is fixed by a general rule of court instead of by statute.

In Equity. On motion to remand.

Wm. Scallon, F. W. Cole, and H. F. Titus, for plaintiffs.

Forbis & Forbis, for defendant.

KNOWLES, J. This cause is presented on a motion to remand the same to the state court, on the ground that the petition for removal was not filed within the time prescribed by law. Plaintiffs commenced their action by filing their complaint against defendant on the 3d day of January, 1891, in the district court of the third judicial district of the state of Montana, in and for Deer Lodge county. Summons was duly issued upon this complaint, and served upon the defendant on the 20th day of January, 1891. Defendant appeared in the cause on the 22d day of said month, two days after said service, by filing a general demurrer to the complaint, specifying that the complaint did not state facts sufficient to constitute a cause of action. There seems to have been no ruling upon this demurrer. On the 5th day of June, of the same year, defendant filed its petition for removal from the above state court to this. The law of Montana requires that the defendant in a cause, if served in the county in which the same is commenced, must appear and answer the complaint within 10 days from the date of service of summons. Defendant was served in the county in which the action was brought. The language of the act of congress of 1887, and as corrected by the act of 1888, upon the subject of the removal of causes from the state court to the federal courts, contains this clause as to the time when the petition for removal should be filed: "At the time or any time before the defendant is required by the laws of the state, or a rule of the state court in which suit is brought, to answer or plead to the declaration or complaint of the plaintiff." It would seem that, taking the state statute as to the time when a defendant is required to answer after service of summons, and this provision upon removal, and there cannot be much dispute as to the time when the petition for removal should be made. The party is required by the law of the state to answer within 10 days after service of summons, and the statute of congress provides that when this time arrives, as provided by the state law, the petition for removal shall

be made. Counsel for defendant contend, however, that by the provisions of section 87, p. 81, Comp. St. Mont., defendant was not required to answer on the expiration of said 10 days, but could demur. This provision reads as follows: "The defendant may demur to the complaint within the time required in summons to answer," etc. Still this provision does not change the time prescribed by the statute. It only allows the defendant at that time to substitute a demurrer. It is not said by this provision of the statute the time for answering is changed or extended. Upon the overruling of the demurrer, the right to answer is a matter within the discretion of the court. *Thornton v. Borland*, 12 Cal. 439; *Barron v. Deval*, 58 Cal. 95; *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. Rep. 495. The answering, after the overruling of a demurrer, is not then in accordance with a provision of law, but in accordance with a discretionary order of court granted upon motion.

The next point presented is, would the answering, after the overruling of a demurrer, be an answer in accordance with a rule of a state court, as that term was understood in the act of congress? In the case of *Spangler v. Railroad Co.*, 42 Fed. Rep. 305, PHILIPS, J., says:

"But the rule of court was not intended by congress, in my opinion, to apply to such a provision as that found in the Missouri statute, 'unless longer time be granted by the court.' It clearly has reference to those states where no time is fixed by the statute for answering, but under the law the court, by rule, prescribes the time, which is the case in some states."

In those states where the time for answering is prescribed by a rule of court, it would seem that the petition should be filed at the expiration of such time. But if a defendant should substitute a demurrer for an answer, and this should be overruled and permission given to answer, in those states where this rule prevails could this last time for answering be the one at which the defendant could file his petition for removal? Also, if it was so held, would there not be two times in such states when a defendant could by a rule of court file such a petition? It would seem to me that this is evident. It seems quite certain, however, that congress intended to fix a definite time in which such a petition could be filed, and not to allow one period for filing the same under a statute in one state, and two periods for the same under rules of court in another state. The time fixed by the statute, or the rules of the courts, where there are no statutes, becomes a part of the act of congress upon this subject. The views here expressed are in accordance with those of Judge SAWYER, of this circuit. In the case of *Austin v. Gagan*, 39 Fed. Rep. 626, he said:

"The statute means at any time before the defendant is required to answer by the laws of the state, when the time is specifically regulated by the statute, and by the general rules of practice governing the matter, adopted by the courts where the matter is thus regulated, instead of by specific statute of the state,—not within the time provided by special orders extending the time on application by or stipulations of the parties."

The time allowed for a party to answer upon the overruling of a demurrer is a special order. It applies to one case.

Said PHILIPS, J., also in the case of *Spangler v. Railroad Co.*, *supra*:

"If the time for removal can be made to depend upon action, capricious or otherwise, of the state judge in extending it for a month or six months, there would be no uniformity, no certainty, in the law of removal. It would in the state court, in the same jurisdiction, be one time for one defendant, and another time for another defendant, wholly dependent upon the discretion or humor of the court at the return time. The evident policy of congress in this enactment was to make certain, fixed, and definite the time of such removal, and to hasten trials, and not to permit hurtful delays by removals. Recognizing the fact, as the lawyers of the committee who framed the law did, that in some of the states the time for pleading by defendants summoned to court was wholly regulated by positive rule of the court, in the absence of a stated statutory time, they employed the term 'rule of the state court.'"

These decisions appear to me to interpret the statute concerning removals under consideration correctly, and, in accordance with them, the answering after overruling a demurrer is not answering under a rule of court, as that term was understood in the statute under consideration.

Dillon on Removal of Causes (section 118) says upon this point:

"In other words, it is the evident design of the statute that the petition must be filed not later than the time when the defendant is required to make his first responsive allegation to the initiatory pleading on the part of the plaintiff, whether his response takes the form of a plea (such as the general issue) or a demurrer, or an answer under the reformed codes of procedure, or in equity."

In the case of *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. Rep. 495, the supreme court holds that a hearing of a general demurrer to a complaint, such as this one, interposed in this case, is a trial of a cause on its merits. If a party can petition for the removal of a cause after a trial under the statute of 1887, he has a greater privilege guarantied to him thereunder in some respects than under the statute of 1875. All the authorities agree that this was not intended by congress. There are two or three circuit court decisions that appear to hold a contrary view to that I have expressed, and the decisions I have followed, but I believe that the correct rule will be found to be that a person must petition for a removal, under our statute, at the time the statute designates as the time for answering the complaint. The motion to remand the cause is hereby sustained, and the cause is remanded to the court from which it was removed.

MARTIN v. CARTER *et al.*

(Circuit Court, D. Montana. November 18, 1891)

1. REMOVAL OF CAUSES—TIME OF FILING PETITION—AMENDMENTS TO PLEADING.

Under Comp. St. Mont. p. 88, § 115, which provides that in case the complaint is amended as of course, pursuant to the right given by that section, defendant shall answer within 10 days after the amended complaint is served on him, where defendant waives service by demurring to the amended complaint, the time for him to answer, and hence the time to file a petition for removal, is within 10 days after such waiver.

2. SAME—TIME TO ANSWER—STIPULATIONS.

Stipulations between the parties, allowing defendant further time to answer, are ineffectual to extend the time in which his petition for removal to a federal court must be filed.

3. SAME—RIGHT TO REMOVE—CASUS OMISSUS.

Where a condition of the pleadings arises which is not contemplated by the removal act in fixing the time for filing the petition, there is no authority for removing the action; for, though the constitution gives the right of removal, it does not act *ex proprio vigore*, and legislative action is necessary to carry it into effect.

On Motion to Remand.

Action by James E. Martin against John F. Carter, Selena H. Carter, the Montana Mining & Reduction Company, John W. Cook, and Samuel Whitney. The cause was removed to the United States circuit court, and defendants Cook and Whitney moved to remand it.

Sterling & Muffly and *Word & Smith*, for defendant Montana Mining & Reduction Co.

H. G. McIntire, for defendants Cook and Whitney.

KNOWLES, J. This cause is now before the court on a motion to remand the same to the state district court, in which the cause of action was instituted. The complaint was filed on the 3d day of October, 1890, and on the same day a summons was issued in the cause. It does not appear from the return of the sheriff on the summons that it was served upon the defendant Montana Mining & Reduction Company, but on the 8th day of November, 1890, said defendant filed its demurrer to plaintiff's complaint. On the 8th day of December, of the same year, plaintiff filed an amended complaint. On the 6th day of December preceding this plaintiff and said defendant made and filed a stipulation, to the effect that plaintiff should be entitled to file an amended complaint at any time during the December term of court for 1890, and that said defendant should have until the 31st day of January, 1891, to plead thereto. On the 26th day of January said defendant filed a demurrer to this amended complaint. On the 18th of May following said defendant filed its petition for a removal of the cause to this court.

There are two questions presented for consideration in the said motion to remand: *First*. Did said defendant file its petition for removal in time? and, *second*, was this a severable cause, so that said defendants could have their part of the issues presented in the complaint removed to this court?

In considering the first proposition, it will be observed that there is a difference between this case and that of *McDonald v. Mining Co.*, 47 Fed. Rep. 593, (decided at this term.) In that, the defendant was served with summons; in this, there is nothing to show that said defendant on whose petition the cause was removed was served with process. As far as the record discloses, the said defendant made a voluntary appearance by filing a demurrer to plaintiff's complaint, and was within the jurisdiction of the court when the amended complaint was filed. There are two provisions of the statute of Montana in regard to amending a complaint. A portion of section 87, p. 81, Comp. St. Mont., provides:

"If the complaint be amended, a copy of the amendments shall be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments shall be served upon every defendant to be affected thereby, or upon his attorney, if he has appeared by attorney. The defendant shall answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer, as in other cases."

Section 115, Comp. St. Mont., p. 88, is as follows:

"Any pleading may be amended once by the party of course, and without cost, at any time before answer or demurrer filed; and after the demurrer, and before the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading."

In considering these two sections together, it is evident that the first of them applies to amendments made after the trial of the issue of law presented to the court by the demurrer, while the latter applies to amendments before the trial of any such issue or before the filing of any answer in the case. *McGary v. Pedrorena*, 58 Cal. 91. Plaintiff could have amended his complaint once as of course, after said defendant had demurred to the same, and before the hearing of the demurrer, without the consent of the said defendant. No answer had been filed thereto. Does the fact that the plaintiff had the right to amend his complaint of course, at the time the stipulation above named was entered into, the demurrer not having been heard, place the case in any different condition than it would have been if no stipulation had been entered into? It is an established principle that where a party contracts to do what the law requires him to do the contract is a *nudum pactum*, there being no consideration therefor. *Bish. Cont.* § 48; *Ayers v. Railroad Co.*, 52 Iowa, 478, 3 N. W. Rep. 522; *City of Newton v. Railway Co.*, 66 Iowa, 422, 23 N. W. Rep. 905.

Upon the same principle, where a party contracts to give another a right which the statute gives him, the contract amounts to nothing. The right will be considered to have been exercised by virtue of the statute, and not of the contract. It is true that in this case the whole of the December term of court was given to the plaintiff in which to amend his complaint. But it is a fact that the demurrer to the first complaint had not been disposed of when the amended complaint was filed, and until disposed of the plaintiff had the right to file his complaint

as amended as of course. But here we are confronted with another difficulty. It does not appear in the record that the plaintiff ever served upon defendant a copy of the amended complaint. The provision of the statute is that defendant would have 10 days after the service of the amended complaint in which to answer or demur to the same. It is certain that, under the decisions of the federal courts, the fixing of a time to answer or plead by a stipulation does not fill the requirements of the act of 1887 and 1888 upon removals, as to the time when the petition for removal should be filed. *Austin v. Gagan*, 39 Fed. Rep. 626; *Spangler v. Railroad Co.*, 42 Fed. Rep. 305. Those statutes require the petition to be filed when defendant is required by the statute of the state or a rule of the state court to answer or plead. *McDonald v. Mining Co.*, *supra*, (rendered by this court at this term.) If plaintiff had served defendant with a copy of his amended complaint, then defendant would have been required by the statute of Montana to answer or demur to the amended complaint within 10 days after the service of a copy of the same, and the time for filing the petition for removal would have been fixed. It is true that the service of a copy of the amended complaint was waived by the appearance of defendant and the filing of its demurrer to the amended complaint. *Tyrrell v. Baldwin*, 67 Cal. 1, 6 Pac. Rep. 867. Any general appearance in the cause would have waived the service of the amended complaint, if made after the same was filed. After the waiver of the service of an amended complaint, perhaps the defendant would have 10 days within which to answer or demur to the complaint from the time of the waiver. I am inclined to hold that this is true, and that this would be a time given by the statute. The filing of a demurrer, besides being a pleading in a case, acts as a general appearance. The two acts could have been separate,—first the appearance making the waiver, and then the filing of the demurrer subsequently. The fact that the time was fixed by stipulation for answering or demurring would not, as I think, change the position that defendant would have had 10 days from the time that it waived the service of a copy of the amended complaint in which to answer or plead to the same by virtue of the statute. If so, this was the time when defendant should have filed its petition for removal. But this position is not entirely free from doubt. If it is not a correct solution of the question presented, then it appears to me that we have a case not contemplated by the statute; or "any rule of a state court," as that term has been construed. If the demurrer in this case would have been sustained, then, the same being a general demurrer, taking issue upon the cause of action as stated, it would have been a trial of a cause on its merits. *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. Rep. 495. If it should have been overruled in the state court, the defendant might have been allowed to answer only at the discretion of the court, and this has been held not to be an answer required by statute or a rule of court. And up to this time the defendant could say that the time had not yet been reached when it was required by statute of the state or a rule of a state court to file an answer or plead; and that there was no probability

when that time would be reached in the consideration or determination of the cause. If it should be considered that the facts as presented in this case show a condition not contemplated by congress as expressed by the statutes of 1887 and 1888, upon removal of causes from state to federal courts, then there was no authority for removing the same; for, although the constitution may give this right of removal, yet the constitution does not act by its own vigor in such matters. There should be legislative action carrying this provision of the constitution into effect, and pointing out the mode in which this right can be effectuated. Without this, a removal of a cause from a state to a federal court cannot take place. Taking either position as correct, and the motion to remand this cause ought to be sustained. It is certain that congress, by virtue of the acts we have been considering, intended to provide that a petition for the removal of a cause should be made as soon as all the parties were before the court, and an issue upon the merits of the controversy presented by the complaint was made to appear. I have not thought it necessary to consider the other proposition presented. The motion to remand this cause to the court in which it originated is sustained.

HALL *et al.* v. CHATTANOOGA AGRICULTURAL WORKS *et al.*

(Circuit Court, E. D. Tennessee, S. D. December 22, 1891.)

1. REMOVAL OF CAUSES—PETITION AND BOND—ACTION BY STATE COURT.

The fact that a petition and bond for the removal of a cause, under section 3 of the removal act, have been filed in the state court during vacation, will not warrant the federal circuit court in declaring the cause removed before the state court has had an opportunity to take action thereon.

2. SAME—DIVERSE CITIZENSHIP.

Under the removal act of 1887, § 2, cl. 4, any defendant who is a citizen of another state may remove the cause, notwithstanding that his co-defendants are citizens of the state in which the action is brought.

3. SAME—LOCAL PREJUDICE—AFFIDAVIT.

Under section 3 of the removal act, as amended by the acts of 1887 and 1888, providing for the removal of a cause "when it shall be made to appear" to the circuit court that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court, the facts relied on to show prejudice must be set out in the petition for removal, and supported by the affidavit of at least one credible person.

4. SAME—SUFFICIENCY OF AFFIDAVIT.

A bill was brought by certain persons residing in Tennessee, as creditors and stockholders of a corporation, to wind up its affairs, and to hold certain stockholders in Ohio for the balance of their subscriptions. The latter applied to the federal circuit court for a removal of the cause, on the ground of local prejudice, and filed an affidavit alleging that the corporation was formed in Tennessee to purchase the property of a manufacturing corporation in Ohio, which purchase was made; that the petitioners, as trustees for many citizens of Ohio, owned a majority of the stock; that many stockholders in Tennessee were refusing to pay their subscriptions, on the ground that they had been defrauded in the purchase by the Ohio people, and that much talk of this kind had been indulged in, thus creating a local prejudice against the Ohio stockholders; that in suits against the Tennessee stockholders the defendants had set up the alleged fraud, and, in order to appeal to the local prejudice, had demanded juries to try the issues; and that affiant is informed and believes that a jury will be demanded in this cause. *Held*, that this was sufficient evidence to warrant a removal, especially when the allegations of the bill itself disclosed a disposition to appeal to local prejudice.

5. SAME—PETITION.

A petition for the removal of a cause on the ground of local prejudice should state the facts relied on as showing prejudice, and should be sworn to by at least one of the petitioners, or by some agent or attorney authorized by them.

6. SAME—AMENDMENT OF PETITION.

When the affidavit for removal sets out the necessary facts, a petition which is defective in this respect may be amended to conform thereto.

In Equity. Bill by W. R. Hall and others, residents of Tennessee, in a state court, as creditors and stockholders of the Chattanooga Agricultural Works, a Tennessee corporation, and others, to wind up the affairs of the corporation, pay its debts, and distribute the surplus, if any, among the stockholders. Henry Tod and Tod Ford, stockholders, residing in Ohio, were made parties defendant, and it was sought to compel them to pay the balance of their subscriptions to the stock; and they removed the cause to the United States circuit court. The cause is now heard on motion to remand. Conditional order of remand.

Andrews & Barton, for complainants.

Clark & Brown, for defendants.

KEY, J. The petition for removal in this case seeks to bring the cause from the state court into this court upon two grounds: That is, because there is a separable controversy between the petitioners and the other parties to the suit; and because there exists such prejudice or local influence that petitioners will not be able to obtain justice in the state court, or in any other court of the state to which this cause could be removed. It appears that application has been made in the state court for the removal of the cause because there is a separable controversy between the parties, but as yet there has been no action of the state court upon the application, for want of a session of the court. In cases which are sought to be removed, except those in which the application is predicated upon local influence and prejudice, the petitions must be filed in the state court. The acts of congress of March 3, 1887, and August 13, 1888, in section 3 of the act of 1875, as amended by these acts, provide that, except where the application for removal is based upon local influence and prejudice, the party desiring to remove the cause may make and file a petition in such suit in the state court at the time or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to plead or answer to the declaration or complaint of the plaintiff for the removal of such suit; and shall make and file therewith a bond, with good and sufficient surety, for his entering in the circuit court, and filing, on the first day of its then next session, a copy of the record. It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit; and, the said copy being entered as aforesaid in the circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court.

It appears from the record that, since the adjournment of the last term of the state court, a petition for removal and a bond have been prepared and filed; but there has been no session of the court since, so that

the petition and bond could be presented to the state court as contemplated by the statute. It would be premature, and a want of comity, for this court now to say that the cause had been removed before the state court had opportunity to consider and pass upon the question the law submits to it. Moreover, the cause is not removed until the petition and bond shall be presented to the state court for acceptance. Then, and not until then, is the state court required to determine whether it will proceed further or not. If the petition and bond conform to law, the cause is removed; if not, it is not removed. The decisions relied upon by petitioners' attorney were made in cases in which petitions and bonds had been presented to the state court complying with the requirements of the law, but in each case the state court declined to accept the petition and bond, and proceeded further, or attempted to do so, in the suit. When the state court considers the application for removal so far as to accept or reject petition and bond, if the application be such as authorizes a removal, the removal relates back to the date of the application; but it would be something remarkable for a party to go to the clerk in vacation, file his application for removal, and take his suit into this court, without presenting the matter to the state court at all, or giving it an opportunity to accept the petition and bond as the law prescribes.

The case mentioned by the petitioners' counsel,¹ decided here, did not involve the point now made. In that case the petition and bond for removal had been presented to and accepted by the state court. The authority of the state court over the cause had come to an end. The next term of this court thereafter had not met, but a copy of the record had been filed, and it was moved to take a step preliminary to the preparation of the cause for trial. This was resisted upon the ground that the case could not come here until the first day of the next term. It was held that, though the petitioners were bound to file a copy of the record by the first day of the next term, still the cause was removed to this court when the state court accepted the petition and bond, and, whenever a copy of the record came into this court, this court's jurisdiction of it began.

The other ground of removal has its source in the act of March 3, 1887, corrected by the act of August 13, 1888. This law amends and modifies the second section of the act of March 3, 1875, among many other things, so as to make it read as follows:

"And where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause."

¹Not reported.

This provision is peculiar and different in its features from the general character of the act in respect to removals. The application is made to the circuit court of the United States, and it removes the cause, when it is made to appear that, from prejudice or local influence, justice cannot be obtained. The act of 1875 has nothing in regard to removals for such causes. Before the act of 1887, removals for prejudice and local influence rested upon section 639, subsec. 3, Rev. St. The applicant was to file his petition and affidavit in the state court, and he was only required to swear that he had reason to believe, and did believe, he could not obtain justice therein. The act of 1887 does not define how the matter shall be made to appear, but the supreme court has determined how it is to be done. In *Ex parte Pennsylvania Co.*, 137 U. S. 457, 11 Sup. Ct. Rep. 143, it is said:

"Our opinion is that the circuit court must be legally (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court. Legal satisfaction requires some proof suitable to the nature of the case; at least, an affidavit of a credible person, and a statement of facts in such affidavit which sufficiently evince the truth of the allegation. The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by an affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered."

In this case the court affirmed the action of the circuit court in remanding the cause, because the amount in controversy did not exceed \$2,000. Upon the branch of the case as to which the opinion is quoted the court says:

"We are disposed to think that the proof of prejudice and local influence in this case was not such as the circuit court was bound to regard as satisfactory. * * * We do not say, as a matter of law, this affidavit was not sufficient, but only that the court was not bound to regard it so, and might have well regarded it as not sufficient."

- When we couple these expressions with one in the longer paragraph quoted, that is, "the amount and manner of proof required in each case must be left to the discretion of the court itself," we may reasonably infer that, if the circuit court had concluded that the affidavit was sufficient, the action of the circuit court, in that respect, would not have been reversed.

The view taken by the supreme court is strengthened and emphasized by the clause of the act of 1887 which follows the provisions in regard to removal by defendants for prejudice or local influence. This clause is:

"At any time before the trial of any suit which is now pending in any circuit court, or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe, and did believe, that, from prejudice or local influence, he was unable to obtain justice in said state court, the circuit court shall, on application of the other party, examine into the truth of said affidavit, and the

grounds thereof; and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto."

No such form of proceeding is required of defendants as of plaintiffs. In the last case the court must examine into the truth of the affidavit, and the grounds thereof. In the case of a defendant the law does not state how the matter is to be presented to the court, whether by petition or affidavit or otherwise.

It is insisted that the affidavit presented in this case does not give such facts in support of the allegations of prejudice and local influence as make it appear that such prejudice or influence exists. The facts stated in the affidavit are substantially that the Chattanooga Agricultural Works is a corporation organized in Tennessee to purchase the property of the William Anson Wood Mower & Reaper Company of Youngstown, Ohio, and it did purchase it, and that petitioners, as trustees for citizens of Ohio, and in their individual right, own a majority of the stock in the agricultural works; that many stockholders at Chattanooga are refusing to pay for the stock subscribed, because, as they say, the property of said mower and reaper company was valued at a fraudulent and unreasonable valuation, and the Chattanooga stockholders were thus defrauded by the Youngstown people; that much talk of this kind has been indulged in by those refusing to pay, and much local prejudice has been created thereby and exists against the Youngstown, Ohio, stockholders; that some of the resident stockholders have been sued for their subscriptions, and that they make the defense of fraud and misrepresentation and overvaluation, and, unwilling to leave the controversy to the decision of the judge, demand a jury to try the issues; that these issues are prepared by one of the leading solicitors in the present bill, and affiant is informed and believes that it is intended to ask for a jury in this case; that a jury will be demanded in order to appeal to their prejudice against corporations generally, as well as to their prejudices against the non-residents in this controversy with the resident stockholders. No part of this affidavit is predicated on information and belief, except that in relation to the jury that is to be called for. When we look into the record, we find that the resident stockholders consist of a large number of leading and influential men in this locality, representing various professions and lines of trade, business, and manufactures. An examination of the bill filed by complainants shows from its general scope, and many of its allegations and expressions, an inclination or disposition to appeal to prejudice, as against the non-resident stockholders, and lends support to the averments of the affidavit. So far as the affidavit is concerned, it appears to be made by a credible person, and its facts make it appear that prejudice and local influence exist. But the office of the affidavit is to support the petition. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. "Inferentially this is the minimum of evidence to be received and

accepted, and, if the court is not satisfied with this, more may be required, but it must not be satisfied with less." *Ex parte Pennsylvania Co.*, *supra*. The petition in the case in hand does not state the facts upon which the allegation of prejudice or local influence is founded. It does not aver that either or both exist. It simply states that an affidavit (Margerum's) has been filed that it may be made to appear that, by reason of prejudice or local influence, justice cannot be obtained. The petition is not signed by petitioners, nor is it sworn to. It is a mere perfunctory petition, signed by petitioners' attorneys, and has no higher merit than would a mere formal declaration in a civil action, and affording no evidence upon a fact to be determined. It exercises no power, force, or influence in making it appear to the mind or conscience of the court that the facts exist which would authorize the removal. The petition, as well as the affidavit, should state the facts upon which the removal is sought, and should be sworn to by at least one of the petitioners, or by some agent or attorney authorized to act for them, other than the person who makes the supporting affidavit.

There is another question presented for consideration. The petitioners are both citizens of Ohio; the complainants are all citizens of Tennessee. The defendants are the petitioners, and George J. Margerum, the Chattanooga Agricultural Works, and the Third National Bank of Chattanooga. All the defendants, except the petitioners, are citizens of Tennessee, the same state of which complainants are citizens. The language of the act of 1887 is:

"When a suit is now pending, or may hereafter be brought, in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant being such citizen of another state," etc.

The language of the act of 1867, (Rev. St. § 639, subsec. 3,) in describing the suit, is the same; and as to the act of 1867 it has been uniformly held that all the persons on one side must be citizens of the state in which the suit is brought, and all those on the other citizens of some other state. *Young v. Parker*, 132 U. S. 267, 10 Sup. Ct. Rep. 75. Granted that the area of removability has been enlarged by the act of 1887, inasmuch as any of the defendants may remove, still the rule under the act of 1867 applies that, when the citizenship on the plaintiff's side of the suit is such as to prevent the removal under that act, it is equally effective to defeat the right under the act of 1887." *Wilder v. Iron Co.*, 46 Fed. Rep. 682, decided by Chief Justice FULLER.

But in this case no such difficulty arises, because the complainants are all citizens of one state, and the petitioners of another and different state, and in this circuit it has been held uninterruptedly that where all the plaintiffs are citizens of one state, and a defendant is a citizen of another and different state, any such defendant may remove without regard to the citizenship of his co-defendants. *Adelbert College v. Toledo, W. & W. Ry. Co.*, 47 Fed. Rep. 845. The language of Judge JACKSON in deciding the cause is:

"Under the present act, [1887,] any defendant may effect the removal, provided the requisite diverse citizenship of the plaintiff or plaintiffs exists as under the act of 1867."

This course of decision is sustained in *Dillon on Removals*, (5th Ed.) 61:

"But in another respect the act of 1887 is much more liberal than its predecessor. For whereas, the law of 1867 required that in cases where there were several defendants all must possess the requisite citizenship, (that is, none of them must be citizens of the same state with the plaintiff,) and all must join in a petition to remove the cause on the ground of local prejudice, now the act of 1887 extends the right to 'any' defendant possessing the requisite citizenship. 'Nor can the right of removal thus given to "any" defendant having the prescribed citizenship, with any respect for the ordinary significance of language, be construed to include "all" the defendants, and so be denied to "any" unless "all" have such citizenship.' It follows, of course, from this, that the non-resident defendant may remove the cause on this ground, irrespective of the action of his co-defendants, and it is not necessary that all should join."

According to these authorities, the petitioners, so far as the question of citizenship is concerned, may rightfully present their petition for removal.

If this application for removal depends upon the proceedings, petition, and bond for removal in the state court, there could be no amendment of these, or any of them, here. They are the record of another court. So far, however, as the petition, bond, and affidavit made to and for this court, to obtain from it an order for the removal of the cause, are concerned, they belong to this court, and are its property, so to speak, and the court, in the exercise of a just and liberal discretion, ought to allow such amendments as may result in a due execution of the law. Clearly, it appears, if the petition states the facts averred in the affidavit, and was sworn to, this cause ought to be removed. This omission may be largely excused, to say the least, by the crude and uncertain condition in which the law of removal is left by the act of 1887. It will be ordered, therefore, that the motion to remand the cause be sustained, unless the petitioners within 10 days amend their petition so as to conform to the opinion of the court as herein expressed. Final action is reserved until the coming in of said amended petition, should it be filed within the time prescribed. The demurrer and motions to dissolve or modify the injunction and attachment will await final action upon the motion to remand.

DAVIS, Assistant Treasurer, v. TILLOTSON *et ux.*

(Circuit Court, S. D. Ohio, W. D. December 31, 1891.)

REMOVAL OF CAUSES—PETITION IN STATE COURT—TIME OF FILING.

When the petition for the removal of a cause on the ground of diverse citizenship is not filed in the state court before the answer-day fixed by the state laws, as required by the express terms of section 3 of the removal act of 1887, (as amended by Act Aug. 13, 1888,) the cause must be remanded; and the fact that no advantage could be taken of the default of answer in the state court, because the suit was a joint one against the defendant and another, who had not been served, is immaterial.

At Law. Action by Joseph W. Davis, assistant treasurer of Champaign county, Ohio, against Ephraim Tillotson and Mary S. Tillotson to recover taxes. Heard on motion to remand to the state court, from which it was removed. Granted.

E. P. Middleton, for plaintiff.

Geo. M. Eichelberger and Harmon, Colsten, Goldsmith & Hoadly, for defendants.

SAGE, J. The petition in this case was filed in the court of common pleas of Champaign county, Ohio, the 21st of May, 1890, and on the same day summons was issued. On the 27th day of May the summons was returned, served on Ephraim Tillotson personally. The answer-day was the 21st of June, 1890. The defendant Ephraim Tillotson, on the 28th day of June, 1890, appeared specially, and moved to quash the service of process upon him, and for the dismissal of the cause for want of jurisdiction. At the May term, 1891, of said court, the motion was overruled, and leave was granted to the defendant to answer by August 1, 1891. On the 13th of July, 1891, said defendant filed his petition for removal to the United States court upon the ground that he was a resident and citizen of the state of Illinois, as was also his wife, Mary E. Tillotson, who was his co-defendant. She has not been served with process.

The action is for the recovery of back taxes amounting to \$15,466.59, with interest, and the statutory penalties, upon personal property and credits alleged to have been withheld by the defendants from listing for a series of years, beginning with 1884 and ending with 1889. It is urged against the motion to remand that the action is upon a joint, and not a joint and several, liability, and therefore no judgment can be taken against the defendant Ephraim Tillotson, who filed the petition for removal. The contention in support of the removal is that, as no judgment can be taken against the defendant served until his co-defendant is brought before the court, he was not in default when he filed his petition for removal. But section 3 of the removal act of 1887, as amended August 13, 1888, requires that the petition for removal be filed in the state court at or before the time when the defendant is required by the laws of the state, or the rule of the state court in which the suit is pending, to answer or plead to the declaration or complaint of the plaintiff. That time

in this case was the 21st of June, 1890. Whether a judgment could have been taken upon the defendant's default is not material. It may be true that the case could proceed no further until the bringing in of his co-defendant, but he was none the less in default, and unable to make any defense without leave of court. If the absent defendant has any property in the state of Ohio, a writ of attachment can be issued against her by the state court, on the ground of non-residence, and she brought in upon service by publication. That could not be done, upon the ground stated, in the federal court. While, therefore, there may be an advantage to the removing defendant, resulting from the transfer of the cause to this court, the cause cannot be allowed to remain here, unless the petition for removal was filed in accordance with the provisions of law. I think it clear, upon the facts, that the filing was too late.

The cause will therefore be remanded, at the costs of the defendants.

MAISH v. BIRD *et al.*

(Circuit Court, D. Iowa, C. D. August, 1893.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—FORECLOSURE OF MORTGAGE.

In a suit in a state court between citizens of the state to foreclose a mortgage, a non-resident, who was made a party defendant on the ground that he claimed some interest in the property, filed a cross-bill alleging that the mortgage was fraudulent and void, and praying a decree to set it aside. *Held*, that the matters set forth were purely matters of defense, which might properly have been set up by answer, and hence the issues were subordinate to and inseparable from the main controversy, and the non-resident defendant was not entitled to remove the cause to a federal court.

2. ATTACHMENT—GARNISHMENT OF PERSONS IN POSSESSION—LIEN.

The service of garnishment process upon persons in possession of specific chattels creates no lien thereon, in the absence of an actual levy.

In Equity. Suit to foreclose a chattel mortgage. On motion to remand to the state court.

Wright, Cummins & Wright, for plaintiff.

Nourse & Knuffman and Brown & Dudley, for defendants.

MCCRARY, J. Maish, the holder and owner of a mortgage executed by Bird, brought his suit in a state court to foreclose the same, making Morrison, Harriman & Co. defendants, on the ground that they claimed an interest in the mortgaged property. Maish and Bird are citizens of Iowa, and Morrison, Harriman & Co. citizens of New York. The latter appeared and filed a cross-bill, alleging that the mortgage sued on is fraudulent and void, and praying a decree to set it aside; and thereupon they petitioned the state court for a removal of the cause to this court, on the ground that, under their cross-bill, there is a controversy wholly between citizens of different states, and which can be fully determined as between them. The original suit was not removable. It was a proceeding, as to the main controversy, by one citizen of Iowa against an-

other. There is nothing in the cross-bill that would have been improper in an answer except the prayer for affirmative relief. I am of the opinion that the non-resident defendants could not, by filing a cross-bill of this character, so change the nature of the suit as to make it removable, and thus compel Maish and Bird to bring their controversy here. If this is within the power of any non-resident who happens to be made a defendant in foreclosure proceedings in the state courts, the consequences must be very serious. A cross-bill is a defense. It cannot be employed for the purpose of introducing into the suit any distinct matter. It is only auxiliary to the original suit, and a graft and dependency on it. The original and cross-bill together constitute but one suit. We cannot look alone to the cross-bill to determine whether the suit is removable. 3 Daniell, Ch. Pr. 1851; *Ayers v. Chicago*, 101 U. S. 184; *Donohoe v. Mariposa Co.*, 5 Sawy. 163.

It is not necessary to determine whether, in any case, a defendant in a chancery suit in a state court can, by allegations in a cross-bill, present issues upon which he can remove the cause to a federal court, when the parties to the main controversy, the obligor and obligee in the contract sued on, are citizens of the same state. It is only necessary, in this case, to hold that where the facts alleged in the cross-bill are purely defensive in their nature, and such as may properly be alleged by way of answer, no right of removal can be acquired by presenting them in the form of a cross-bill. A careful consideration of the record also satisfies me that there is no separate controversy upon the cross-bill which can be wholly determined without reference to the issues joined upon the original bill. Should Morrison, Harriman & Co. sustain by proof the allegations of the cross-bill, they would do no more than establish a good defense to the complainant's suit, and decree for all the defendants would follow. If the allegations of the cross-bill should not be sustained by proof, then the trial would become a controversy solely between mortgagor and mortgagee, both citizens of Iowa. Thus it is seen that the issue presented by the cross-bill is incidental and subordinate, and not a separate controversy, distinct from the main case, which can be considered and determined by itself.

There is another serious difficulty in the way of our retaining jurisdiction of this case. Conceding that the cross-bill is all that counsel for defendants claim for it,—that is to say, that it is a separate suit or controversy, in which Morrison, Harriman & Co. claim affirmative relief outside of and independently of the issues joined upon the original bill,—does it not follow that it is in substance and effect a creditors' bill, brought to set aside an alleged fraudulent conveyance by the debtor? It alleges that Bird is indebted to Morrison, Harriman & Co.; that they have commenced proceedings by attachment and garnishment to enforce their claim against certain property; and that Bird has made a fraudulent mortgage conveying said property to complainant, Maish. A lien upon the property is claimed, not by virtue of a levy of the attachment thereon, but by reason of the service of the process of garnishment upon complainant and upon the Iowa National Bank, alleged to be in posses-

sion of the mortgaged property. Are these allegations sufficient to give a federal court of equity jurisdiction, and to entitle the plaintiffs in the cross-bill to relief? It would seem not. *Jones v. Green*, 1 Wall. 330. It is more than doubtful whether such a bill can be maintained upon the ground that the complainant has issued an attachment and caused it to be levied upon the property; because, if such be the case, it would seem that his remedy would be by proceeding to judgment in the attachment cause, and by selling, or offering to sell, the attached property upon special execution. But, however this may be, it appears from the allegations of the cross-bill in this case that no levy upon the property has been made. It is clear that no lien was obtained by the garnishment of the parties in possession. *Moor v. Walker*, 46 Iowa, 167; *White v. Griggs*, 54 Iowa, 651, 7 N. W. Rep. 125; *Silverman v. Kuhn*, 53 Iowa, 452, 5 N. W. Rep. 523.

I do not inquire what the practice in the state courts may be, for in equity causes, whether originally brought in the federal courts or removed from the state courts, the former are bound to observe the general principles of the equity practice and jurisprudence. It follows that the motion to remand must be sustained; and it is so ordered.

In re HELENA & LIVINGSTON SMELTING & REDUCTION CO.

(Circuit Court, D. Montana. November 23, 1891.)

1. REMOVAL OF CAUSES—FEDERAL QUESTION—WATER-RIGHTS.

An action in a state court, based upon an allegation that the defendant, in operating its quartz-mill, by means of a water-right claimed by it, has poured over the complainant's lands a quantity of tailings and *débris*, only questions the defendant's right to so use the land, and does not involve any right secured by Rev. St. U. S. §§ 2339, 2340, which declare that vested water-rights shall be protected, and all patents granted and pre-emption or homesteads allowed shall be subject thereto; and hence the cause is not removable to a federal court on the ground that it involves a right secured by the laws of the United States.

2. SAME.

Under Rev. St. U. S. § 2339, declaring that vested water-rights, "recognized and acknowledged by the local customs, laws, and the decisions of the courts," shall be protected, the question whether defendant, in using a water-right for the operation of his quartz-mill, has a right to pollute the water of the stream, is purely a question of local law, and cannot be made the ground of a removal to a federal court.

Petition by the Helena & Livingston Smelting & Reduction Company for a writ of *certiorari* commanding a state court of Montana to remove the cause of John J. Hall against said company to the United States circuit court. Writ denied.

Cullen, Sanders & Shelton, for petitioner.

Adkinson & Miller, for respondent.

KNOWLES, J. In this case the Helena & Livingston Smelting & Reduction Company petitions this court for a writ of *certiorari*, directed to
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the district court of the fifth judicial district, in and for the state of Montana, commanding said court to remove the cause of *John J. Hall vs. The Helena & Livingston Smelting & Reduction Company* to this court, and that a transcript of the record be made by the clerk of said district court, and, upon the payment or the tender of the fees therefor, to transmit the same forthwith to this court. There is no dispute but that the petition for removal in this case was filed in the state court within the time prescribed by the statutes of the United States of 1887 and 1888, upon the subject of removal of causes from state to the federal courts. The removal was not claimed in this case upon the ground that the parties were citizens of different states, but upon the ground that the cause was one arising under the laws of the United States. The question presented then for consideration is as to the correctness of this claim. The amount in controversy, the petition sets forth, exceeds \$2,000, exclusive of costs and interest. This is sufficient. In order to show the court that the cause is one which arises under the laws of the United States, defendant has set forth in his petition for removal the following facts:

"That your petitioner is the owner of a certain concentrator and quartz-mill, situated at Corbin, in the county of Jefferson, state of Montana, and is the owner of a certain mill-site and water-right. That the said quartz-mill and concentrator has been in operation for a period of six years, and during all of said time has been engaged in concentrating and crushing ores from mines near it, and in the vicinity, in said county and state. That the owner of said mill-site, quartz-mill, and concentrator holds title to the said mill-site, and the adjoining land which they occupy in their mining operations, and the water-right, and to each and every thereof, under letters patent from the United States. Your petitioner further shows that it will be claimed by the plaintiff in this action upon the trial thereof, under the issues tendered by the complaint herein, that your petitioner, in operating its said mill and concentrator, and in using the waters aforesaid, has poured down upon and over the land set forth and described in plaintiff's complaint, a large quantity of tailings and *débris* from said mill, and has polluted the waters of Prickly Pear creek, which flow over the land of plaintiff in the operations of said mill and concentrator, to such an extent as to render the same unfit for the use of plaintiff."

Then follow allegations in the petition showing that defendant appropriated the waters of Prickly Pear creek, and erected its mill and concentrator, and acquired title to the premises on which they are erected, long prior to the time that plaintiff purchased his land from the United States, and that defendant's mill and concentrator were in operation before that time, and that defendant was accustomed to load the waters it had appropriated with tailings, and send the same down upon plaintiff's land, and that plaintiff received his patent subject to this right of defendant to load his waters so appropriated, and send them down upon plaintiff's land.

Defendant claims these rights by virtue of sections 2339 and 2340 of the Revised Statutes of the United States. Let us see what these sections provide:

"Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and

accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. Sec. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section."

It will be seen by reference to these sections that the right here conceded is that of water-rights, and the right of way for ditches and canals, and of the use of the public lands for reservoirs in connection with such water-rights. If we look at the allegations of defendant's petition for removal, it will be seen that it claims the right to use a portion of plaintiff's land as a place for depositing the tailings it sends down from its quartz-mill and concentrator upon the land of plaintiff. This is a different right from that of appropriating water, and constructing ditches and reservoirs connected with the same. It is the claim of an easement upon the land of plaintiff, and I cannot see that any such an easement as is claimed by defendant is granted to defendant in any manner in the above sections. This is not the claim of a right of way for a ditch, but of a right to deposit tailings on plaintiff's land. If defendant has this easement by prescription, that prescription right would arise under the state, and not under national, statutes.

Then it is set forth that defendant is polluting the waters of Prickly Pear creek to such an extent as to render the same unfit for plaintiff's use. Whether these waters so polluted are the waters of Prickly Pear creek appropriated by defendant does not fully appear. If they are not, I do not see how the right to pollute the waters not appropriated can be claimed under the above sections. If the waters polluted are those appropriated by defendant, then the question may arise, from whence this right to pollute these waters? The water-rights specified in section 2339 are those "recognized and acknowledged by the local customs, laws, and the decisions of the courts" in the localities where such rights are claimed. The laws referred to are local laws, and not national statutes. It will be seen, therefore, that in determining whether a party has a water-right, and its extent and character, the local customs, laws, and decisions of courts must be consulted and determined. The ascertainment of what these are involves no construction of any United States statute. This point, then, will be found decided in the case of *Trafton v. Nougues*, 4 Sawy. 178, where it was held that where the only question was, what are the local laws, rules, regulations, and customs by which the rights of the parties are governed? no federal question is presented. For these reasons I hold that this court has no jurisdiction of this cause, and the writ of *certiorari* is consequently denied.

WENHAM v. SWITZER.

(Circuit Court, D. Montana. November 23, 1891.)

DEPOSITIONS—STRIKING FROM FILES—TIME OF TAKING.

Under Equity Rule 69, providing that "three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time," a deposition not taken within three months will be stricken from the files when no motion has been made to file it *nunc pro tunc*, and no extenuating circumstances are shown.

In Equity. Suit by A. A. Wenham against William S. Switzer. Heard on motion to strike depositions from the files. Motion granted. Robinson & Stapleton and Word & Smith, for complainant. Aaron H. Nelson, for defendant.

KNOWLES, J. The defendant moves to strike from the files the depositions taken on the part of complainant in the above cause, because not taken within three months after issue was joined therein. There seems to be no dispute but that the deposition was not taken within three months after that date. The cause is one in equity. A portion of rule 69 in equity, prescribed by the supreme court, reads:

"Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing."

It seems under the decision of *Fischer v. Hayes*, 19 Blatchf. 25, 6 Fed. Rep. 76, when proofs are not taken in proper time they may be filed under certain conditions *nunc pro tunc*. But no motion of that kind has been made in this case, and I do not know that the extenuating causes which would allow this exist. Under the above rule there seems no discretion in this court but to grant the motion of defendant. It is therefore granted, and said depositions are hereby stricken from the files.

WAKELEE v. DAVIS.

(Circuit Court, S. D. New York. January 8, 1892.)

INJUNCTION—ACTION AT LAW—APPEAL—STAY OF PROCEEDINGS.

The defendant in an action upon a judgment which was void for want of service was enjoined from setting up the invalidity thereof, because, while procuring a discharge in bankruptcy, he obtained substantial benefits by contending that the judgment was valid. Held, that he was not entitled to a suspension of the injunction or to a stay of proceedings in that action pending an appeal from the injunction decree, since, in case of reversal, the court would so mould its judgment, should the plaintiff obtain one, in the action at law commenced by her as to allow defendant the full advantage of his defense.

In Equity. On motion by defendant to suspend the operation of an injunction granted herein (44 Fed. Rep. 532) pending appeal to the supreme court.

Joseph H. Choate and Thaddeus D. Kenneson, for the motion.

Anson Mallby, opposed.

COXE, J. I have read all the papers and briefs. A large portion of defendant's brief is devoted to the discussion of propositions which have, heretofore, been decided adversely to him. Debate on these questions is closed, so far as this court is concerned. The situation does not seem complicated. If the decree herein is reversed, on the merits, the complainant cannot recover at law; if affirmed, it is probable that she can recover. In view of the possibility of an affirmance she should be in a position to enforce her rights speedily. The defendant, by refusing to enter into a stipulation by which all the questions in controversy could be determined in one action, has made the suit at law necessary. There can be no reason why that suit should not progress, at least, so far that the complainant will be secure if she finally succeeds. The defendant is apprehensive lest he may lose the right to assert the invalidity of the California judgment in case the appellate court holds that he is not estopped. Of this there is no danger. The court will see that the defendant is protected. Even if the action at law should proceed to trial, judgment will be permitted only on terms which will fully guard the defendant's rights. At present there is no reason for suspending the operation of the ordinary machinery of the law. This court has held that the defendant shall not assert the invalidity of the California judgment. It would be an inconsistent if not an absurd proceeding to permit the defendant to do what it has solemnly adjudged he should not do. When the decree of this court is reversed, and not till then, can the defendant assert that the judgment "is not valid and does not still stand of record?" A stay may never be necessary. When it is it will be granted, but in such a way as to protect the complainant. The defendant in asking for a suspension or even for a stay is making an extraordinary request of the court. If this unusual favor is granted now it must be on conditions. If her proceedings at law are stayed the least the complainant has a right to ask is that the defendant speed this cause or give security for the future. The orders signed are calculated, I think, to make these views operative.

THOMSON v. BEAL.

(Circuit Court, D. Massachusetts. January 14, 1892.)

EVIDENCE—WRITTEN CONTRACT—CONTEMPORANEOUS WRITING.

A person depositing money in a bank accepted from the cashier a certificate of deposit, which made no mention of interest, but with a verbal agreement that interest should be paid. The cashier at the same time indorsed a memorandum of the rate of interest on the stub from which the certificate was taken. *Held*, that the stub should be read with the certificate, as evidence of the entire contract.

In Equity. Suit by Elihu Thomson against Thomas P. Beal, as receiver of the Maverick National Bank, to recover interest on a certificate of deposit. Heard on demurrer to the complaint. Overruled.

Simon Davis, for complainant.

Hutchins & Wheeler, for defendant.

COLT, J. This demurrer raises the question whether the defendant shall pay the complainant interest upon a certain certificate of deposit. From the allegations in the bill, it appears that the complainant, on September 16, 1886, deposited in the Maverick National Bank, of which the defendant is receiver, the sum of \$4,800, and received a certificate of deposit as follows:

MAVERICK NATIONAL BANK.

\$4,800.00.

BOSTON, Sept. 16, 1886.

Elihu Thomson has deposited in this bank forty-eight hundred dollars, payable to the order of himself on return of this certificate properly indorsed.

A. C. JORDAN, Teller.

E. H. LOWELL, Asst. Cashier.

No. 33,455.

At the time of the deposit and receipt of the certificate, the cashier agreed verbally to pay the complainant interest at the rate of $2\frac{1}{2}$ per cent. per annum upon the return of the certificate properly indorsed, and at the same time the cashier made a memorandum of the agreement on the stub or margin of the book from which the certificate was taken, as follows:

Date,

\$4,800.00.

Deposited by Elihu Thomson.

Sept. 16, 1886.

Order of

$2\frac{1}{2}$ %.

No. 33,455.

The general legal proposition advanced by the defendant in support of the demurrer, that parol evidence cannot be introduced to contradict or vary the terms of a written agreement, is well settled, and requires no citation of authority.

But the question here presented is whether the certificate of deposit, which does not in express terms mention any interest, is to be considered as alone representing the entire contract in writing, or whether such certificate should not be taken in connection with the written memorandum made at the time on the stub of the bank's book from which the certificate was taken. In taking both writings together as constituting one contract, we are not seeking to add to or vary the terms of a written

contract by parol evidence, but we are simply seeking to discover what the contract actually was, as exhibited in writing made at the time. I understand the rule to be that all contemporaneous writings relating to the same subject-matter, while the controversy exists between the original parties or their representatives, are admissible as evidence, and that extrinsic evidence is admissible to show which paper expresses the real intention and agreement of the parties. *Payson v. Lamson*, 134 Mass. 593; *Hunt v. Livermore*, 5 Pick. 395. The defendant argues that the writing on the stub was a mere private memorandum made by the cashier for his own convenience. There is no allegation in the bill to this effect. The bill alleges that, at the time the certificate was given, "said cashier made a memorandum thereof by making, or causing to be made, the figures 2½ per cent. on the stub or margin of the book from which said certificate was taken." In a certain sense, the stub and the certificate cut from it may be said to constitute but one writing; at all events, in my opinion, both may be consulted in order to ascertain what was the real contract between the parties. Demurrer overruled.

WEIDENFELD v. SUGAR RUN R. Co. et al.

(Circuit Court, W. D. Pennsylvania. January 7, 1892.)

1. RAILROAD COMPANIES—DUTIES OF DIRECTORS—DELEGATION OF POWER—LOCATING ROUTE.

Under Act Pa. Feb. 19, 1849, imposing upon the president and directors of a railroad company the duty of locating its road, this duty cannot be delegated to an executive committee appointed under the by-laws to have "general supervision of the operations and policy of the company," with power to authorize its officers to execute "such contracts and agreements" as the committee may deem expedient; and a location made by such a committee is void, as against a subsequent location on the same ground by the directors of another company having the right of eminent domain.

2. SAME—EMINENT DOMAIN—PRIVATE USE.

A railroad to be built solely for the private use of the controlling stockholder in conveying tan-bark from a certain tract of land to his mills is not entitled to exercise the right of eminent domain, though the company is organized under Act Pa. April 4, 1868, which provides for the formation and regulation of public railroad companies.

3. SAME—JURISDICTION OF FEDERAL COURTS.

Act Pa. June 19, 1871, provides that when it is alleged that the private rights of individuals or corporations are injured by any corporation claiming a franchise to do the act from which the injury results, the court may inquire whether such corporation does in fact possess such franchise, and, if it does not, may enjoin it from committing the injurious acts. *Held*, that this equitable right may be administered in a federal court, by inquiring whether a corporation organized under the general railroad law is not intended for a purely private purpose.

4. SAME—RIGHTS OF STOCKHOLDERS.

A stockholder of a railroad company which has located and partially constructed its line may maintain a bill to enjoin a rival company from appropriating this work to its own use, when he shows that the directors of his own company are acting in sympathy with the rival company, have furnished it with knowledge of certain defects which render their own location invalid, and have refused to resist such appropriation.

In Equity. Bill by C. Weidenfeld against the Sugar Run Railroad Company and others to restrain that company from appropriating the

right of way of the Allegheny & Kinzua Railroad Company, in which complainant is a stockholder. Preliminary injunction granted.

C. Walter Artz, for complainant.

H. C. Dornan and John Ormerod, for defendants.

REED, J. The complainant's bill shows that, in a proceeding in the circuit court for the northern district of New York between the same complainant and the Allegheny & Kinzua Railroad Company, S. S. Bullis, and Mills & Barse, as defendants, a preliminary injunction was granted on the 18th of July, 1891, restraining those defendants from interfering or aiding any interference with the Interior Construction & Improvement Company in the execution of its duties under certain agreements with the defendants, and from constructing or aiding the construction of any competitive or other line of railroad, in violation of said agreements. That among the lines of railroad proposed to be constructed under said agreements was what is known as the "Sugar Run Branch of the Allegheny & Kinzua Railroad," which was designed, among other things, to reach certain timber land of Messrs. Bullis and Barse, which they had agreed to place under the lien of a mortgage given to secure the bondholders of the Allegheny & Kinzua Railroad Company, and from which branch the latter company expected to derive a large revenue in transporting the timber and bark coming from said lands. That subsequently, in November, 1891, the Sugar Run Railroad Company, the defendant in this case, was incorporated, and the route of its railroad surveyed and located in greater part over the route of the Sugar Run Branch of the Allegheny & Kinzua Railroad. That the Sugar Run Railroad Company was organized by A. A. Healy and others named as defendants, in collusion with the said Bullis, with the especial purpose of evading the injunction of the said circuit court. The charge of collusion is denied both by the answers of the defendants and by their affidavits, and has not been established by the plaintiff. While there is enough shown to lead to the conclusion that the officers of the Allegheny & Kinzua Railroad, and particularly its president, Mr. Bullis, have regarded with complacency the organization of this rival railroad, and its appropriation of the route and grading of one of the branches of their railroad, and while they have made no effort to protect the interests of their company, yet, so far as shown, the defendant company has been organized and is proceeding with its work as a separate enterprise, and its promoters are acting in independence of Mr. Bullis or the Allegheny & Kinzua Railroad. The injunction cannot be continued on this ground. In this connection it may be said that the defendant Healy is the owner of a large quantity of bark, which he reserved in a sale of timber land to Bullis in 1887, and which the defendants allege he is anxious to transport to his tanneries, and therefore he and his associates are constructing the defendant company's railroad with that object in view; Mr. Bullis and his assignee, the Allegheny & Kinzua Railroad Company, having failed, according to the terms of the agreement between Messrs. Bullis and Healy, to construct said railroad and transport said bark.

So far Mr. Healy seems to be acting for his own protection and in his own interest, and not in the interests of Mr. Bullis.

The plaintiff further contends, however, that, as a stockholder of the Allegheny & Kinzua Railroad Company, he is entitled to ask that its rights in the Sugar Run branch be protected; that it had located this branch, and had graded and cleared several miles of its route, which work the defendant company has appropriated, and is preparing to lay its railroad in part upon this graded road-bed. The defendant company claims priority of location and title, as between itself and the Allegheny & Kinzua Company, to the route; and its counsel contend that under the law of Pennsylvania it is entitled to appropriate this route regardless of the work done by the latter company. It appears from the affidavits that the actual location in behalf of the latter company was made by the Interior Construction & Improvement Company, the contractor for the construction of its lines of railroad. The line as located by the contractor was approved by the executive committee of the Allegheny & Kinzua Railroad Company, but was never authorized or approved by its board of directors. The by-laws of the latter company provide for the appointment of an executive committee, and provide "said committee shall have a general supervision of the operations and policy of the company, and shall have power to authorize the execution by the president, secretary, or treasurer of such contracts or agreements as said executive committee may deem expedient." This authorization has reference only to the conduct of the ordinary business and operations of the company, and does not extend to such important acts as the direction and approval of the location of its lines of railroad. The statute of Pennsylvania, (Act Feb. 19, 1849,) under which this railroad company acts in the construction of its railroad, imposes the duty of location upon the president and directors of the company; and this discretion cannot be delegated; nor can the board of directors approve and ratify, the unauthorized action of its officers in making such location, as against the rights of another railroad company, which may have attached to the property in question prior to such ratification. *Appeal of New Brighton Ry. Co.*, 105 Pa. St. 13; *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 141 Pa. St. 407, 21 Atl. Rep. 645. This question can only arise between two corporations having the right of eminent domain. If the defendant company has this power, and is entitled to its exercise, then, as between it and the Allegheny & Kinzua Railroad Company, it would seem entitled to the location, because, as appears, its board of directors have proceeded with the location of its line in the manner prescribed by the statute; and this is so, although the other company has actually done work upon the ground. *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, *supra*; *Titusville, etc., R. Co. v. Warren, etc., R. Co.*, 12 Phila. 642; *Davis v. Railroad Co.*, 114 Pa. St. 308, 6 Atl. Rep. 736.

It becomes important, then, to ascertain what rights and powers the defendant company possesses. It is organized under the general railroad law of Pennsylvania, being the act of assembly approved April 4, 1868, entitled "An act to authorize the formation and regulation of rail-

road corporations." Its articles of association state that it is to be constructed and maintained for the term of 10 years, from Sugar Run Junction, McKean county, Pa., to Sugar Run Station, on the river division of the Western New York & Pennsylvania Railroad, in Warren county, Pa., a distance of about 12 miles. Its authorized capital is \$120,000, or 1,200 shares, of \$100 each. Of this capital stock 269 shares have been subscribed, 250 of which are subscribed for by A. A. Healy, 10 shares by Mr. Lewis, his attorney, and the remaining 9 shares by 9 persons. The Allegheny & Kinzua Railroad Company has the right under its charter to build the Sugar Run branch over the route in question, the defect being, as stated, in the location of its line upon the ground; and the complainant contends that the defendant company is a private enterprise for the benefit of the defendant Healy; that he is attempting to use the powers conferred by the statute for his own private purpose; and that the Allegheny & Kinzua Company, or the complainant as a stockholder in the latter company, have such standing as to be able to raise the question. The affidavits read on behalf of the defendants, of Messrs. Lewis, Healy, and Brown, the statements of Mr. Healy to Messrs. Smith and Byrne, as stated in their affidavits, and the communication of Mr. Roberts to the councils of the city of Bradford, set forth in the affidavit of A. G. McComb, satisfy me that the purpose of the organization of the Sugar Run Railroad Company was a private one, namely, to reach and transport the bark belonging to or purchased by the firm of Healy & Sons for use at their tanneries. Although its promoters profess that it is organized for a public purpose, yet they have failed to show any public use or necessity for the railroad, nor any public traffic that it will obtain when constructed. Messrs. Healy and Brown admit that their purpose in subscribing to the stock was to secure a means of reaching the bark they needed for the tanneries; and as the stock is held by themselves, their attorneys and business associates, it is probable that their motive in subscribing to the stock actuated all the subscribers for one share each. The company is organized for the short term of 10 years, and is manifestly intended to meet a temporary necessity. It follows, therefore, that its stockholders are endeavoring to use its corporate powers, including that of eminent domain, for a private purpose.

Whether the use is a public one, for which private property may be taken, is a judicial question. If the use itself is found to be only private, or, further, if, the use being public, the appropriation can in no respect be subservient thereto, it is the duty of the judicial department to protect the citizen by proper remedies from the taking of his property, whether attempted in open disregard of or under color of law. *Pierce, R. R. 146; Boom Co. v. Patterson*, 98 U. S. 403. By a statute of Pennsylvania, (Act June 19, 1871,) it is provided that, in proceedings in courts of law or equity, in which it is alleged that the private rights of individuals or of corporations are injured or invaded by any corporation claiming a right or franchise to do the act from which such injury results, the court may inquire and ascertain whether such corporation

does in fact possess the right or franchise to do the act, and, if such rights or franchise have not been conferred on such corporation, such courts, if exercising equitable powers, shall by injunction, at suit of the private parties or other corporations, restrain such injurious acts. This equitable right may be administered by a court of the United States. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495. In the case of *Appeal of Edgewood R. Co.*, 79 Pa. St. 257, it appeared, as in this case, that a number of persons had procured a charter for a railroad company, and, under cover of constructing a railroad for public use, were engaged in the construction of a railroad from a tract of coal owned by themselves to the Pennsylvania Railroad. A bill was filed by a property holder to restrain the appropriation, by virtue of the power of eminent domain conferred upon the railroad company, of a portion of his property for its uses. The supreme court of Pennsylvania, finding the facts to be that the railroad was projected and constructed with the primary object of connecting the coal mines with the Pennsylvania Railroad, held that the railroad was being constructed for private purposes under cover of a charter obtained under the general railroad laws of the state; that there appeared a perversion of an enactment passed for one purpose, in order to subserve other and inconsistent purposes; that the charter of the defendant company did not warrant the appropriation of the land of the plaintiff for the purpose to which the defendant had applied it; and that it did not possess the right or franchise to do the acts which had resulted in the injury of which the plaintiff complained. In *Appeal of Western Pennsylvania R. Co.*, 104 Pa. St. 399, the same court, commenting upon the *Edgewood R. Co. Case*, said:

"A charter authorizing the building of a public railroad did not warrant the construction of a purely private one. * * * The question was one of corporate power, and that question was determined by the inspection of the charter of the company proposing to exercise the power."

In the present case it is stated in the affidavits that deeds for this land, upon which the Allegheny & Kinzua Company has partly constructed its railroad, are in the possession of its officers, but, however that may be, it is in possession of the land, and has by that possession sufficient interest to question the right of the defendant company to dispossess it and appropriate the land.

One other question was raised, namely, the right of the complainant to maintain the bill in this case as a stockholder of the Allegheny & Kinzua Company. The bill contains the averments required by the ninety-fourth rule in equity, that the complainant was a stockholder at the time the transactions took place of which he complains, and that the suit is not a collusive one. It further alleges that the officers and directors of the Allegheny & Kinzua Company are not only not acting for the interests of their corporation, but are acting in sympathy with the defendants interested in the Sugar Run Company; that the defendant Bullis and his associates thus acting are a majority of the board of directors, and own a major portion of the stock of the company; that they are now acting in such bad faith and disregard of their duties.

Mr. Smith's affidavit shows that the board refused to direct steps to be taken to resist the appropriation of the property of the company and interference with its rights, and Mr. Bullis has been seen upon the line with the president of the Sugar Run Company since the latter company commenced work. It also appears that the information as to defects in location was furnished to the officers of the latter company by the officers of the Allegheny & Kinzua Company. The complainant, as a stockholder, is injured by these unlawful acts on the part of the Sugar Run Company, with the consent and acquiescence of the officers and directors of his company. It is clear that this is a real grievance, and a real and meritorious application by the complainant to prevent a wrong to the corporation within the ruling of Justice HARLAN in the case of *County of Tazewell v. Farmers' Loan & Trust Co.*, 12 Fed. Rep. 752. In a previous case between the same complainant and the Allegheny & Kinzua Company and its directors, the complainant was seeking as a stockholder to settle the contract relations between that company and the Interior Construction Company, of which he was an officer, and his charges against the officers of the railroad company grew out of those contract relations. This court then thought he had not shown such standing, in view of the requirements of rule 94, as to sustain his bill. *Weidenfeld v. Railroad Co.*, 47 Fed. Rep. 11. This is a different case. No contract relations are involved in this case. The attempt is to strip the company of its property, in which the complainant as a stockholder has a direct interest, and there is such a disregard of duty and non-performance of manifest official obligation, amounting to what the law considers a breach of trust, that it is a case in which the stockholder has a right to interfere. It does not involve a discretion as to the bringing of suit which ought properly to be left to the judgment of the board of directors or of the majority of the stockholders, for here a portion of the corporate property and the exercise of the franchises of the company over the route in question are in jeopardy, and its officers, in disregard of their duty, are consorting with its enemies, and furnishing them with information as to the defects in its rights to the use of the route. While the question is not entirely free from doubt, yet I think sufficient is shown by the complainant to give him standing in this application.

A preliminary injunction should issue, therefore, restraining the Sugar Run Railroad Company, its officers, agents, contractors, and employees, from interfering with the line of the Sugar Run Branch of the Allegheny & Kinzua Railroad Company, as projected and partly graded. So far as the restraining order relates to construction by the Sugar Run Railroad Company of portions of its railroad which do not interfere with the line of said branch, it should be dissolved; otherwise it should continue in force until the writ of injunction issue, which should only be upon the filing by the complainant of an injunction bond, in the sum of \$10,000, to indemnify the said Sugar Run Railroad Company, with sureties to be approved by the court. And it is so ordered.

SIoux FALLS NAT. BANK v. SWENSON *et al.*

(Circuit Court, D. South Dakota. January 5, 1892.)

1. TAXATION OF NATIONAL BANKS—INJUNCTION—FEDERAL QUESTION.

A bill to enjoin the collection of taxes assessed against a national bank and against the stockholders on their shares, on the grounds that the taxation was double, that the stockholders were not allowed to set off debts against the valuation of their shares, and that the board of equalization illegally increased the assessment, raises the federal question of the validity of the tax, under Rev. St. U. S. § 5219, prescribing the method in which national bank shares may be taxed.

2. SAME—JURISDICTIONAL AMOUNT—HOW ASCERTAINED.

Comp. Laws S. D. § 1570, makes it the duty of a bank and its officers to retain so much of the dividends belonging to its stockholders as shall be necessary to pay the taxes levied upon their shares until the tax has been paid, but does not require the bank to pay the tax out of the fund thus retained. *Held*, that when a national bank sues in its own behalf and for its individual stockholders to enjoin the collection of a tax assessed against the capital stock, and also against the shares as the property of the stockholders, and does not aver that it has in its hands or under its control any dividend belonging to stockholders which could be applied to pay the taxes, the proceeding is in separate and distinct rights; and the jurisdictional amount must be determined by the amount of the tax against each complainant, and not by the aggregate tax against all.

In Equity. Suit by the Sioux Falls National Bank against Ole S. Swenson and others to enjoin the collection of taxes.

Keith & Bates, for complainant.

D. R. Bailey, C. L. Brockway, and Park Davis, for defendants.

Before SHIRAS and EDGERTON, JJ.

SHIRAS, J. The bill in this cause is filed by complainant, the Sioux Falls National Bank, in its own behalf, and also in behalf of its stockholders, for the purpose of restraining the collection of certain taxes assessed for the year 1890 against said bank and its shareholders for state, county, and city purposes, the defendants being the county treasurer of Minnehaha county, S. D., the county of Minnehaha, and the city of Sioux Falls. It is averred in the bill that, in addition to the assessment made against the several shareholders of said complainant bank, there was also assessed against said bank, upon its capital stock, the sum of \$28,500, the same being in form an assessment made in the name of C. E. McKinney, the president of the bank, which said assessment was afterwards increased 75 per cent. by the state board of equalization; and it is charged that this assessment, and the taxes levied thereon, are illegal and void, because, in effect, the same is a double assessment. In the answer filed herein it is admitted that the assessment and the taxes based thereon are void, and it is averred that the board of county commissioners of Minnehaha county on the 31st day of January, 1891, adopted a resolution declaring the assessment and the taxes levied thereon null and void.

There is some question as to the power of the board to thus annul taxes payable to the state and city, and therefore the complainant seeks an injunction restraining the enforcement of the taxes admitted to be illegally assessed. Touching the assessment made against the several shareholders in the bank, it is averred in the bill that the assessor, in the first

instance, assessed the several shareholders upon a valuation of substantially 75 per cent. upon the full value of the stock, and that the assessor, in making the assessment of personal property and moneyed capital in said city of Sioux Falls, aimed to assess the same upon the basis of two-thirds of its actual value, and that persons owning credits other than bank-stock were allowed to deduct therefrom the amount of *bona fide* indebtedness owing by them, respectively. It is further averred that, at the time the assessor was making the named assessment, certain of the shareholders in the complainant bank claimed exemption from assessment on the bank shares held by them, because the indebtedness owing by them exceeded the value of the shares of stock held by them, but that such exemption was refused by the assessor as well as by the county board of equalization, before whom the same claim on behalf of said shareholders was duly presented. It is also averred that the state board of equalization increased the assessment of the shares of bank-stock 75 per cent., and that the taxes for state, county, and city purposes were levied upon the basis of this increased assessment, which it is averred is illegal and void. It is further shown in the bill that the shareholders, who do not claim deductions on account of indebtedness, have tendered the amount of tax due from them upon the basis of the assessment made by the assessor in the first instance. To the portions of the bill that are applicable to the assessment made against the shareholders a demurrer is interposed, and the case is submitted upon the bill, answer, and demurrer.

Objection is taken, in the first instance, to the jurisdiction of the court, on the double ground that the controversy is not within federal jurisdiction, and, further, that, if it is, the remedy at law is adequate, and therefore this proceeding in equity cannot be sustained. Under the provisions of section 4 of the act of August 13, 1888, (25 St. at Large, 436,) for jurisdictional purposes national banks are deemed to be citizens of the state wherein they are located. The complainant and defendants are therefore citizens of the same state, and, if jurisdiction exists, it must be because the controversy arises under the laws of the United States. The contention of complainant, which we hold to be well founded, is that the matter in dispute arises under the laws of the United States, for the reason that the controversy is whether the method of assessment pursued was or was not a violation of the provisions of section 5219 of the Revised Statutes of the United States.

But under the statute now in force, to-wit, the act of August 13, 1888, the circuit court of the United States has not jurisdiction of cases arising under the constitution or laws of the United States, unless the amount involved, exclusive of interest and costs, exceeds \$2,000. According to the averments of the bill, the assessment against the bank, made in the name of its president, was finally placed at \$35,625, upon which sum was levied in the aggregate, for state, county, and city purposes, taxes to the amount of 34 mills on the dollar. The amount thus levied was less than \$2,000. The highest assessment against any single stockholder is that against C. E. McKinney for the sum of \$39,501, and

the total tax levied thereon is less than the jurisdictional amount. Thus it appears that, to reach the requisite sum, the amount of tax assessed against two or more of the parties in interest must be added together. Is this permissible? In considering this question the provisions of the statute of South Dakota, in regard to the duty of the corporation touching the taxes assessed against the shareholders, must be kept in mind. By section 1570 of the Compiled Laws of the state, it is made the duty of the bank, or of the managing officers thereof, to retain so much of the dividends belonging to the shareholders as shall be necessary to pay the taxes levied upon the shares of stock, until the tax has been paid; and any officer of the bank paying any dividend before the tax of the shareholder has been paid, is made personally liable for the unpaid tax. The statute, however, does not impose the duty of paying the tax out of the dividends upon the bank. The bank, therefore, cannot be said to have under its charge a fund to be by it distributed in payment of the taxes assessed against the shareholder, and in this respect the statute of South Dakota differs from the statute of Kentucky, which was under consideration in *Bank v. Com.*, 9 Wall. 353, and which authorized a judgment against the bank, if it refused to pay the taxes assessed against the shareholders; and it also differs from the statute of Ohio, which provided that the bank might pay the tax; and which the supreme court held, in *Cummings v. Bank*, 101 U. S. 153, was substantially the same as the Kentucky statute. Furthermore, it is not averred in the bill that there is in the hands or under the control of the complainant any dividend belonging to the stockholders which could, under any circumstances, be applied to the payment of the taxes; and hence it is not, in any way, made to appear that the bank has a fund in excess of \$2,000 which is involved in this controversy, or that it can be made liable in any way for the payment of the taxes assessed against the shareholders. Hence there is no claim asserted against the bank, or in which it may be said to be interested as trustee or otherwise, other or different from the several claims based upon the taxes assessed against the bank in the name of its president, and against the shareholders individually.

Can these be aggregated together in order to reach the jurisdictional amount? In determining the jurisdiction of the supreme court upon appeal or writ of error, that court has been repeatedly called upon to determine "when the matter in dispute"—which is the phrase used in sections 691 and 692 of the Revised Statutes, regulating appeals and writs of error to the supreme court, as well as in section 1 of the act of August 13, 1888, prescribing the jurisdiction of the circuit courts—exceeds the limit named in the statute, and these decisions are therefore pertinent to the question now under consideration. In *Seaver v. Bigelow*, 5 Wall. 208, in which several creditors having judgments, no one of which exceeded \$2,000, united in a creditors' bill to reach a fund in excess of that sum, it was held that an appeal did not lie, it being said:

"It is true, the litigation involves a common fund, which exceeds the sum of \$2,000, but neither of the judgment creditors has any interest in it exceeding the amount of his judgment. Hence, to sustain an appeal in this class

of cases, where separate and distinct interests are in dispute of an amount less than the statute requires, and where the joinder of parties is permitted by the mere indulgence of the court, for its convenience and to save expense, would be giving a privilege to the parties not common to other litigants, and which is forbidden by law."

In *Paving Co. v. Mulford*, 100 U. S. 147, which was a suit in equity, it was held that—

"It is well settled that neither co-defendants nor co-complainants can unite their separate and distinct interests for the purpose of making up the amount necessary to give us jurisdiction on an appeal."

In *Russell v. Stansell*, 105 U. S. 303, an injunction was sought by three parties, suing for themselves and a number of others, for the purpose of restraining the collection of an alleged illegal assessment made on their property to meet a decree rendered against a levee board in Mississippi. The circuit court dismissed the bill, and an appeal was taken to the supreme court, which in turn dismissed the appeal for want of jurisdiction, on the ground that it did not appear that the tax assessed against any one of the property owners exceeded \$2,000 in amount. In passing upon the question the court held:

"While the appellants, and those whom they have been chosen to represent, are all interested in the question on which their liability to the appellee depends, they are separately charged with the several amounts assessed against them. There is no joint responsibility resting on them as a body. The proceeding on his part was to require each of the several land-owners in the levee district to pay his separate share of the debt that had been established against the district. The recovery was against each separately. While the appellants were permitted, for convenience' sake and to save expense, to unite in a petition setting forth the grievances of which complaint was made, their object was to relieve each separate owner from the amount for which he personally, or his property, was found to be accountable. An injunction, if granted, would necessarily be to prevent the appellee from collecting from each owner the amount for which he was separately liable. It is clear that, under the rulings in *Paving Co. v. Mulford*, 100 U. S. 147; *Seaver v. Bigelow*, 5 Wall. 208; *Rich v. Lambert*, 12 How. 847; *Stratton v. Jarvis*, 8 Pet. 4; and *Oliver v. Alexander*, 6 Pet. 143,—such distinct and separate interests cannot be united for the purpose of making up the amount necessary to give us jurisdiction on appeal."

In *Hawley v. Fairbanks*, 108 U. S. 543, 2 Sup. Ct. Rep. 846, several parties, having separate judgments against the town of Amboy, united in a petition for a writ of *mandamus* to compel a county clerk to levy a tax sufficient to pay the judgments in question. The trial court granted the writ, commanding the clerk to extend upon the tax collector's book a sum sufficient to pay each of the several judgments held by the relators. To reverse this judgment a writ of error was sued out, and in the supreme court a motion to dismiss was made on the ground that the amounts of the several judgments could not be added together to make out the amount requisite to confer jurisdiction on the supreme court. The court held that the proceeding embraced distinct causes of action in favor of different parties, and that the amounts due the several relators could not be added together, but that the jurisdiction depended

upon the question whether the amount due any single relator was sufficient to confer jurisdiction. The record showed that the amount due one of the relators exceeded the jurisdictional amount, and the court retained the case as to that relator, but dismissed the writ as to all the others. In the opinion delivered in *Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. Rep. 1066, will be found an exhaustive review of the prior decisions on this subject. See, also, *Clay v. Field*, 138 U. S. 464, 11 Sup. Ct. Rep. 419, and *Henderson v. Coke Co.*, 140 U. S. 25, 11 Sup. Ct. Rep. 691.

The rule deducible from these authorities is, that jurisdiction is not conferred because a number of persons are interested in a given question, and the aggregate of the several claims may exceed the amount requisite for jurisdiction. The "matter in dispute," within the meaning of the statute, is not the principle or rule of decision which is involved in the controversy, and which may be common to the interests of all the parties to the litigation, but it is the money value which is at stake; and the claims of the several parties cannot be added together to form the matter in dispute; unless each party has an undivided interest in a claim to the property that is the subject of the litigation.

In the case now before the court the bank and its shareholders are all interested in the questions involved in the legal proposition touching the validity or invalidity of the mode of assessment pursued, but the money interest they have in the litigation is separate and distinct. The tax assessed against the bank is separate and distinct from that assessed against the shareholders, and the tax assessed against one shareholder cannot be collected from another. If the tax collector should undertake to enforce the payment of the taxes complained of, he would proceed against the property of each shareholder separately for the tax due from him alone. The bank and each one of the shareholders could have commenced a separate action to restrain the collection of the tax assessed against each one, and in such case neither of the complainants would have had any money interest in the cases brought on behalf of the other shareholders. As the case now stands, the bank and its shareholders are interested alike in the legal propositions arising on the record, but there is no common or undivided interest in any property, nor in any fund, nor in a tax assessed in a lump against property owned in common. The assessment and tax is against each one separately, and the money interest each one has in the litigation is measured by the amount of the tax assessed against him individually. That is the extent of the money interest each one has in the suit, and the case, therefore, is one wherein for convenience' sake, and to save cost and expense, one suit may be brought to settle the rights of all; but the money claims involved are separate and distinct, and the amount thereof cannot be added together for the purpose of conferring jurisdiction upon this court. It is clear from the record that, had separate suits been brought by each shareholder for the purpose of canceling the assessment complained of, none of them could have been maintained in this court, because none would have involved a sum exceeding \$2,000; and under the authorities cited it is equally clear

that, while the joinder of separate and distinct claims or rights of action may be permitted under proper circumstances, for convenience' sake, and to prevent a multiplicity of suits, and to escape unnecessary costs, it is not permitted to add together the several and distinct money interests belonging to the litigants, in order to create a jurisdiction which does not otherwise exist. As it appears from the face of the record that none of the distinct and several amounts of taxes assessed against the bank and its shareholders exceeds \$2,000, it is clear that the controversy does not embrace a matter in dispute exceeding that sum which, under the statute, is a requisite to the jurisdiction, and, being without jurisdiction, all that the court can do is to dismiss the bill for that reason.

EDGERTON, J., concurs.

DAKOTA NAT. BANK v. SWENSON *et al.*

(Circuit Court, D. South Dakota. January 5, 1892.)

In Equity. Suit by the Dakota National Bank against Ole S. Swenson and others to enjoin the collection of taxes.

McMartin & Carland, for complainant.

D. R. Batley, C. L. Brockway, and Park Davis, for defendants.

Before SHIRAS and EDGERTON, JJ.

SHIRAS, J. The bill herein filed must be dismissed for want of jurisdiction. It does not appear that any of the taxes assessed against the complainant bank or any one of its shareholders exceeds \$2,000, and hence it does not appear that the controversy involves "a matter in dispute" exceeding in value \$2,000, which under the statute now in force is a requisite to the jurisdiction of this court. For the authorities and grounds *in extenso* upon which this ruling is based, see opinion just filed in the similar case of *Bank v. Swenson*, 48 Fed. Rep. 621.

EDGERTON, J., concurs.

STATE *ex rel.* CITY OF COLUMBUS v. COLUMBUS & XENIA R. Co. *et al.*

(Circuit Court, S. D. Ohio, E. D. December 31, 1891.)

1. REMOVAL OF CAUSES—PROCEEDING IN MANDAMUS.

As the federal circuit courts have no jurisdiction in *mandamus* except in aid of jurisdiction previously acquired, an original proceeding in *mandamus*, brought upon the relation of a city to compel certain railroads to lower the grade of a street crossing, is not removable thereto from the state court at the instance of a non-resident defendant. *Rosenbaum v. Bauer*, 7 Sup. Ct. Rep. 633, 120 U. S. 450, followed.

2. SAME—JURISDICTION OF CIRCUIT COURT—STATE AS PARTY.

In such a proceeding the state is the real party in interest, and for this reason also the circuit court would have no jurisdiction of the case. *New Hampshire v. State*, 2 Sup. Ct. Rep. 176, 108 U. S. 76, followed.

3. SAME—FEDERAL QUESTION.

The fact that one of the roads claims to have a vested right in the existing crossing, which is entitled to protection under the constitution of the United States

does not, under such circumstances, give the circuit court jurisdiction. The proper course is to raise the federal question in the state courts, and then take it by appeal to the United States supreme court.

4. SAME—SEPARABLE CONTROVERSY.

A proceeding in *mandamus* on the relation of a city to compel several railroads to lower a street crossing jointly used by them is not a separable controversy as between the state and one of the roads which uses the track over the crossing by virtue of a lease from another road.

At Law. Motion to remand.

This is a proceeding in *mandamus*, instituted by the state of Ohio upon the relation of the city of Columbus to compel the defendant railroad companies, all of which, with the exception of the Baltimore & Ohio Railroad Company, are citizens of the state of Ohio, to construct a safe and sufficient crossing over the tracks at High street in said city, and to restore said highway to its original condition of usefulness. The petition was filed in the circuit court of Franklin county, Ohio, on the 24th day of February, 1891. On the 3d of October, 1891, the defendant the Baltimore & Ohio Railroad Company and certain other companies were by leave of the court made defendants, and duly served with process requiring them to appear on the 2d of November, 1891, and show cause as specified in the writ. On the 31st of October, 1891, the Baltimore & Ohio Railroad Company filed an answer, setting up that it was a corporation organized under the laws of the state of Maryland, and that it acquired by contract made by its lessors with the city of Columbus the right to the use of said street, and to cross the same at grade; and that said contract was in full force, and conferred upon it vested rights, which neither the state nor the city could interfere with or take away. The petition for removal was filed on the 2d of November, 1891. It sets forth that the defendant is a citizen of the state of Maryland and the plaintiff a citizen of the state of Ohio, and that there is a separable controversy between them which can be fully determined without the presence of any of the other parties to the suit. It also sets forth the nature of the suit, and the denial of the alleged corporate duty, obligation, and liability of the defendant set out in the petition filed in said cause. The motion to remand assigns the following reasons:

(1) That this court has no jurisdiction to hear and determine the controversy in this action.

(2) That this is not an action mentioned or described in the act of congress defining the jurisdiction of the circuit courts of the United States.

(3) That it is not a suit between the city of Columbus and the defendants, or any of them, but that it is a suit between the state of Ohio and these defendants.

(4) That the duty, obligation, and liability of the Baltimore & Ohio Railroad Company, which the plaintiff prays the court to compel said defendant to perform, is not distinct and separate from the duty, obligation, and liability of the other defendants in this cause.

(5) That the matter in dispute does not exceed, exclusive of interest and costs, the sum and value of \$2,000.

Selwyn N. Owen, for relator.

J. H. Collins, for Baltimore & O. R. Co.

SAGE, J. The objections to the jurisdiction are: *First*. That the circuit court of the United States cannot acquire jurisdiction by removal from a state court of an original proceeding in *mandamus*, such as was instituted in this cause. The state of Ohio, upon the relation of the city of Columbus, seeks to compel the defendants to lower their tracks at the crossing of High street, so as to place them 12 feet and 3 inches below their present location. *Second*. That the state of Ohio is the plaintiff, and the real party in interest in the cause. The first objection is supported by *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. Rep. 633, holding that a circuit court of the United States has no jurisdiction in *mandamus* except in aid of a jurisdiction previously acquired by that court, and that it cannot acquire jurisdiction by removal from a state court of an original proceeding to obtain a *mandamus* against the treasurer or the board of supervisors of a city to compel them to take action, in accordance with the statute of Ohio, to pay the interest or principal of bonds issued by the city. The objection that the state is the real party in interest, and therefore the case is not within the jurisdiction of the circuit court, is supported by *New Hampshire v. State*, 108 U. S. 76, 2 Sup. Ct. Rep. 176; *New Jersey v. Babcock*, 4 Wash. C. C. 344; and *Adams v. Bradley*, 5 Sawy. 217. The objections to the jurisdiction of the court on each of the above grounds are well taken, and will be sustained.

It is also urged that there is not in this case a separable controversy between the Baltimore & Ohio Railroad Company and the plaintiff. The proceeding is against the defendants jointly. They all use the tracks at the crossing of High street, and the prayer is that they be compelled to lower them as stated above, and to construct a viaduct which shall accommodate the travel over the street. In the nature of the case, the judgment in the cause must be for or against all the defendant companies. Certainly no decree could be rendered against the Baltimore & Ohio Railroad Company without including its lessor, under whose lease it operates its trains upon the tracks which cross High street; and the lessor is a citizen of the state of Ohio. The fact that the Baltimore & Ohio Railroad Company filed a separate answer does not make its controversy a separable one. *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. Rep. 90; *Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. Rep. 735; *Pirie v. Tredt*, 115 U. S. 41, 5 Sup. Ct. Rep. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. Rep. 730. Upon the proposition that the controversy is not a separable one, *Ayres v. Wiswall*, cited above; *Railway Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. Rep. 738; *Starin v. City of New York*, 115 U. S. 248, 6 Sup. Ct. Rep. 28; and *Safe-Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. Rep. 733,—are in point, and leave no room for doubt that the Baltimore & Ohio Railroad Company has no separable controversy in this case.

Counsel for the Baltimore & Ohio Railroad Company, however, contend that the defense that the company has vested rights which are sought

to be interfered with or taken away by the proceeding in *mandamus* raises a federal question which brings the case within the jurisdiction of this court. This point was considered in *Dey v. Railway Co.*, 45 Fed. Rep. 82. There the suit was brought by the state railroad commissioners to compel a railway company to obey an order made by them in their official capacity respecting the transportation of cars. The complainants were all citizens of Iowa, and the defendants, a Wisconsin corporation. The case was removed to the circuit court of the United States. It was urged against the motion to remand that upon the face of the record it was apparent that there was a federal question involved, which conferred jurisdiction upon the federal court. The court held that, if it were admitted that the facts pleaded by the defendant company presented a question arising under the constitution and laws of the United States, the inherent nature of the proceeding would not thereby be changed, and that, if the subject-matter of the suit was not within the jurisdiction of the circuit court, a defense thereto, based upon the constitution or laws of the United States, could not confer upon that court the power to grant the relief sought if that defense were overruled. The court further held that the remedy in such cases is to set up in the state court the defense presenting the federal question, and upon an adverse ruling it could be taken from the court of last resort in the state to the supreme court of the United States, and in that way the administration of the public laws of the state be left to the state tribunals, and the federal question be finally decided by the highest federal court. This is a clear and forcible statement of the rule, in which I entirely concur, and it disposes of the objection.

As to the proposition that this suit does not involve in amount or value the sum necessary to bring it within the jurisdiction of this court, the pleadings and the admissions of counsel upon the hearing of the motion make it plain that the objection is not well founded. The changing of the grade of the tracks, saying nothing of any other cost or expense, must necessarily cause an outlay of many times the jurisdictional amount.

The motion to remand will be granted, at the costs of the Baltimore & Ohio Railroad Company.

*In re CHASE et al.**(Circuit Court, D. Massachusetts. January 11, 1892.)***CUSTOMS DUTIES—CLASSIFICATION—COMMON GOAT HAIR.**

Tariff Act 1890, Schedule K, par. 877, class 2, imposes a duty of 12 cents per pound on "Leicester, Cotswold, Lincolnshire, down combing wools, Canada long wools, or other like combing wools of English blood; * * * and also hair of the camel, goat, alpaca, and other like animals." *Held* that, in view of the fact that in former acts this group has been construed to embrace only combing wools, common goat hair is not included in it, but belongs in paragraph 604 of the free-list, which covers "hair of horses, cattle, and other animals * * * not specially provided for in this act."

At Law. Petition by L. C. Chase & Co. for a review of the decision of the board of general appraisers as to the classification of common goat hair. Reversed.

Josiah P. Tucker, for petitioners.

Henry A. Wyman, Asst. U. S. Atty.

COLT, J. The subject of importation in this case was common goat hair, upon which the collector assessed a duty of 12 cents per pound, under paragraph 377, Schedule K, of the tariff act of October 1, 1890, which is as follows:

"Class two, that is to say Leicester, Cotswold, Lincolnshire, down combing wools, Canada long wools, or other like combing wools of English blood, and usually known by the terms herein used, and also, hair of the camel, goat, alpaca, and other like animals."

The petitioners duly protested against this assessment, and claimed that the merchandise in question came under paragraph 604 of the free-list, which provides as follows:

"Hair of horses, cattle, and other animals * * * not specially provided for in this act."

The board of general appraisers affirmed the decision of the collector, and the petitioners now ask the court to review this question, as provided by section 15 of the act of October 1, 1890. The grounds upon which the board based their decision are set forth in the prior case of *Central Vt. R. Co. v. Collector of Burlington*, (G. A. 280,) where the same question arose.

It must be admitted that the question here presented is not free from difficulty. Paragraph 377 of Schedule K of the tariff act of 1890, under which this importation was classified by the collector, relates to what is known as the "combing-wool" class, embracing those kinds of wool which are fit for combing; the closing part of the paragraph, however, has reference to hair, and specifies the "hair of the camel, goat, alpaca, and other like animals." Now, it is admitted that the hair of the camel and alpaca are fit for combing; and, further, that the hair of certain kinds of goat, like the Cashmere and Angora, are adapted for combing purposes. Shall the words, then, "hair of the * * * goat," be taken literally as if they formed a distinct paragraph, and so held to cover all

kinds of goat hair, or shall they be construed in connection with the paragraph in which they are found, and in the light of the whole context and surroundings, and so limited to combing goat hair? It can scarcely be seriously contended that congress intended by this language to include common goat hair unfit for combing purposes, and so to assess a prohibitive duty of 12 cents a pound upon such kinds of goat hair. In dealing with such a difficult, intricate, and complex subject as the tariff, embracing, as it does, the enumeration and proper classification of hundreds of different articles of commerce, it is hardly possible that congress could succeed in every instance in expressing, in exact and unambiguous language, precisely what was intended; and in the construction of the custom laws the supreme court have conformed to what they believed was the intent of congress, though such construction may have involved a change or modification of the exact language of the statute. *Hartranft v. Meyer*, 135 U. S. 237, 10 Sup. Ct. Rep. 751; *Elliott v. Swartwout*, 10 Pet. 137, 152. While the words of a statute are generally to have a controlling effect upon its construction, the interpretation of these words is often to be sought from surrounding circumstances and preceding history. *Siemen's Adm'r v. Sellers*, 123 U. S. 276, 285, 8 Sup. Ct. Rep. 117. So here, while the language taken in its ordinary sense and apart from the general context, should be construed as it has been by the collector and the board of general appraisers, yet I think that the surrounding circumstances and preceding history call for a different construction.

In the tariff act of 1861, and since that time, wools, hair of alpaca, goat, and other like animals have been grouped together. The acts of 1861 and 1864 made the rate of duty upon this class of merchandise dependent upon the value per pound. The act of 1867 adopted a new method and divided these articles into three classes, and this subdivision has continued to the present time and is found in the act of 1890. This new method is based upon race of blood and fitness or adaptability for use in the arts. In the acts of 1867 and 1883 there are found three classes: "Class 1, clothing wools;" "class 2 combing wools;" and "class 3, carpet wools and other similar wools." The act of 1890 retains the same classification, but omits the words "clothing wools," "combing wools," "carpet wools, and other similar wools." I do not deem the omission of these words of any importance or significance whatsoever, because the same general classification is retained as in the previous acts. With the exception of the omission of the heading words "combing wools," the addition of the word "camel," and the transposition of the words "alpaca" and "goat," the language of paragraph 377 of the present act is the same as is found in the prior acts of 1867 and 1883. The construction put upon this paragraph by the treasury department from 1867 down to 1890, (with the exception of a part of the year 1886,) and by the federal courts, is adverse to the present ruling of the board of general appraisers, and in harmony with the contention of the petitioners. Syn. Ser. Nos. 4,108, 7,999; *contra*, Nos. 7,544, 7,614, rendered in 1886; *U. S. v. McNeely*, where the question was passed upon by Judge

BUTLER. This case is not reported, but is referred to and accepted as authority in Syn. Ser. No. 7,999. See, also, *Dobson v. Cooper*, 46 Fed. Rep. 184, where Judge BUTLER again ruled on the same question.

I am not unmindful of the force of the reasons urged by the board of general appraisers in their opinion, and by the district attorney in his brief, as to the import of the specific language used in paragraph 377, and that grammatically the words "hair of the * * * goat" are not qualified by the word "combing," but, in view of the surrounding context, the evident intent of congress, the construction given by the federal court and the treasury department for a long term of years except in the year 1886, I feel bound to hold that these words were not intended to include common goat hair. If this importation is not within paragraph 377, it is clear that it comes under paragraph 604 of the free-list. The decision of the board of general appraisers is reversed, and judgment should be entered for the petitioners for a return of the amount of duties paid.

UNITED STATES BANK v. LYON COUNTY *et al.*

(Circuit Court, N. D. Iowa, W. D. January 5, 1892.)

FEDERAL PRACTICE—FOLLOWING STATE STATUTE—EQUITY AND LAW CAUSES.

The constitution of Iowa perpetuates the distinction between law and equity jurisdiction, but the state statute provides that, if an error is made in the form of an action, it shall not cause an abatement thereof, but the cause shall be transferred to the proper docket. *Held*, that the United States circuit court, sitting in Iowa, should follow this practice, and, upon sustaining a demurrer to a bill in equity on the ground that the complainant had an adequate remedy at law, would permit the cause to be transferred to the law docket, with leave to amend the pleadings, if necessary.

At Law. Suit by the United States Bank against the county of Lyon, Iowa, and others. Heard on motion to transfer the cause from the equity to the law docket. Motion granted.

Henderson, Hurd, Daniels & Kiesel, for plaintiff.

Van Wagenen & McMillan, Kauffman & Guernsey, and *E. C. Roach*, for defendants.

SHIRAS, J. This suit is pending upon the equity docket, the bill therein having been filed to recover a decree or judgment against the defendants for the amount of money paid by the complainant bank in the purchase of certain bonds issued by the county of Lyon, but which the county now refuses to pay, on the ground that the bonds were issued without legal authority therefor. Upon demurrer to the bill, this court held that the facts alleged in the bill did not show a case for equitable relief, on the ground that complainant had an adequate and sufficient remedy at law, and that the real object sought by complainant was a decree or judgment for the money advanced in the purchase of the bonds.

The demurrer was therefore sustained. See 46 Fed. Rep. 514. Thereupon the complainant filed the present motion, asking that the cause be transferred to the law docket, and be there proceeded with as a law action. The question is whether this is within the power of the court. If the court of equity was one separate and distinct in all respects from the court of law, each court being presided over by its own judge or chancellor, exercising authority under different commissions, and the courts being created under different acts of congress, it would be clear that a case at law, wrongly brought in the court of equity, could not be transferred from the one court to the other. The circuit court of the United States, however, is a single court, vested with jurisdiction over actions at law and suits in equity. Thus in section 11 of the judiciary act of 1789 it is enacted "that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute," etc. Therefore the transfer of a cause from the equity to the law docket of the same circuit court is not transferring the case from the jurisdiction of one court to that of another and distinct tribunal, but, in effect, is merely directing that it be placed upon the proper docket, so as to be proceeded with according to the rules governing the practice in that branch of the court. In the state of Iowa, the distinction between law and equity jurisdiction is perpetuated in the state constitution; yet by the statute it is provided that, if an error is made in the form of action adopted, it shall not cause an abatement thereof, but the cause shall be transferred to the proper docket. Why may not this court follow this statutory enactment as a proper rule of action, when it finds that a case, proper for an action at law, has been commenced in form of a suit in equity? If the cause of action is one cognizable in a circuit court of the United States, and is brought in that court, but an error is committed in bringing it in equitable instead of legal form, why is it not within the power of the court to order that in this particular the form of the action may be amended, and the cause be entered upon the proper docket? Why put the parties to the delay and expense necessarily caused by a dismissal and recommencement of the proceeding, when the same can be saved by following the rule enacted in the state statute, and adopting the same as the proper practice in the federal court? In sustaining the demurrer to the bill, the ruling was not that the circuit court did not have jurisdiction, but that the case was not a proper one for equitable cognizance, because an adequate remedy could be had at law. It was not held that the complainant did not have a cause of action, but only that the form of the proceeding was erroneous, in that it should have been at law, and not in equity. Under the broad provisions of section 954 of the Revised Statutes, is it not permissible to the court to permit an amendment of the pleadings so as to conform the same to the kind of remedy which the court holds is appropriate to the case, and if, when amended, the cause is one proper to be proceeded with at law, to order the cause to be transferred to that docket, or *vice versa*?

In cases removed from the state courts, it sometimes happens that a case pending in equity under a state statute becomes, under federal practice, a case at law. If, upon removal, the cause is docketed upon the equity calendar, because it was in equity in the state court, certainly it was within the power of the federal court to order it to be transferred to the proper docket, if it is a case at law, under the federal practice. It sometimes appears in removal cases that the cause, as removed, embraces several controversies separable and distinct, some of which are of equitable and some of legal cognizance. The circuit court, by the removal, takes jurisdiction of the entire cause, but, if need exists, it may require a separation of the controversies, so as to place upon the law docket the controversies of legal jurisdiction, and upon the equity docket those of equitable cognizance. The power thus exercised, of assigning removed causes to the proper docket, is akin to that now asked to be exercised in ordering the transfer of this cause from the equity to the law docket; and is there any good reason why, if the power exists in the one case, it may not in the other? Counsel for defendants argue with ability the proposition that the section of the United States statute providing for conforming the practice in law cases with that obtaining in the state courts cannot be so construed as to authorize the court to modify the practice in suits in equity, and there can be no doubt that such is the law. The difficulty with the argument is, however, that the court is not asked to modify the practice and mode of procedure in equity causes, but only to determine whether it has the power to order a cause wrongly brought in equity to be transferred to the law side of the court, there to be proceeded with as a law action.

Counsel for defendants cite, among others, the case of *Thompson v. Railroad Co.*, 6 Wall. 134, as an authority adverse to the power of the court to grant the motion, but, on the contrary, it tends to support the right of the court to grant the motion. The case was commenced as an action at law in a state court, and was thence removed to the United States circuit court. When it reached the federal court, leave was obtained to substitute a bill in equity for the petition at law, and the case was then proceeded with as a suit in equity. A decree upon the merits was rendered, and the defendants appealed to the supreme court on the ground that there was an adequate remedy at law. The supreme court sustained this claim, taking jurisdiction of the case by appeal, because the cause in the federal court was in form a suit in equity; but in its final order it did not dismiss the cause, nor order the circuit court to dismiss the same, but it reversed the decree, remanded the cause, with directions to dismiss the bill without prejudice, (not the cause, but the bill,) and to proceed in conformity with the opinion. The opinion pointed out that there was no necessity for a change from law to equity after the suit was transferred, and that the action at law could be maintained in the form in which it was brought in the state court. The error which caused the reversal was in permitting that which was properly a law action to be transferred into one in equity. There is no intimation in the opinion that, if the facts had been such as to justify the

change in the form of the proceeding, the court would not have had the right to permit the change from the one to the other form, which would, of necessity, have involved the transfer from one docket to the other. On the contrary, the inference is that, if the facts had required the change, the power to authorize it exists. Furthermore, is it not fairly inferable from the order made by the supreme court that the circuit court, after dismissing the bill in equity, had the power to proceed with the cause in its original form, without requiring the plaintiff to recommence the action. If this was not so, why was the circuit court directed, after dismissing the bill in equity, to proceed in conformity with the opinion? See case of *Cherokee Nation v. Railway Co.*, 135 U. S. 641, 10 Sup. Ct. Rep. 965, in which the supreme court remanded a case in equity to the circuit court, with instructions requiring the case to be transformed into proceedings at law for the awarding damages for right of way. I deem the question one of exceeding doubt, in a case brought originally in this court, and it can only be settled by an adjudication of the higher tribunal. If the right to order the transfer exists, it will tend to save expense and delay to litigants; and, for the purpose of obtaining an adjudication of the question, the motion will be sustained, and the case will be transferred to the law docket, there to be proceeded with as an action at law, with leave to amend the pleadings, if that be deemed necessary.

UNITED STATES v. HOM HING.

(District Court, N. D. New York. January 6, 1892.)

CHINESE EXCLUSION ACTS—POWERS OF UNITED STATES COMMISSIONER—*DEDIMUS POTESTATEM*.

The provision made by the Chinese exclusion acts, (23 U. S. St. at Large, p. 58, § 12, and 25 U. S. St. at Large, p. 476, § 13,) for the examination before United States commissioners of Chinese persons alleged to be unlawfully in this country, clothes them with a jurisdiction which is entirely independent of the district court; and that court has no power to issue a *dedimus potestatem* to take testimony to be used in such an investigation, since Rev. St. U. S. § 836, authorizing the issuance of such a commission by the federal courts "in any case where it is necessary in order to prevent a failure or delay of justice," applies only to cases of which those courts have jurisdiction.

At Law.

This is an application for a commission to take testimony of witnesses residing in San Francisco in a proceeding under the Chinese exclusion acts, pending before Edward L. Strong, a United States commissioner at Ogdensburgh in this district. The affidavit upon which the motion is based is not entitled in the United States district court, but "before Edward L. Strong, United States commissioner." The motion is made at a special session of the district court. The proposed order is entitled "At a special term of the United States district court," it directs that a *dedimus potestatem* issue, that it be returned to Commissioner Strong, and

"that the testimony so taken may be introduced in evidence before said United States commissioner on the trial of this action before him with the same force and effect as if the witnesses had been personally examined before him in open court."

D. S. Alexander, U. S. Dist. Atty., for the motion.

Daniel Magone and *C. A. Kellogg*, opposed.

COXE, J. The defendant was arrested under the Chinese exclusion acts, charged with having come illegally into the United States, and brought before Commissioner Edward L. Strong. Testimony was given before the commissioner tending to show that the defendant was born in the United States and, for this reason, entitled to remain. A motion is now made at a special session of the district court for a commission to examine witnesses residing at San Francisco who will, it is alleged, disprove defendant's testimony as to the country of his nativity. It is conceded for the purposes of this motion that the papers show, sufficiently, the materiality of the San Francisco witnesses, and the objection that the proceeding is one where the defendant has a right to be confronted by the witnesses against him, is not pressed.

The motion is opposed on the following grounds: *First*. Under section 866 of the Revised Statutes the court has not the power to issue a *dedimus* for the purpose of taking testimony in a cause pending in another tribunal. *Second*. That the commissioner has exclusive jurisdiction of the investigation in question free from the direction and control of this court which has not the power to direct what testimony he shall receive. *Third*. That the proceeding before the commissioner is a statutory proceeding and not a trial and there is no power in the court, or elsewhere, to order that the testimony shall be taken by commission. *Fourth*. That the proceeding is summary and, even if the power existed to issue a *dedimus*, it should not be exercised where the defendant will be deprived of his liberty pending the return of the testimony.

The only provision of the act of May 6, 1882, (22 St. at Large, 58,) applicable to the point in controversy is as follows:

"And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the president of the United States, and at the cost of the United States, *after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or remain in the United States.*"

Section 12 which contains the foregoing language was amended by the act of July 5, 1884, (23 St. at Large, 115.) The amendment does not change the language in italics above quoted.

Section 13 of the act of September 13, 1888, (25 St. at Large, 476,) provides as follows:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court,

or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district. A certified copy of the judgment shall be the process upon which said removal shall be made, and it may be executed by the marshal of the district, or any officer having authority of a marshal under the provisions of this section."

This section, which provides for a hearing, a conviction, a judgment and an appeal, has recently been held to be in force by the district judges of Vermont and of the eastern district of Michigan. *In re Mah Wong Gee*, 47 Fed. Rep. 433; *U. S. v. Chong Sam*, Id. 878.

The foregoing are all the provisions of the Chinese exclusion acts relating to the powers and duties of circuit court commissioners. They are mentioned, with others, as judicial officers before whom the suspected Chinaman may be brought, but no additional or exceptional powers in conducting the investigation are conferred upon them. The investigation is to be carried on as other investigations are. As the acts in question do not clothe the court with power to issue a *dedimus*, where the investigation is proceeding before a commissioner, it remains to be seen whether such power can be found in any other provision of law. The taking of testimony by commission is a creature of statute, in derogation of the common law. A commission should never issue unless the authority is clear. Something more than a mere presumption is required. *Dwinelle v. Howland*, 1 Abb. Pr. 1; *Randall v. Venable*, 17 Fed. Rep. 162.

Section 866 of the Revised Statutes provides that—

"In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage."

It is very clear that the words "in any case" do not mean broadly any case where one of the parties to a controversy desires the evidence of a foreign witness, but any case of which the court, granting the commission, has jurisdiction. The cause must be one pending in the court and not before some other tribunal or officer over whom the court has no power or control.

This is not a case where the court has referred the action or some part thereof to a commissioner to report his findings of fact and law. The commissioner in this proceeding is as independent of this court as he is of the court of queen's bench. Commissioner Strong has precisely the same power and authority, in the investigation now pending before him, that a justice of the supreme court would have in like circumstances,—no more and no less. For the court to undertake to direct the course of proceeding before him would be an unwarrantable interference which he would be justified in resenting, and particularly so in view of the appeal to the district judge permitted by the act of 1888.

The district attorney quotes with approval from the opinion of the court in *Chow Goo Pooi's Case*, 25 Fed. Rep. 77, as follows:

"The power exercised by the magistrate is a power summarily to investigate and determine the right of a person to enter or remain in the country,—a power sometimes conferred upon commissioners of immigration but by this law confined to a 'justice, judge, or commissioner.'"

He further compares the functions performed by the "justice, judge or commissioner" with those, which, by the same statutes, are conferred upon the collector of the port and those which by the "alien labor and immigration act" (26 St. at Large, 1084) are conferred upon "inspection officers."

This position is entirely correct. The investigation is summary and the functions of the commissioner are akin to those exercised by the collector and inspectors. But can it be contended that the court has the power to issue a commission in an investigation pending before these officers, in the one case to determine whether a Chinaman has a right to land and in the other to ascertain whether an immigrant is an idiot or afflicted with a contagious disease? If such power has ever been exercised in these or similar circumstances I have been unable to discover it. It is freely admitted that no precedent for this practice exists and after a somewhat extended examination I have been unable to find an authority which contains the remotest hint that the court possesses such power.

It is, of course, unnecessary to pass upon the other objections urged by the defendant, further than to say that it would seem to be for the advantage of both parties—the defendant as well as the government—if the officers charged with the execution of these laws were invested with a discretionary power to issue commissions and act upon testimony taken *de bene esse*. The crude and obscure provisions of the sections quoted have already provoked a marked conflict of authority and involved the courts in a maze of perplexity and doubt. The law should be made plain and effective. At present it is neither. The motion is denied.

NOTE BY THE JUDGE. During the investigation of the questions presented by the foregoing motion I found it necessary to examine and collate many statutes conferring general and special powers upon circuit court commissioners. As there is often misapprehension regarding their powers and duties I have thought that the result of this labor might be of some interest, especially as I am not familiar with any extended collection of references on the subject. Section 627 of the Revised Statutes provides that "each circuit court may appoint, in different parts of the district for which it is held, so many discreet persons as it may deem necessary, who shall be called 'commissioners of the circuit courts,' and shall exercise the powers which are or may be expressly conferred by law upon commissioners of circuit courts." Commissioners of the circuit court have no powers, therefore, except such as are expressly conferred by law. The office was originally created by the act of February 20, 1812, (2 St. at Large, 679.) This act made it lawful for the circuit court "to be holden in any district in which the present provision by law, for taking bail and affidavits in civil causes, is inadequate, or on account of the extent of such district, inconvenient, to appoint such and so many discreet persons, in different parts of the district, as such courts shall deem necessary, to take acknowledgments of bail and affidavits." Rev. St. §§ 945, 1014, 1778. By the act of March 1, 1817, (3 St. at Large, 350,) the

authority of commissioners to take bail and affidavits in civil causes depending in the circuit courts was extended to the district courts. They were also given authority to take depositions under the thirtieth section of the judiciary act. Rev. St. § 863. By the act of August 23, 1842, (5 St. at Large, 516,) it was enacted that commissioners "shall and may exercise all the powers that any justice of the peace, or other magistrate, of any of the United States, may now exercise in respect to offenders for any crime or offense against the United States, by arresting, imprisoning, or bailing the same, under and by virtue of the thirty-third section of the act of the 24th of September, A. D. 1789, * * * and who shall and may exercise all the powers that any judge or justice of the peace may exercise under and in virtue of the sixth section of the act passed the 20th of July, A. D. 1790." An act passed July 28, 1866, (14 St. at Large, 343,) extends the powers of commissioners to the seventh section of the act of July 20, 1790. The second section of the act of August 23, 1842, authorizes commissioners to require a recognition from witnesses to appear at the trial of the cause where the crime was committed on the high seas or elsewhere with the admiralty and maritime jurisdiction of the United States. Section thirty-third of the act of September 24, 1789, (the Judiciary Act,) referred to in the act of August 23, 1842, just quoted, provides "that for any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of, any of the United States where he may be found agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense." Rev. St. § 1014. The sixth section of the act of July 20, 1790, (1 St. at Large, 183,) provides for a summons of the master of a vessel in cases of mariners' wages. The seventh section provides for the arrest and commitment of deserting seamen. Rev. St. §§ 4546, 4547. By the act of August 8, 1846, (9 St. at Large, 73,) commissioners are given authority to enforce the awards of foreign consuls. Rev. St. § 728. By the act of September 16, 1850, (9 St. at Large, 458,) commissioners are vested with the same power to take oaths, affirmations or acknowledgments under the laws of the United States as justices or justices of the peace of any state or territory. Rules five and thirty-five of the supreme court authorize the taking of bonds or stipulations in admiralty suits, before commissioners. They are empowered to compel witnesses to appear and depose to letters rogatory addressed to them from any court or foreign government. 10 St. at Large, 630. They are given cognizance of offenses against the elective franchise and civil rights of citizens. Rev. St. § 1982; 18 St. at Large, 335. The court is authorized to increase the number of commissioners for the purpose of enforcing the civil rights act. Rev. St. § 1983. The act of July 13, 1866, (14 St. at Large, 152,) empowers commissioners to issue search-warrants in internal revenue cases. Rev. St. § 3462. They also have authority to discharge a defendant imprisoned on mesne process in cases where he would be entitled to a discharge if process were issued from a state court. Act March 2, 1867, (14 St. at Large, 543.) They may discharge a poor convict after having heard and determined the matter. Rev. St. §§ 1042, 5296. They may hold to security of the peace and for good behavior. Id. § 727. They were authorized to take evidence and proofs of debt in bankruptcy. Id. §§ 5003, 5076. They also have jurisdiction in extradition cases if authorized by the court to act, (Id. §§ 5270, 5271,) and they may issue search-warrants in trade-mark cases, (19 St. at Large, 141,) and counterfeit money cases, (26 St. at Large, 743.) They may take affidavits in land-entry cases. 19 St. at Large, 121. Other statutes confer special powers upon commissioners for the District of Columbia and for certain territories, but these statutes are not of general interest.

To recapitulate and condense the foregoing provisions, it will be found that commissioners have authority as follows: (1) To take bail, affidavits, oaths, recognizances, affirmations, depositions *de bene esse* and acknowledgments in United States courts and under the laws of the United States and to compel witnesses to answer letters rogatory. (2) To exercise the powers of justices of the peace in arresting and holding to bail in criminal causes under the laws of the United States. (3) To summon masters of vessels in cases of mariners' wages, to arrest deserting seamen and to take bonds and stipulations in admiralty causes. (4) To enforce extradition treaties and the awards of foreign consuls. (5) To issue search-warrants in internal revenue, trade-mark, and counterfeit money cases. (6) To discharge defendants imprisoned for debt and poor convicts. (7) To hold to security for the peace and take evidence and proofs of debt in bankruptcy. (8) To determine the *status* of Chinese persons under the exclusion acts.

HITCHCOCK *et al.* v. CITY OF GALVESTON.

(Circuit Court, E. D. Texas. March Term, 1880.)

1. MANDAMUS—WHEN RETURNABLE—TEXAS STATUTE.

Rev. St. Tex. art. 1215, providing that the defendant shall be summoned to appear at the next regular term of court, relates only to ordinary process obtained from the ministerial officer of the court, and not to extraordinary writs, and a writ of *mandamus* may be made returnable at the same term. *Fitzhugh v. Custer*, 4 Tex. 391, followed.

2. SAME—ALTERNATIVE WRIT—AGAINST MUNICIPAL OFFICERS—SERVICE.

Where a writ of *mandamus* is issued against the mayor and aldermen of a city commanding them to pay forthwith a judgment against the city, or to show cause why a peremptory writ should not be issued requiring them to levy a tax for the purpose of paying the same, service upon the mayor alone is sufficient for the purpose of eliciting an answer, as the city is the real party in interest.

3. SAME—LEVY OF TAX—REMEDY AT LAW—PENDING GARNISHMENT.

Where a person having a judgment against a city has garnished stocks owned by it to an amount sufficient to satisfy his claim, he cannot have a writ of *mandamus* to compel the levy of a tax, while the question of the validity of his garnishment is still pending in the supreme court on his own appeal.

Application by D. G. Hitchcock & Co. for a writ of *mandamus* to the mayor and aldermen of the City of Galveston, requiring them to levy a tax for the purpose of paying a judgment against the city, owned by him. Heard on demurrer to the return to the alternative writ. Demurrer overruled, and judgment for respondents.

F. Charles Hume, for petitioners.

W. P. Ballinger and *R. V. Davidson*, for respondents.

BRADLEY, Justice. On the 7th of May last the plaintiffs, upon a petition filed for that purpose, obtained an order for the issue of an alternative *mandamus* commanding and directing the defendant the city of Galveston to pay forthwith the amount of plaintiffs' judgment, with interest and costs, (being a judgment for \$117,540.99, rendered May 9, 1879, with interest at 8 per cent. per annum,) or to appear before the court on Tuesday, June 1, 1880, and show cause, if any there might be,

why the peremptory writ of *mandamus* should not issue, requiring a sufficient tax to be levied, assessed, and collected on and out of the taxable property within its corporate limits to pay said judgment, interest, and costs, and requiring said judgment, interest, and costs to be paid out of the proceeds of such levy, assessment, and collection within 90 days from the service of said writ. The alternative writ was directed to the city of Galveston and to the mayor and aldermen by name, but was served only on the mayor, being served on the day it was issued. The defendants have appeared and filed a return—*First*, interposing some preliminary objections; and, *secondly*, assigning reasons why a peremptory *mandamus* ought not to be granted. The preliminary objections are two: First, it is objected that the writ ought not to have been made returnable in the same term, this adjourned term of the court being a mere continuation of the term pending when the writ was issued; and for this objection reference is made to article 1215 of the Revised Statutes of Texas, which directs that the citation shall command the sheriff to summon the defendant to appear and answer the plaintiff's petition at the next regular term of the court. This is substantially the old law, first enacted in December, 1836, (see Laws 1836, p. 201,) and afterwards in 1848, (see Hart. Dig. p. 269, art. 810; Pasch. Dig. art. 1506.) By an early construction given to this law in the case of *Bradley v. McCrabb*, Dall. Dig. 504, it was decided that it related only to the ordinary process obtained from the ministerial officer of the court without the intervention of judicial power, and not to those extraordinary writs, such as *habeas corpus*, *mandamus*, etc.; which are issued by the direction of a court or judge, and which would be deprived of much of their efficacy if they could only be made returnable to a future term. This case was cited and approved in *Fitzhugh v. Custer*, 4 Tex. 391. This objection, therefore, is not sustained. The other preliminary objection—that the writ was only served on the mayor—must also be overruled. The proceeding is against the city, and is against the mayor and aldermen individually only as representative officers. The mayor being the head officer, the writ was properly served on him. Of course, if a peremptory *mandamus* be issued, it ought regularly to be served on all officers individually whom it is desired to bring into contempt for disobedience to the command of the writ. But for the purpose of eliciting an answer from the corporation to show cause why a peremptory *mandamus* should not be issued, service on the mayor is sufficient.

Two principal grounds are alleged by the defendants in their return against the application for the writ of *mandamus*: *First*, that the plaintiffs have not exhausted their ordinary remedies for collecting the judgment; and, *secondly*, that the common council of the city of Galveston have no legal power to levy the tax which the plaintiffs seek to compel them to levy. The first of these grounds is based on the fact alleged in the return, that on the 9th of June, 1879, the plaintiffs, in order to collect the amount due on their said judgment, caused to be issued out of this court two separate writs of garnishment,—one against the Galveston Wharf Company, garnishing 6,222 shares of the capital stock of said

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company, belonging to the city of Galveston, and worth \$35 per share, besides \$4,666.50 of dividends then due the city; the other against the Galveston City Railroad Company, garnishing 693 shares of the capital stock of said company, belonging to the said city, and worth \$12 per share; and that dividends in the former company to the amount of \$18,666 have since accrued to the city on its said stock; and that by said proceedings all of said stock and dividends have been placed beyond the control of said city; that judgment was given against the plaintiffs in said suit of garnishment against the Galveston Wharf Company, (the court considering the said stock not liable for the city's debt,) which judgment has been removed by writ of error to the supreme court of the United States by the plaintiffs; and that judgment was given in favor of the plaintiffs in the suit against the Galveston Railroad Company, which judgment has been removed by writ of error to the supreme court of the United States by the defendant the city of Galveston; so that the question of the liability of said several stocks to the satisfaction of said plaintiffs' judgment is still pending and undetermined. The property belonging to the city thus garnished amounts to over \$250,000, and is abundantly sufficient to satisfy the judgment in question if it should be held to be applicable to the payment thereof. The plaintiffs argue that the city is estopped from urging this objection to the *mandamus*, because it contends and insists that the property garnished is not liable to be applied to the payment of the judgment. But this argument cannot avail the plaintiffs, for they are equally estopped by contending and insisting that it is so applicable. One estoppel meets and nullifies the other; and the fact remains that here is abundant property of the city to pay the whole demand, which the plaintiffs have taken the ordinary means to subject to that purpose. Had the property been visible and tangible, instead of being a chose in action, and had it been levied on under an ordinary execution, it is evident that such execution could not have been returned *nulla bona*, and, though the defendant in such case had contended that the property levied on could not be sold to pay the city indebtedness, yet, if the plaintiffs insisted to the contrary, and prosecuted their claim to hold it, they could not, while prosecuting such claim, demand a *mandamus* for raising a tax also. Had the plaintiffs yielded to the judgment of this court in reference to the stock of the wharf company, they might then, perhaps, have been in a position to ask for this kind of relief. But not thus yielding, they take the attitude of still pursuing the stock as a just means of satisfying their judgment.

It is a well-settled principle that a writ of *mandamus* will not be granted where the party has another adequate remedy. Hence a *mandamus* will not ordinarily be granted to compel a municipal body to levy a tax to pay a judgment until, by the issue of an execution and a return of *nulla bona*, it be shown to the court that the plaintiff has exhausted all ordinary remedies for the collection of his debt. In the present case, it is true, *nulla bona* has been returned to the common execution issued upon the judgment. But the laws of this state afford

remedies for reaching property which cannot be levied on by ordinary execution. The plaintiffs, perhaps, may not have been obliged to resort to these remedies. But it is shown that they have chosen to do so; they have seized upon property of the city sufficient, and more than sufficient, to pay their whole debt, and by a process which holds it as firmly as tangible property can be held under an ordinary execution. They are engaged in prosecuting their right to hold this property. Their very course of action shows that the question whether they are not entitled to hold it is at least a doubtful one. Until this question is decided it does not appear that they have any need of the extraordinary remedy of *mandamus*. The plaintiffs cannot with one hand grasp property sufficient to satisfy their judgment, and reach out the other for a *mandamus* to levy taxes. If their right to the property seized is disputed, they are still in no plight to ask for a *mandamus* until that dispute is decided, or is by them abandoned. Entertaining these views, I think that the demurrer to the return must be overruled, and judgment given for the respondents, refusing the issue of a peremptory *mandamus*. This renders it unnecessary to consider the question of the power of the city to levy the tax in question. Judgment is given for the respondents accordingly.

VAN DUZEE v. UNITED STATES.

(District Court, N. D. Iowa, E. D. November Term, 1891.)

1. CLERKS OF COURT—FEES—FILING DISCHARGES OF WITNESSES.

The clerks of the federal courts are entitled to fees for filing the discharges given by the district attorney to witnesses for the government, since Rev. St. U. S. § 877, provides that such witnesses shall not depart without leave of the court or the district attorney, and it is the approved practice to give them written discharges for use in drawing their pay from the marshal.

2. SAME—FILING RECEIPTS.

Although there is no law expressly requiring the clerks of the federal courts to take receipts from the United States collector for fines paid by persons sentenced for violation of the internal revenue laws, yet, as such receipts are necessary for the proper settling of the accounts of both clerks and collectors, they are papers, within the meaning of Rev. St. U. S. § 828, cl. 3, giving fees to the clerks for filing "a declaration, plea, or other paper."

3. SAME—REPORT ON ACCOUNTS.

Under the rule of court requiring the district attorney to examine the accounts of the marshal, clerk, and commissioners, and make a written report thereon to the court, such report, though not required by statute, becomes a part of the records of the court; and the clerk is entitled to a fee for filing the same.

4. SAME—CERTIFICATE OF ALLOWANCE OF ACCOUNTS.

Act Cong. Feb. 22, 1875, requires the accounts and vouchers of the marshal, clerk, and district attorney to be made out in duplicate, the original to be forwarded to Washington, and the duplicate to be retained by the clerk; the papers forwarded to be accompanied by a certified copy of the order of allowance. *Held*, that the latter paper is no part of the vouchers required to be made in duplicate, and hence the clerk is not entitled to a fee for duplicates thereof.

5. SAME—ENTRIES OF SUBMISSION AND APPROVAL OF ACCOUNTS.

Under Act Cong. Feb. 22, 1875, requiring the official accounts to be presented to the court in the presence of the district attorney or his assistant, it is necessary

that an entry should be made, showing such submission; and the clerk is entitled to a fee for making the same, as well as for entering the subsequent order of approval or disapproval.

6. SAME—DRAWING JURIES.

The clerk is entitled to compensation for services rendered in procuring the names of persons to serve as jurors, and in drawing the juries for the terms of court in the district. *Goodrich v. U. S.*, 42 Fed. Rep. 892, followed.

7. SAME—DUPLICATE VOUCHERS OF ACCOUNTS.

The clerk is entitled to fees for filing the vouchers and duplicates accompanying the accounts of the marshal, since, by the instructions of the department of justice, he is required, when sending forward the originals, to certify that duplicates thereof are on file in his office.

8. SAME—COPY OF BAIL-BOND.

Rev. St. U. S. § 1018, authorizes the sureties on a bail-bond to arrest their principal, and to deliver him to the marshal before a judge or committing officer, and requires the latter, on request of the sureties, to enter their exoneration upon the recognizance or a certified copy thereof. *Held*, that the clerk is not entitled to a fee from the government for making a certified copy for this purpose, as the sureties themselves should pay him for the same.

9. SAME—ISSUING WARRANT TO BRING PRISONER FROM JAIL.

Under Rev. St. U. S. § 1030, a formal warrant is not necessary to authorize a marshal to bring a prisoner confined at Sioux City to Ft. Dodge for trial; and the clerk is not entitled to a fee for issuing the same.

10. SAME—INDICTMENT—COPY FURNISHED TO ACCUSED.

The clerk is entitled to a fee for a certificate and seal to a copy of an indictment furnished to the defendant under the rule of court, as it is the usual practice to certify copies of all parts of the record furnished by the clerk.

11. SAME—INDORSING APPROVAL OF RECOGNIZANCES.

As it is the duty of the clerk to approve recognizances in criminal cases, his indorsement of approval thereon, in accordance with the usual practice, is the making of an entry or certificate, within the meaning of Rev. St. U. S. § 828, allowing a fee of 15 cents per folio for such entries.

12. SAME—PAYING JURORS.

The clerk is entitled to fees for administering the oath to jurors, both grand and petit, when they prove up their attendance before him; for the issuance of a certificate to each juror showing the number of days' attendance and the miles traveled, as a basis for the marshal's payment; for entering the order requiring the marshal to pay the jurors, and for making copies thereof for the marshal; and for making a report to the court of the *per diem* and mileage due the jurors,—since all these acts are required by the rule of court, and are useful checks upon the accounts of both officers.

13. SAME—ORDER FOR DRAWING JURORS.

The clerk is entitled to fees for the certificate and seal attached to the copy of the order for drawing juries, under the provisions of the statute and rules of court, as this is the proper method of furnishing that officer with evidence of the court's order.

14. SAME—FINAL ENTRIES IN CRIMINAL CASES.

According to the settled practice in Iowa, the final entries in criminal cases should contain the following papers, for which the clerks of the federal courts in Iowa are entitled to folio fees: The commissioner's order for appearance before the grand jury; the entry showing the due presentment of the indictment by the grand jury; the indictment; the bench-warrant, and return thereon; the arraignment and plea; the entry showing trial and verdict; the sentence and final orders, such as granting new trial, modifying or suspending sentence, or directing manner and place of executing it; the *mittimus* and return showing the execution of the sentence; and the entry of satisfaction when a fine is paid. But it should not contain the bail-bonds or entries of default and forfeiture thereof, the orders for attachments of witnesses who fail to appear, the attachments themselves, or the return thereon.

15. SAME—SWEARING WITNESSES.

The docket fee of three dollars in criminal cases does not include compensation for swearing the witnesses, and the clerk is entitled to the statutory fee therefor.

16. SAME—COPY OF SENTENCE.

Code Iowa, § 4515, requires that when a prisoner is committed to the custody of a jailer the latter shall be furnished with a certified copy of the entry of judgment. *Held* that, when a prisoner is committed to the state jail under the sentence of a federal court, it is the duty of the clerk to furnish such certified copy and he is entitled to the statutory fee therefor.

17. SAME—COPIES OF INDICTMENTS.

When the clerk, upon the written order of the district attorney, furnishes him with copies of indictments containing numerous counts against the officers of a national bank, and it clearly appears that such copies are necessary for the proper preparation of the government's case, the clerk will be allowed folio fees therefor.

18. SAME—MITTIMUS.

When a prisoner is ordered to be confined until his fine is paid the clerk is entitled to fees for issuing the *mittimus*, for filing the same when returned by the marshal, and for entering his return thereon.

19. SAME—VOUCHERS.

The order of the court of the northern district of Iowa, directing the marshal to procure the necessary record-books for the Cedar Rapids division of the district, constituted the proper voucher for his expenditures; and, as he is required to file with the clerk a duplicate of all vouchers which accompany his account, the clerk was entitled to fees for furnishing duplicates of the order.

At Law. Statutory action by A. J. Van Duzee, as clerk of United States court, to recover fees for certain services. On demurrer to petition.

A. J. Van Duzee, pro se.

M. D. O'Connell, U. S. Dist. Atty., and De Witt C. Cram, Asst. Dist. Atty., for the United States.

SHIRAS, J. Attached to the petition in this cause is an itemized account of the work done and services rendered for which the plaintiff seeks to recover judgment. The demurrer presents the question whether the items included in the account come within the classes of service for which the plaintiff, as clerk of the court, is entitled to compensation from the United States.

1. The first question arises on a charge for filing the discharges given to witnesses summoned on behalf of the government by the district attorney. Section 877 of the Revised Statutes requires that witnesses summoned to attend court on behalf of the United States shall be subpoenaed generally, and not in a particular case, and that they must not depart from the court without leave of the court or of the district attorney. Under the rule of this court, before a witness can obtain his pay from the marshal, he is required to obtain from the clerk a certificate showing the number of days of attendance and mileage to which he is entitled; and, to properly prepare this certificate, the clerk must know the day on which the witness is discharged from attendance, and also the fact that he has obtained the proper leave from the district attorney. It is and has been the settled practice for years, in this district, for the district attorney to furnish to the witness a written discharge, which is filed with the clerk, and upon which in turn the clerk bases the certificate which he gives the witness as evidence for the guidance of the marshal in paying the witness the sum due him. There can be no possible question that it is the duty of the district attorney to furnish the written discharge as evidence of the leave granted the witness to depart from the court; and no reason is perceived why it is not the duty of the clerk to file and preserve this discharge, for his own protection, and for that of the witness. If a witness duly summoned and in attendance should depart without leave of the court, or of the district attorney, he could be liable for contempt; and hence it is entirely proper that the files of

the court or the records should show that leave had been granted. If a witness should apply, under the statute, to the court for leave to depart, and the same should be granted, the record would contain an entry to that effect; and for the making the same the clerk would be entitled to his fee. When the leave is granted by order of the district attorney, the discharge should be filed, so as to be preserved as part of the record of the proceedings of the court, and in either case the clerk is entitled to the statutory fee for making the record by filing the discharge.

2. The second item in dispute is the charge for filing receipts of the United States collector for fines paid in or collected from persons sentenced for violation of the internal revenue laws. Under the regulations of the treasury department, the clerk is required to pay all fines collected in revenue cases to the collector of the proper district. As evidence of the receipt thereof, the collector executes written receipts, which operate in the double capacity of evidence showing that the collector has become liable to account for the money thus received, and as evidence that the clerk has performed his duty of payment to the proper officer. The argument in support of the demurrer to this class of items is that there is no law requiring the taking or filing such receipts, and therefore the same are not "papers," within the meaning of the third clause of section 828 of the Revised Statutes. It certainly cannot be possible that the government seeks to have it declared to be the law that the clerk is not required or expected to take receipts for moneys thus paid to the collectors. It cannot be that the department would be satisfied with a practice of the clerk paying hundreds of dollars to the collectors without any written evidence being taken of such payments. The proposition is its own refutation; and it is entirely clear that it is the duty of the clerk, when these payments are made, to take proper receipts from the collectors, not only as evidence for his own protection, but as evidence on behalf of the government showing that the collector has become liable for the amounts thus paid him. Such receipts are not the private property of the clerk, but should be kept in his office as part of the official papers, there to remain for the benefit of the government, and as evidence useful in settling the accounts of the clerk and accounts of the collectors; and as such they form part of the record of the particular cases in which the fine has been collected and paid over. Such receipts are part of the papers connected with the case, are properly filed as such, and for such filing the clerk is entitled to the statutory fee.

3. The next item in dispute is the fee charged for filing the written reports made by the district attorney in regard to the accounts of the marshal, clerk, and commissioner. By a rule of this court, duly adopted and spread upon the record, it is provided that, when the reports of the officers named are filed, they must be submitted to the district attorney for his examination, and he is required to make to the court a written report of the result of such examination. The argument made in support of the demurrer, that the act of February 22, 1875, does not call for a written report from the district attorney, does not

meet the question. This court has the right to adopt rules for the conduct of the business before it; and, as already stated, it has adopted a rule requiring the district attorney to make an examination of the accounts of officers, and to report thereon in writing. The accounts of officers are voluminous, and require that kind of examination that cannot be well given them in open court. The requirements of the rule of court are in addition to those of the act of 1875, and are intended as an additional safeguard against the allowance of illegal fees. Under the rule, it is the duty of the district attorney to make a written report of the result of his examination of each account, and it is the duty of the clerk to file such report when made. The report is a paper lawfully filed as part of the record of the court, and the clerk is therefore entitled to the usual fee for such filing.

4. The next items demurred to are the charges made for duplicate copies of the orders of court approving the accounts of the marshal, clerk, and district attorney. The act of February 22, 1875, requires that the accounts of the officers named, and the vouchers belonging thereto, shall be made in duplicate; the original to be forwarded to Washington, and the duplicate to be retained by the clerk. In order to entitle the original to consideration and allowance by the department, it is required that duly certified copies of the orders of allowance by the court shall accompany the accounts. Yet these orders do not form part of the accounts and vouchers of which a duplicate is required to be left with the clerk. The "duplicate" named in the act is the duplicate of the accounts and the vouchers, and does not include the orders of the court. To these items the demurrer is sustained.

5. The fee charged for entering upon the record the fact of the submission of official accounts to the court is demurred to on the theory that the act of February 22, 1875, only required the entry of the order of approval or disapproval. The usual practice is that in accordance with the requirements of the statute the account is presented to the court in the presence of the district attorney or his assistant, and is supported by the oath of the party. Thereupon the court, as soon as possible, examines the account in detail, and then makes the final order. The necessary examination precludes the entering the order of approval at the time of the entry of the fact of submission in open court, and hence the need of the two entries. The act of 1875 requires that the record shall show that the district attorney or his assistant was present in court when the account is submitted, and hence there must be a record entry of the fact of the presentation of the account in open court in presence of the attorney; and the statute further requires a record entry of the final order of approval or disapproval. The clerk has no control over these matters. If the court receives the presentation of the account upon one day, it is the duty of the clerk to make the proper entry of that fact in the proceedings of that day; and then when the court, upon another day, renders its decision, and orders the approval of the account, the clerk must make the proper entry thereof. For such entries he is entitled to the proper fees.

6. The next point arising upon the demurrer is whether the clerk is entitled to compensation for services rendered in procuring names of parties to serve as jurors, and in drawing the juries for the term of court in the district. This question has been adjudged in this circuit in favor of the right of the clerk to compensation for such services. See opinion of Judge CALDWELL in *Goodrich v. U. S.*, 42 Fed. Rep. 392. Relying upon the ruling in that case, the demurrer will be overruled to these items of charge in the present cause.

7. Exception is next taken to the charge made for filing the duplicate vouchers accompanying the accounts of the marshal. These accounts and vouchers pass under the control of the clerk, as they are required to be presented to the court in the first instance; and then, upon approval, the clerk is required to forward the original account and the original vouchers to the department at Washington, and to retain the duplicates. In the instructions issued by the department of justice to the clerks, (see Register of 1886, p. 265,) the clerk is required to certify, when forwarding the original of the accounts and vouchers, that the duplicates thereof are on file in his office. These papers are therefore matters that are to be filed, and under the ruling of BREWER, J., in *Goodrich v. U. S.*, 35 Fed. Rep. 193, the clerk had the right to file each paper, and to make the statutory charge therefor.

8. The next item demurred to is a charge for a certified copy of a recognizance in a case wherein the sureties thereon caused the rearrest of the party under indictment. Section 1018 of the Revised Statutes authorizes the sureties to arrest their principal, and, before a judge or committing officer, to deliver him to the marshal; and, at the request of the bail, it is made the duty of the judge or committing officer, to enter upon the recognizance, or a certified copy thereof, the exoneration of the bail. Under this section, it would seem to be the duty of the bail to procure and pay for the certified copy of the recognizance in case they desired to have the exoneration indorsed thereon. To authorize the rearrest of the principal, and his delivery to the custody of the marshal, it is not necessary that the recognizance, or a copy thereof, should be procured in the first instance; and need therefor does not arise unless the bail desires to ask the entry of discharge thereon. The copy made is not furnished to the marshal as evidence of his right to receive the prisoner, for that is based upon the action of the sureties taken before the judge or officer; but it is furnished the sureties in order that they may, if they choose, have entered thereon a discharge of liability. The clerk is entitled to demand a fee from the bail when they demand a copy, but such fee is not a proper charge against the United States.

9. The demurrer must also be sustained to the charge for issuing warrant to the marshal to bring a prisoner confined at Sioux City to Ft. Dodge for trial. Strictly, under section 1030 of the Revised Statutes, a formal writ or warrant for that purpose was not needed; and, treating the warrant as in fact a copy of the order for bringing the prisoner to Ft. Dodge, no fee is chargeable therefor under the provisions of the section just cited.

10. Exception is also taken to the charge for certificate and seal attached to the copy of the indictment furnished on demand to the defendant in the case of *U. S. v. Parquette* under the provisions of the standing rule of this court. It was the duty of the clerk to furnish the copy; and it is the usual rule that copies of all parts of the record, when furnished by the clerk, shall be duly certified to by the clerk. The charge is allowed.

11. The next item excepted to is the folio charge for the approval by the clerk of recognizances given in certain criminal cases. It is the duty of the clerk to approve these bonds, and it is the practice to evidence such approval by a written entry or certificate of approval upon the face or back of the bond. This is the making of an entry or certificate, within the language of section 828 of the Revised Statutes; and the folio fee of 15 cents is chargeable therefor.

12. The next class of items to which exception is taken is that including charge for administering the oath to jurors, grand and petit, when they are proving up their attendance before the clerk, for the issuance of a certificate to each juror showing the number of days he has attended court, and the number of miles traveled, as the basis for the action of the marshal in making payment to the jurors; for entering order directing the marshal to pay the jurors; for making copies of such order for the marshal; and for making report to the court of the *per diem* and mileage due the jurors,—as the evidence upon which the court relies in making the order for payment. The clerk is required to perform these services in carrying out the requirements of the rule adopted by the court regulating the manner in which proof of the amounts due jurors is to be furnished. When the jurors are discharged from further attendance, the rule requires them to go to the clerk; and, upon a proper book prepared by him, to enter their names, places of residence, days of attendance, and number of miles of travel; and, as evidence of the correctness thereof, they are required to make oath thereto. Thereupon the clerk makes out and furnishes to each party a certificate showing the days of attendance and miles traveled and the amount due. This certificate is submitted to the marshal, and thus he is furnished with a check upon the juror. When the account of the marshal is made out for submission to the court, the rule requires that it shall be first submitted to the clerk, who is required to compare the payment made with the facts appearing on his book or record; and, if they agree, he is required to make a certificate of that fact upon the account of the marshal. Thus there is put in operation a check upon the juror, and also upon the marshal; for his account will not be approved unless it agrees with the clerk's record. The court is also required to make an order directing the payment of the sums due the jurors; and as the basis therefor the clerk is required to make a report to the court of the names of the jurors, and the amount due them. Thus it is made the duty of the clerk to perform each act for which the fee is charged; and, as they are all services of a character for which the fee-bill provides payment, the clerk is entitled to pay therefor.

13. Exception is also taken to the charge for certificate and seal attached to copy of order furnished the jury commissioner, directing the drawing of juries under the provisions of the statute and rules of court. It is the proper practice to furnish to the commissioner the evidence of the order made by the court, requiring him to aid in summoning a jury; and what better mode for so doing can be suggested than by sending him a certified copy of the order? The charge is therefore allowed.

14. Exception is next taken to the folio fee charged for making final entries in a number of criminal cases. The purpose of the final entry is to bring together in compact form upon the record the evidence of the material steps taken in the given case. Under the rule and settled practice in Iowa, there should be included, of the items claimed in the account attached to the petition herein, in the final entry, the commissioner's order for appearance before the grand jury; the entry showing the due presentment of the indictment by the grand jury; the indictment; the bench-warrant, and return thereon; the plea of defendant, including arraignment; the entry showing trial and verdict; the sentence and final order or orders of the court, such as order granting new trial, or modifying or suspending sentence in whole or in part, or directing mode or place of carrying into effect the sentence imposed; the *mittimus* and return of the officer showing the execution of the sentence; and the entry of satisfaction, when the sentence by way of fine is paid. The final entry should not include the bail-bonds; the entry of default, and forfeiture thereof; orders of attachments for witnesses who may fail to appear; the attachment and return, and the order made thereon. These do not constitute any part of the proceedings against the defendant named in the indictment, although they grow out of it, and hence are not proper parts of the final entry or record.

15. Exception is taken to the charge for administering the oath to witnesses in criminal cases, it being argued that the docket fee of three dollars includes services of this nature. The fee-bill (section 828) expressly provides for a fee of 10 cents for administering oaths; and in *Van Duzee v. U. S.*, 140 U. S. 199, 11 Sup. Ct. Rep. 941, it is expressly held that the docket fee of three dollars is intended to cover the entry of the case, indexing, making minutes on calendar, and such other incidental services as are not covered by other clauses of the statute. The administering an oath is a service for which compensation is expressly provided by another clause of the statute; and the fee therefor is properly chargeable.

16. Objection is also made to the charge for certificates and seals to copies of the sentence, and order based thereon, in cases wherein a prisoner is sentenced to imprisonment, and an order is made fixing the place wherein the sentence is to be carried out. Section 1028 of the Revised Statutes provides that when a prisoner is delivered to a sheriff or jailer under a writ, warrant, or *mittimus*, a copy thereof shall be left with such sheriff and jailer, and the marshal's return shall be made on the original. The statutes of Iowa (section 4515, Code) require that when a prisoner is committed to the custody of a keeper of a jail or

prison a certified copy of the entry of the judgment shall be furnished him. Certainly it is the proper practice, when prisoners are committed to a state jail under a sentence of a court of the United States, that there shall be furnished to the jailer the evidence which the state statute requires him to demand before he will receive a prisoner under his custody. The copy of the judgment entry shows the terms of the sentence, and the order shows where the sentence is to be carried out, which is a necessity in case of sentence in the federal courts. These copies, when delivered to the jailer, are the evidence upon which he relies as proof of his authority to hold the prisoner in custody. Clearly, therefore, the copies should be certified to; and thus the jailer has furnished him that which, on its face, bears evidence of its official character. The copies in question constitute the *mittimus* required by section 1028 of the Revised Statutes, and the jailer is entitled to demand an official copy thereof before he can be required to assume the charge of the prisoner; and this requires that the clerk shall make the proper certificate, with his official seal attached, and for so doing he then becomes entitled to the statutory fee.

17. Exceptions are next taken to the folio fees for making copies of certain indictments, and certifying the same, at the request of the district attorney. These indictments were found against certain officers of a national bank, and contain many counts. The charge therefor was allowed by the court when the clerk's account was originally passed on, because the court knew the character of the cases, the large number of counts in the indictments, and that, to enable the district attorney to prepare the causes for trial, it was absolutely necessary that he should have, for his own use, a copy of the indictments, which set forth in detail the various acts counted on as violations of the banking act. The facts upon which the allowance was made clearly proved the need of furnishing to the district attorney the copies charged for; and as the services were rendered by the clerk in aid of prosecutions instituted by the government, and upon the written order of the district attorney, the court, in passing upon the account of the clerk, allowed the folio fee for the copies, and the fee for the certificate and seal, and also for filing the written order or *præcipe*. The ruling then made is now affirmed.

18. Exception is also taken to the fee charged for issuing a *mittimus* in cases wherein the defendant is ordered to be imprisoned until the fine be paid, and for filing same when returned by the marshal, and for entering his return thereon. The *mittimus* is the warrant issued to the marshal, directing him to commit the defendant to custody as required by the sentence, without which the marshal would not be justified in committing the defendant to jail; and its issuance and return are necessary steps in carrying out the judgment or sentence of the court. The fees charged for these services are therefore allowed.

19. The last item demurred to is the charge for making duplicate copies of the order of the court, directing the marshal to procure the necessary record books for use in the Cedar Rapids division of this district. These copies of the order are in themselves vouchers for the ben-

est of the marshal. He is entitled to a certified copy of the order of the court as the evidence of his authority to procure the requisite books, which forms part, at least, of the papers which vouch for the proper outlay made by him in this particular, and he is required to file with the clerk a duplicate of all vouchers which accompany his account, and hence the need for duplicate copies of the order made.

The total sum sued for is \$714.40. Under the conclusion reached as herein announced, the clerk is entitled to \$666.90, the remainder of the sum total being disallowed; and judgment will therefore be entered for said amount of \$666.90.

VULCAN IRON-WORKS v. CYCLONE STEAM SNOW-PLOW Co. *et al.*

(Circuit Court, D. Minnesota, Fourth Division. December 30, 1891.)

1. REPLEVIN—ACTION ON BOND—VALUATION OF PROPERTY—ESTOPPEL.

Where the sheriff, in taking a replevin bond under the Illinois statute, adopts the valuation of the property as alleged in the affidavit and writ, both the principal and his sureties are bound thereby, and, in an action on the bond, are estopped to allege a less value.

2. SAME—RECITALS.

The fact that the bond contains no express recital of value is immaterial, as the statute requires a bond in double the value of the property, and the value must be estimated in order to fix the amount of the obligation.

At Law. Action by the Vulcan Iron-Works against the Cyclone Steam Snow-Plow Company and Commodore P. Jones, upon a replevin bond. Heard on motion for a new trial. Denied.

Keith, Evans, Thompson & Fairchild, for plaintiff.

Hunt & Morrill, Hart & Brewer, John D. Smith, and Victor Linley, for defendants.

NELSON, J. There is a single question only presented for consideration on this motion for a new trial, and that is whether, in an action brought on the replevin bond, the principal and sureties are bound by the value fixed in the affidavit and writ and bond taken by the sheriff under the statute of Illinois before the property could be seized. The weight of authority would seem to decide they are. In some states it is said that in the original suit of replevin, when the value of the property is involved, the plaintiff is not concluded by the value alleged in his affidavit. Cobbey, Repl. § 996, p. 558. However it may be in such a case, I think the Maine and Massachusetts authorities cited with approval by the United States supreme court (*Ice Co. v. Webster*, 125 U. S. 426, 8 Sup. Ct. Rep. 947) and the Indiana supreme court (*Wiseman v. Lynn*, 39 Ind. 259) lay down the true rule, that they are bound by the value fixed in the writ or bond. Such a rule, if law, is in accordance with justice and reason. The allegation of value in the affidavit of the plaintiff is solemnly made and sworn to. The writ is under its control.

It was placed in the sheriff's hands by its procurement. The issuance and service was caused by it as the actor, and the sheriff, in every instance, acted for the company. The bond of the plaintiff and sureties taken by the sheriff, in double the value of the property fixed by the plaintiff, is a judicial admission and a conclusive presumption of law. See 2 Sedgw. Dam. (7th Ed.) p. 431. To hold the plaintiff and his sureties bound thereby is a rule of protection for the general good. The same principle is applied in England. *Middleton v. Bryan*, 3 Maule & S. 155. The Illinois statute did not require the plaintiff, in his affidavit, to fix a value of the property. Still he did so. The sheriff was not compelled to take a bond in double the value alleged by the plaintiff before he executed the writ; yet, in performing his duty under the statute, he appears to have taken the plaintiff's estimate under oath of the value of the property. To permit the principal and sureties, the defendants in this suit, on their bond, who have solemnly fixed the value, to introduce evidence tending to show that the value of the property was less than they placed it when the sheriff seized it, and to show that the plaintiff in this suit has not been injured by the wrongful taking, and that the property is worthless, would enable the principal and sureties to assume a position now in reference to the property inconsistent with that occupied by them when the writ issued and the bond was taken. There is no hardship in holding the plaintiff to the value fixed in his writ, and the sureties in this case have no equities greater than the principal. See *Huggeford v. Ford*, 11 Pick. 222; *Cobbey*, Repl. § 1380, and cases cited.

It is stated by counsel that there are few cases reported upon this question. Undoubtedly true, for upon a forfeiture of a bond the defenses are limited, and a plea or answer is rarely interposed. A demurrer to the declaration or complaint is sometimes interposed. But it is said that there is no recital of value in the bond. The statute requires that the plaintiff, or some one else on his behalf, shall give to the sheriff, etc., a bond with sufficient security in double the value of the property about to be replevied. The plaintiff prepares the bond required by the statute, and in order to comply therewith estimates the value, and gives a bond in double the amount thereof. Such act estops the principal and sureties from denying the truth of the admission. The point argued is more refined and technical than sound. I find no error in excluding the testimony, and the motion for a new trial is denied.

FULLER v. UNITED STATES.

(District Court, N. D. Iowa, E. D. November Term, 1891.)

STATUTES—AMENDMENT—WHEN RETROSPECTIVE—DISABLED SOLDIER.

Rev. St. U. S. §§ 4787, 4788, provide that certain ex-soldiers, sailors, etc., shall be entitled to receive from the war department artificial limbs, or a money commutation therefor, from the time of their application therefor, and "at the expiration of every five years thereafter." Act Cong. March 3, 1891, amended the provision by substituting "three years" for "five years." Held, that the amendment was not retrospective, so as to entitle a person who had been receiving commutation money at intervals of five years to back pay equivalent to the same sums at three-year intervals.

At Law. Petition by Henry D. Fuller to recover from the United States commutation money for artificial limbs, under Act Cong. March 3, 1891. Heard on demurrer to the petition. Demurrer sustained.

R. M. Marvin, for plaintiff.

M. D. O'Connell, Dist. Atty., and D. C. Cram, Asst. Dist. Atty., for defendant.

SHIRAS, J. The petition herein filed avers that the plaintiff, during the war of the Rebellion, was in the service of the United States, as a member of Company F, twenty-eighth regiment of Iowa infantry, and that while in the line of his duty he was severely wounded, losing an arm and foot; that, under the provisions of the acts of congress of 1868 and 1870, he became entitled to receive artificial limbs as therein provided, or to commute the same into money payments at the rate of \$75 for a leg, and \$50 for an arm; that on August 29, 1870, he made his application for the benefit of the act, electing to take the money payments instead of the artificial limbs, and has received five payments of \$125, beginning with the date named; that by the act of congress of March 3, 1891, the period of five years named in the original acts has been changed to three years, and that thereby the plaintiff has become entitled to a restatement of his claim for commutations, and is now entitled to demand the sum of \$125 for every period of three years, beginning with the date of his application, to-wit, August 29, 1870, instead of for the period of five years. A demurrer is interposed to the petition, whereby is presented the question whether the act of March 3, 1891, is to be construed to be retrospective in its operation; so that parties, situated as is the plaintiff, are entitled to now claim from the United States the sums that would have been payable to them had the original act been the same as the act of March 3, 1891. Under the statutes in force previous to March 3, 1891, the plaintiff was entitled to receive an artificial leg and arm every five years, beginning with the date of his application for the benefit of the statute, or to commute the same into a money payment. When the revision of the statutes was made in 1873, these statutes became sections 4787 and 4788 of the Revision. The act of March 3, 1891, enacts that section 4787 shall be amended by striking out the word "five" and inserting the word "three," so that after that date the

plaintiff would be entitled to artificial limbs, or the money commutation therefor, every three years. The question is whether this amendment is to be given a retroactive effect, so that the plaintiff and others, entitled to the benefit of the act, can now demand the additional number of artificial limbs, or the money commutation therefor, that they would have received had the original act contained the word "three" instead of "five." In construing statutes, the general rule is that "words in a statute ought not to have a retrospective operation, unless they are so clear, strong, or imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *U. S. v. Heth*, 3 Cranch, 398; *Murray v. Gibson*, 15 How. 421; *Chew Heong v. U. S.*, 112 U. S. 559, 5 Sup. Ct. Rep. 255. There is certainly nothing in the language used in the act of March 3, 1891, showing that it was the purpose of congress to make the act retrospective, and the amendatory act can be given full force by allowing it to speak from the date of its enactment. An ingenious argument is made by counsel for plaintiff, based upon the thought that, as the amended statute reads that the parties entitled to the benefit of the act "shall be entitled to receive a new limb or apparatus at the expiration of every period of three years thereafter," and as the word "thereafter" refers to the time when the party makes his application for the benefit of the statute, therefore, under the amended act, the plaintiff can begin the enumeration of the three-year periods with August 29, 1870. This would be true if the statute is retroactive in its operation, but the use of the word "thereafter" does not affect that question. The purpose of the original and amended statute is that there shall be furnished so often, to those who have lost limbs in the service of the United States, artificial limbs, or the equivalent thereof in money. In the original statute, the words "every five years thereafter" were used, and the meaning thereof was that, when due application has been made under the statute and the regulations made by the surgeon general, then the party became entitled to a limb, or the money commutation therefor, and every five years thereafter he would become entitled to another limb, or the money value thereof, and the word "thereafter" only indicated the time when the period fixed in the statute began to run in his favor. Up to the adoption of the act of March 3, 1891, the plaintiff, therefore, was entitled to a limb, or the commutation therefor, for every period of five years, beginning with the date of his application, to-wit, August 29, 1870. On the 29th of August, 1890, he received the commutation payment then due him, and a new period of five years then began to run. By the amendment of 1891, the length of these periods is reduced from five to three years, and the plaintiff, therefore, will be entitled to new limbs, or the money value thereof, in August, 1893. In the case of *Ely v. Holton*, 15 N. Y. 595, the court of appeals had occasion to construe the effect of an amendment made in the same form as that adopted in the present case,—that is, by declaring that, as amended, the section will read as follows, and then setting forth the section in full; and the conclusion is reached that "the provisions of the section which are repeated are to be considered as having been the

law from the time they were first enacted, and the new provisions are to be understood as enacted at the time the amended act took effect;" in other words, the amendment is not to be given a retroactive effect. Believing this to be the proper construction of the statute in question, and that it cannot be held that the amendment was intended to be retrospective, it follows that the demurrer to the petition must be sustained; and it is so ordered.

WALKER v. GOOCH *et al.*

(Circuit Court, N. D. Illinois. February, 1881.)

1. SALE—WARRANTY—BRANDS OF MEAT.

A dealer in cured meats in Chicago agreed in writing to furnish a dealer in provisions in Liverpool "75 boxes Kingan's Cumberland Cut bacon," and "50 boxes Thallon's Stafford middles, * * * goods all warranted to be of choicest quality of grade and brand, or sale to be voided, and goods to be sold for account of" the seller. Both of the packers mentioned were putting up brands of meat exclusively for the Liverpool market, which bore their respective names, and other brands, without their names, for the general market. The seller furnished the latter brands. Their quality was equal to that of the others; but those bearing the packers' names had a first-class reputation in the Liverpool market, and always brought a better price there, the others being rated as second-class. Similar contracts were filled by other dealers by furnishing the same meat. *Held*, that there was a breach of the warranty.

2. SAME—EVIDENCE.

The fact that the brands bearing the packers' names were not for sale by brokers generally, but only by their designated agents in Liverpool, was no proof that such brands were not intended, by the contract, when it did not appear that the purchaser was aware of that fact.

3. SAME—EFFECT OF RECEIVING GOODS.

Nor is it a defense that the purchaser received the goods after being notified by the bills of lading that other brands were furnished, since the contract gave him authority in such event to receive and sell the goods on the seller's account.

4. SAME—EFFECT OF PAYING DRAFT.

Acceptance and payment by the purchaser of drafts drawn upon him in payment therefor, after he became aware of the breach of contract, were not prejudicial to him.

At Law.

Edward A. Dicker, for plaintiff.

Joseph Wright, for defendants.

BLODGETT, J. This is an action on a guaranty by defendants on the sale of a quantity of meats to plaintiff. Plaintiff, in November, 1876, was a dealer in provisions in Liverpool, England. Defendants were dealers in cured meats in the city of Chicago; and one R. H. Rose was agent for the defendants in Liverpool. On the 24th of November, Rose, as agent for defendants, by contract in writing, sold to plaintiff "75 boxes Kingan's Cumberland Cut bacon," for shipment from Indianapolis during November, at 42 shillings per cwt., and "50 boxes Thallon's Stafford middles," at 44 shillings per cwt.; "goods all warranted to be of choicest quality of grade and brand, or sale to be voided, and goods

to be sold for account of Gooch & Barber." At the time this sale was made, Kingan & Co. were packers of meats in Indianapolis, Ind., and John Thallon was a packer of meats in Chicago. Kingan & Co. put up for the Liverpool market a brand of bacon marked "Kingan's Packing Co. Cumberland Cut Bacon, Indianapolis, Indiana," which was forwarded exclusively to an agent of Kingan at Liverpool for sale there. It was not in the hands of general brokers here for sale. Kingan also put up another brand of bacon, marked "Taylor's Cumberland Cut Bacon, Indianapolis," which was in the general market, and bought and sold through brokers here and abroad. Thallon put up a brand of "middles" for the Liverpool market, and forwarded them only to his agent at that place, marked "John Thallon's Stafford Middles," and he also put up another brand, marked "Empire Packing-House Stafford Middles," which were also in the general market, like Taylor's bacon. The proof leaves the exact wording of these brands somewhat in doubt, but makes it clear and undisputed that one of the bacon brands bore the name of Kingan, and one of the Thallon brands bore the name of Thallon. The defendants filled this contract by shipping to plaintiff 75 boxes of "bacon" marked with the Taylor brand, instead of the Kingan brand, and 50 boxes "middles" branded with the Empire Packing-House brand, instead of the Thallon brand; but the proof shows that the "bacon" was in fact packed by Kingan & Co., of Indianapolis, and the "middles" were in fact packed by John Thallon, and that the quality of the goods was equal to those bearing the names of Kingan and Thallon. At the time of shipment, defendants drew on plaintiff at 60 days' sight for the purchase price of the goods, less the freight, and the drafts went forward with the bills of lading attached, describing the goods, and defendants also forwarded to plaintiff by mail, at the time of shipment, invoices of the goods, describing them by their brands or marks. Plaintiff accepted and paid the drafts in the due course of business, and on the arrival of the goods paid the freight, and placed them in the hands of a broker to be sold, and brings this suit to recover the difference between the proceeds of the goods and the amount paid for them; plaintiff assuming that under the contract he had the right to sell the goods as the property of the defendants, if they did not answer the guaranty.

The only question in the case is whether defendants had the right to fill their contract with any other brands of meat than those bearing the names of "Kingan" and "Thallon," respectively. The proof shows clearly that the brand of bacon known in the Liverpool market as "Kingan's Bacon," and the brand of middles known as "Thallon's Stafford Middles," "had a first-class reputation, and always brought the top market price," in Liverpool, and that the "Taylor" brand of Kingan's bacon, and "Empire" brand of Thallon's middles, were rated as second-class goods of those packers, and that on the arrival of these goods at Liverpool the "Taylor" brand of bacon was worth in the market 38 to 40 shillings per cwt., and the "Empire" brand of middles was worth in the same market 40 to 42 shillings, while Kingan's bacon, branded with

Kingan's name, was worth from 45 to 46 shillings per cwt., and Thallon's middles, bearing his name in the brand, were worth 48 to 50 shillings per cwt. The contract calls for "the choicest quality of grade and brand," and notwithstanding the proof in this case tending to show that contracts of this kind were filled by other dealers, at about the time this contract was made, by the shipment of "Taylor" and "Empire" brands, I am of the opinion that the true construction of the contract called for the choicest brand of Kingan's bacon and Thallon's middles; and the proof shows that the choicest brands of those packers were those bearing their respective names. The goods forwarded were not of those brands, and there was, therefore, a breach of contract. But it is urged that the goods branded with the individual names of these packers were not for sale by brokers generally, and therefore the parties to the contract must be presumed to have meant the class of goods which were so for sale by brokers. The reply to this is that there is no proof in the case tending to show that the plaintiff knew that only certain agents of Kingan and Thallon were authorized to sell goods bearing their individual names as part of the brand. The books are full of cases showing that parties have been compelled to pay damages for the non-performance of contracts for the sale of property which they did not own or control at the time they pretended to make the sale. So, if the defendants in this case saw fit to enter into a contract to sell goods they could not deliver, their inability to perform their undertaking is no defense; although the proof as to who had the sale of these "choicest brands" has some bearing upon the question as to what was meant by the terms used in the contract. But the proof leaves no doubt in my mind that the true meaning of the terms used requires the contract to be filled with goods bearing the individual Kingan and Thallon brands.

It is also urged in behalf of defendants that plaintiff had notice, by the bills of lading and invoices, of the brands of goods forwarded to him, and that he should at once have refused to receive the goods and pay the drafts if the invoices of the goods shipped show that they were not of the brand called for by the contract. I do not think this was the duty or right of the plaintiff under this contract. The contract provides that, if the goods are not of the brand and grade called for, the sale is "to be voided, and the goods sold for account" of defendants. This, in effect, made the plaintiff the broker of defendants; and it became his duty to sell the goods for defendants' account, and to apply the proceeds to the payment of his advances, as far as they would go. The contract may be said to be self-adjusting, and provided by its own terms for the contingency of the goods not meeting the guaranty,—a very wise and proper provision, considering the circumstances under which such contracts are made, because, but for this provision, if the goods were not such as responded to the terms of the contract, the plaintiff would have had a right to reject them, and they would have been left in a foreign port, perishable, and perhaps ruined, or largely deteriorated, before notice could be given to the owner. It was, therefore, wise to put into the contract a provision that the plaintiff should dispose of the goods as a

broker for the defendants at the best price he could get. If the proceeds were insufficient to pay advances and expenses of sale, then defendants are liable for the balance.

It is not, perhaps, necessary to pass upon the question as to plaintiff's obligation to accept and pay the drafts in case the goods did not answer the contract, although I incline to the opinion that under this contract it was his duty to do so. He certainly had the right to accept and pay defendants' drafts drawn upon him, and on which drafts defendants had obtained the money, upon the faith that they would be so accepted and paid; and his refusal to do so might have worked most serious injury to defendants' credit, by dishonoring their paper in a market where it was of the utmost importance to them to keep their credit good.

I am, therefore, of opinion that plaintiff has made a clear case of right to recover, and should have judgment for the amount due; being the difference between the price paid for the goods under the contract and the net proceeds of the sale. Judgment for plaintiff.

SHIPPEN v. BOWEN.

(Circuit Court, D. Colorado. February, 1882.)

DECEIT—PLEADING AND PROOFS—SCIENTER.

Under a declaration *ex delicto*, charging that defendant, to induce plaintiff to purchase certain bonds, represented them to be genuine and valid, whereas they were in fact worthless forgeries, there can be no recovery except upon proof that defendant knew them to be forgeries, or that he expressly represented them to be genuine.

At Law. Action of deceit.

McCARY, J. Although this case was tried before the district judge, at his request, and with the consent of the parties, the motion for a new trial has been submitted to me. It is an action *ex delicto* in the usual form of a declaration for deceit. The complaint charges that, to induce plaintiff to purchase certain bonds, the defendant represented that they were genuine and valid bonds, whereas, in truth and in fact, they were worthless forgeries. The court charged the jury that it was necessary for plaintiff to show that the defendant, at the time of the sale of the bonds to plaintiff, misrepresented the facts concerning their genuineness. In other words, the court was of the opinion, and so charged the jury, that plaintiff could not recover in this action by merely proving a sale of the bonds to him by defendant, and that the bonds were forgeries. It was held to be necessary to prove knowledge on the part of the defendant of the forged character of the bonds, or an express misrepresentation concerning the fact of their genuineness. The counsel for plaintiff insists that in such a case as this no *scienter* need be alleged, nor, if alleged, need be proved. I am unable to concur in the soundness of this

proposition. The contention of the plaintiff's counsel is that, because the mere sale of the bonds rendered the seller liable upon an implied warranty of their genuineness, he is equally liable for an implied tort. But this argument fails to note the distinction between an action upon an implied contract of warranty of the genuineness of the bonds sold and an action for deceit or misrepresentation sounding in tort. It is impossible to conceive the idea of a tort as separate and apart from an intentional wrong and injury, or such negligence or other misconduct as necessarily to imply such wrong or injury. A *scienter* is the very gist of a tort. To say that one may recover in tort without proving a *scienter*, is to say that he may omit from his proof the chief element of his case. No doubt there may be cases of express warranty upon which an action of tort may be founded. Of such a character was the case of *Schuchardt v. Allen*, cited by the plaintiff's counsel, reported in 1 Wall. at page 359. That was an action for false warranty of the quality of personal property sold by the defendant to the plaintiff; and it was held to be enough for the plaintiff to prove the warranty, and that it was false, without proof of a *scienter*. There are doubtless numerous cases to be found in the books in which it is asserted that the holder of negotiable paper, by the mere fact of offering it for sale, confirms its genuineness, and represents that it is duly executed, as it purports to be. But this is not the sort of confirmation or misrepresentation that amounts to a tort. It is a misrepresentation within the meaning of the law of contracts; and in the purview of that law it is immaterial whether it be true or false, because there is an implied contract. It is not, however, a false representation, within the meaning of the law of torts, upon which an action *ex delicto* can be maintained. I do not think that any of the cases cited by plaintiff's counsel support the proposition that it is not necessary to prove intent to injure or defraud in such a case as the one now under consideration. A party cannot be guilty of a tort, within the proper signification of that term, who is innocent of all intent to injure or defraud. If the present plaintiff, after his purchase of the bonds in question from defendant, and in perfect ignorance of their fraudulent character, believing them to be valid and genuine, had in good faith sold them to a third party, he would have been liable upon the contract because of the warranty of genuineness which the law implies, but not, in my judgment, in tort, for having knowingly, intentionally, and willfully injured and defrauded the party to whom he sold. Such being my view of the law, the motion for a new trial must be overruled, and it is so ordered.

CITY OF LE MARS v. IOWA FALLS & S. C. R. Co. *et al.*, (three cases.)

(Circuit Court, D. Iowa. May, 1882.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—CONDEMNATION PROCEEDINGS.

A proceeding by a city to condemn certain lands, in which a citizen of the same state with plaintiff owns the fee, while a citizen of a different state holds a perpetual lease, is not a separable controversy when the main question is as to the right to condemn; and the non-resident defendant cannot remove his part of the controversy from the state to a federal court.

At Law. Proceeding to condemn lands. On motion to remand the cause to the state court.

Barcroft & Gatch and *G. W. Ayer*, for plaintiff.

John F. Duncombe, for Illinois Cent. R. Co.

MCCRARY, J. This proceeding was instituted by the city of Le Mars in the state court for the purpose of condemning certain real estate within the corporate limits of the city for street purposes. The defendant the Iowa Falls & Sioux City Railroad Company is the owner of the fee of said real estate, and is, with the plaintiff, a citizen of Iowa. The defendant the Illinois Central Railroad Company is the owner of a perpetual lease upon said real estate, and, being a citizen of Illinois, has removed the case to this court, claiming that there is a controversy wholly between it and the plaintiff, which can be fully determined as between them. The record shows that the principal controversy is as to the right of the city to condemn and take this particular real estate for street purposes. A secondary controversy will arise, if the right of condemnation is upheld, as to the amount of damages to be awarded. It is plain that the city has a right to proceed to condemn land for street purposes against all who have an interest in it, and especially against the owner of the fee. If it were conceded that two separate suits could be maintained, the one against the owner of the fee, and the other against the lessee, it will scarcely be contended that the city could be obliged to divide its action in that way. The law looks with great disfavor upon any rule that will increase litigation by multiplying suits. It is now settled that so much of the act of 1866 (Rev. St. § 639) as expressly authorizes the splitting of a case, and the removal of a part of it to a federal court for trial, leaving another part in the state court, is repealed by the subsequent act of March, 1875. If any part of a suit is removed, the whole must be removed. The question remains to be determined, in what class of cases, if in any, can a cause be removed, where some of the parties litigant on opposite sides are citizens of the same state, and others are citizens of different states? The rules by which we are to be governed, so far as they have been settled by the supreme court of the United States, may be stated as follows:

1. If the parties to the suit can be placed on opposite sides of the real controversy, disregarding the mere form of the pleadings, so that all on one side are found to be citizens of different states from all on the other,

the cause may be removed under the first clause of the second section of the act of March 3, 1875. *Removal Cases*, 100 U. S. 457.

2. Where a suit embraces two distinct controversies, one of which is between citizens of different states, while the other is between citizens of the same state, if the former is a separable controversy which can be fully determined without the presence of the parties to the latter, then either of the parties to the former may, under the second clause of the above-mentioned section, remove the whole case. *Barney v. Latham*, 103 U. S. 205.

3. But congress has not provided for the removal from a state court of a suit in which there is a controversy not wholly between citizens of different states, and to the full or final determination of which one of the indispensable parties, plaintiffs or defendants, on the side seeking the removal, is a citizen of the same state with one or more of the parties against whom the removal is asked. *Blake v. McKim*, 103 U. S. 336.

4. To authorize a removal under the first clause of the section above mentioned, all the parties on one side of the controversy must be citizens of different states from all the parties on the other; and, to authorize a removal under the second clause of that section, there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on another. *Hyde v. Ruble*, 104 U. S. 407, (January, 1882.)

We are therefore to determine in each case whether the controversy arising between citizens of different states is a distinct and separate cause of action. No general rule for determining this question has been laid down by the supreme court; and it would, perhaps, be difficult to formulate one that would be applicable to all cases. In the present case the plaintiff brought suit against two defendants, one of which is a citizen of the same state with plaintiff. The cause of action is against both; the proof must be precisely the same as to both, and the judgment, in so far as it establishes the right of condemnation, must be against both. Each might have a separate claim for damages; but that is a subordinate controversy, and one which cannot be considered until the main question is determined. Until otherwise instructed by the supreme court, this court will hold that in such a case the plaintiff cannot be obliged to litigate with both or either of the defendants in a federal court. The cause of action against one of the defendants is not separate and distinct from that against the other. The controversy is single, and not divisible, within the meaning of the rule laid down by the supreme court. If a party brings a suit in a state court against two or more defendants, upon a cause of action of such a character that he has a right to proceed to judgment against all, and where the same proof applies to all, it is not a divisible or separable controversy. It follows that the motion to remand must be sustained, and it is so ordered. This ruling applies to two other cases between the same parties, in which similar motions have been submitted.

KELLEY v. CENTRAL RAILROAD OF IOWA.

(Circuit Court, D. Iowa, C. D. October, 1883.)

1. DEATH BY WRONGFUL ACT—MEASURE OF DAMAGES.

In an action for wrongful death under the Iowa statute the recovery is to be measured by the amount which would probably have been saved to decedent's estate if he had lived, taking into consideration his occupation, age, health, and habits as to industry, sobriety, and economy, the amount of his property, and the probable duration of his life.

2. SAME—PAIN AND SUFFERING.

No damages can be given for the pain and suffering of the deceased, nor the wounded feelings or grief of his relatives.

At Law. Action by Mary Kelley, administratrix of the estate of Nicholas Kelley, for damages in causing the death of her intestate.

The main question determined in this case was as to the measure of damages, and the report was limited to that part of the judge's charge to the jury which bears upon this subject. McClain's Code Iowa, § 2525, provides that "all causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." Section 2526 provides, among other things, that "when a wrongful act produces death, the damages shall be disposed of as personal property belonging to the estate of the deceased, except that, if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts."

C. H. Gutch, for plaintiff.

Blair & Daly, for defendant.

MCCRABY, J., (*orally charging jury.*) If you find for the plaintiff you will assess her damages at such just and reasonable sum as will compensate the estate of the deceased for the loss occasioned by his death. In determining what this amount shall be, in case you come to the question of damages, you will consider the circumstances of the deceased, his occupation, age, health, habits as to industry, sobriety, and economy, the amount of his property, if any, and the probable duration of his life, and from these elements you will determine what his annual income during life would probably have been which would have been saved to his estate, and not expended, and a gross sum which would have produced a like income at interest will be a proper sum to be allowed as damages. I do not say that you are obliged to find the amount by this process. You may exercise your discretion as to the mode of arriving at the value of the life of the deceased to his estate, but that value, when ascertained and fixed by you, must be the sum of your verdict. This mode is suggested as a convenient one, which you can adopt if you choose.

In a case of this character you are not to take into account the pain and suffering of the deceased, nor the wounded feelings or grief of his relatives, in fixing the damages. What you are to ascertain and by your verdict decide, if you come to the question, is what, according to

the evidence, would have been the probable pecuniary benefit to the estate of the deceased from the continuance of his life. This you are not expected to determine with accuracy, as that would be impossible; but you are to fix, according to your best judgment in the light of the evidence, what the amount would probably have been. Reasonable probability is all that can be expected in such a case. No arbitrary rule can be laid down. The elements which enter into the question of the value of a life to the estate of the deceased are so various that the matter must be left, under proper instructions from the court, to the sound discretion of the jury. The purpose of the statute under which this suit is brought is compensation. It is not the loss of the deceased, but the loss of the estate, which is to be estimated. The purpose of the statute is to make good to the heirs or representatives of the person killed that which they have probably lost by his death. To ascertain this it is of course necessary to take into view all the facts and circumstances which bear upon the question what his accumulations would probably have been. Among the questions proper to be considered in the light of the evidence are the following: Had the deceased, previous to his death, saved his earnings? Had he contributed to his mother's support? Was he a sober, industrious man, or was he habitually intemperate? Was he economical, or was he a spendthrift? From all the facts and circumstances, if he had lived, what sum, if any, would he probably have accumulated in the course of an ordinary life-time, to be left to his heirs?

MATTHEWS v. WESTPHAL *et al.*

(Circuit Court, D. Iowa. May, 1880.)

1. BANKRUPTCY—PREFERENCE OF CREDITOR—CHATTEL MORTGAGE.

Rev. St. U. S. § 5128, providing that any conveyance by a debtor in contemplation of insolvency, and with intent to prefer any creditor, shall be void if made within four months before the filing of a petition in bankruptcy, does not apply to a chattel mortgage made with such intent before the four months, but, by agreement, kept from record until within that time.

2. SAME.

The giving of a chattel mortgage with intent to create a preference is invalid when made within the four months.

In Bankruptcy. On appeal from the decree of the district court.

J. W. Shields, for plaintiff.

Shiras, Van Duzee & Henderson, for defendants.

McCRARY, J. This is an appeal from the decree of the district court in a proceeding in bankruptcy. The suit was brought by plaintiff, as assignee of one Jorgenson, a bankrupt, to set aside a chattel mortgage executed by the bankrupt to defendants, and to recover the value of the property conveyed thereby, upon the ground that the same was fraudu-

lent, at common law, under the statutes of Iowa, and under the bankrupt act. The court below held as follows: (1) That the chattel mortgage was *bona fide*, and not fraudulent at common law or under the Iowa statutes. (2) That it gave defendants such a preference as is forbidden by the bankrupt act to be given to any creditor within four months from the time of the filing of the petition in bankruptcy. Rev. St. § 5128.¹ (3) That, said preference not having been given within said period of four months, the plaintiff could not recover.

I have no difficulty in affirming these rulings upon the first two propositions. The conclusion upon the third was reached by the learned district judge, as appears from his opinion, not without much hesitation. The doubt grows out of the fact, which appears from the evidence, that the chattel mortgage in question, though executed more than four months prior to the filing of the petition in bankruptcy, was, by agreement between the parties, kept from the record until a later period, and was filed for record within the four months. It appears that this agreement not to record was made to prevent the institution of proceedings in bankruptcy by other creditors of the mortgagor. Under these circumstances, did the four months begin to run from the execution of the chattel mortgage or from the recording of the same? It was held by this court in *Harris v. Bank*, 4 Dill. 133, that in a case where a deed of trust was kept off the record to prevent the knowledge thereof from coming to other creditors the four-months limitation did not begin to run until the filing of the instrument for record. This decision would be followed as settling the rule for this court were it not that certain decisions of the supreme court are brought to my notice which seem to establish a different doctrine. This makes it necessary to examine carefully these decisions, since, if the case of *Harris v. Bank* cannot be harmonized with them, it must of course yield to them as the superior authority. The cases cited are *Bernhisel v. Firman*, 22 Wall. 170; *Sawyer v. Turpin*, 91 U. S. 114. And it is insisted that the doctrine of these cases is supported by the case of *Bean v. Brookshire*, decided by Mr. Justice MILLER in the circuit court for the eastern district of Missouri. 1 Dill. 24. In *Bernhisel v. Firman* this precise question did not arise, but the court laid down the general doctrine that, in order to bring a security for a debt within the provisions of the bankrupt law, it is necessary that all the prescribed conditions should concur. And it was said that among these conditions "the cardinal one is that the security should be given by the bankrupt within the time specified," and with the view

¹Rev. St. U. S. § 5128: "If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited."

to giving one or more creditors a preference. The court further said: "It is as much the purpose of the law to sustain all valid claims arising beyond the time specified, as it is to strike down the frauds within that time which it denounces." The case chiefly relied upon by appellee is *Sawyer v. Turpin*. The facts in that case were briefly as follows: The petition in bankruptcy was filed October 22, 1869. On the 15th of the preceding May the bankrupts had conveyed to Turpin the property in controversy by an instrument in form a bill of sale, but in substance a mortgage; to secure a large debt. This instrument was not recorded, and it was insisted that it was kept off the record and kept secret by agreement between the parties to it. On the 31st of July, 1869, the bankrupt executed a mortgage to the same party on the same property, and to secure the same debt. It was nothing more than a change in the form of the security, and therefore, if the first was void, so was the last. The court said, speaking of the original bill of sale:

"Having been executed more than four months before the petition in bankruptcy was filed, there is nothing in the case to show that it was invalid. True, it was not recorded, and it may be doubted whether it was admissible to record; true, no possession was taken under it by the vendee; but for neither of these reasons was it the less operative between the parties. It might not have been a protection against attaching creditors, if there had been any; but there were none. It was in the power of Turpin to put it on record any day, if the recording acts apply to such an instrument, and equally within his power to take possession of the property at any time before other rights against it had accrued. These powers were conferred by the instrument itself, immediately on its execution."

And the court further say:

"It has been argued, however, on behalf of the assignees, that the bill of sale of May 15th was an insufficient consideration for the mortgage, because, as alleged, there was an agreement between Bacheller and Turpin that it should not be recorded, and should be kept secret. If the fact were as alleged, it is not perceived that it would be of any importance, for it is undeniable that the bill of sale rested on a valuable consideration, to-wit, the debt of \$27,839 in gold, due to Novelli & Co.; and it is not denied that it gave to Turpin the right to take possession of the property described in it. It was therefore a valuable security, even if there was an agreement not to record it. If it be said failure to put it on record enabled the debtor to maintain a credit which he ought not to have enjoyed, the answer is that the bankrupt act was not intended to prevent false credits. Its purpose is ratable distribution. But the evidence does not justify the assertion that there was in fact any agreement that the bill of sale should not be recorded, or that possession should not be taken under it."

In *Bean v. Brookmire*, Mr. Justice MILLER stated the rule by which to construe the fifth section of the bankrupt act as follows:

"The acts mentioned in the section are not such as were forbidden by the common law, or generally by the statutes of the states. Nor are they acts which, in their essential nature, are immoral or dishonest. For a man who is insolvent, or approaching insolvency, to pay a just debt, is not morally wrong, nor was it forbidden by any law in this country previous to the bankrupt act; and, though a preference of creditors, by transfer or assignment of property by an insolvent, may sometimes be unjust to the other creditors, it

was not forbidden by many of the states. It is very certain that such a preference may consist with the highest obligations of morality, and under circumstances which any one can imagine it may be the dictate of the purest justice in reference to all concerned. The careful and diligent framers of the bankrupt act were fully aware of all that has just been said. But they were about to frame a system of laws, one main feature of which was to provide for the distribution of the property of an insolvent debtor among his creditors, and they adopted wisely, as the general and pervading rule of distribution, equality among creditors. But they found that this general principle could not, without hardship, be made of universal application. When a creditor had obtained by fair means a lien on any property of the bankrupt, that lien ought to be respected. If he had so obtained payment of the whole or a part of his debt, the payment ought to stand. These exceptions to the general rule of distribution were, however, liable to be abused, and might be used to defeat the purposes of the bankrupt law. The bankrupt, knowing that he must soon be helpless, would desire to pay or secure favorite creditors. They, knowing his inability to pay, and his liability to be called into a bankrupt court, would naturally desire to secure themselves at the expense of other creditors. In this dilemma, congress said we cannot prescribe any rule by which a preference would be held to be morally right or wrong, and it would be fatal to the administration of the law of distribution to permit such a question to be raised. We will therefore adopt a conventional rule to determine the validity of these preferences. In all cases where an insolvent pays or secures a creditor to the exclusion of others, and that creditor is aware that he is so when he receives it, he shall run the risk of the debtor's continuance in business for four months. If the law which requires equal distribution is not called into action for four months, the transaction, if otherwise honest, shall stand; but if by the debtor himself, or any of his creditors, that law is invoked within four months, the transaction shall not stand, but the money or property received by the party shall become a part of the common fund for distribution."

The doctrine of these cases is still further illustrated by the case of *Clark v. Iselin*, 21 Wall. 360. It is, I think, quite evident, from these authorities, that the supreme court does not regard the four-months limitation as an ordinary statute of limitations, analogous to statutes regulating the time within which actions shall be commenced.

Counsel for appellant refers to the case of *Bailey v. Glover*, 21 Wall. 342, where it is held that the second section of the bankrupt act, which requires that all suits by or against an assignee in bankruptcy shall be brought within two years after the cause of action accrues, is a statute of limitations, and to be construed as other statutes of that class. But there is a clear distinction between that section and the one now under consideration. The former fixed and limited the time within which suits could be brought, and was therefore clearly a statute of limitations, pure and simple. The latter describes the acts which shall constitute a fraudulent preference, and has no relation to the matter of limiting the time for bringing suits. It is not a statute of limitations within the usual and ordinary meaning of those terms. In describing the acts which will amount to a preference, congress has seen fit, in this section, to make the time when the preference is given an essential element. It must be "within four months of the filing of the petition by or against the bankrupt." No exception is expressed, and I think it clear from

the rulings of the supreme court, above quoted, that none can be implied.

Nothing is said about notice of the preference to other creditors or about the recording of the instrument, when there is one by which the preference is given. The preference may be by procuring or suffering an attachment or seizure of the debtor's property by payment, by pledge, by assignment, transfer, or conveyance, directly or indirectly, absolutely or conditionally. Notice to other creditors could be given by recording only in the single instance of a preference by means of a conveyance absolute or conditional. If it be by payment or by assignment or pledge it will hardly be claimed that an agreement not to make it public would prevent the running of the four months. It would be very unjust to apply a different rule to the creditor who receives a conveyance or mortgage. These and other considerations seem to have led congress to fix an arbitrary period, or, in the language of Mr. Justice MILLER, they saw fit to "adopt a conventional rule to determine the validity of these preferences." I am constrained, therefore, notwithstanding the force of Judge DILLON's reasoning in *Harris v. Bank*, to concur in the opinion of the district judge. The decree of the district court dismissing the bill is affirmed.

In re WO TAI LI.

(District Court, N. D. California. August 16, 1888.)

CHINESE RESTRICTION ACT—RIGHT OF ENTRY—CERTIFICATE OF IDENTITY.

The Chinese restriction act of 1884, § 6, provides that any Chinese person other than a laborer, entitled by treaty to enter the United States, shall have a certificate of his identity issued by the Chinese government, and viséd by the diplomatic representatives of the United States, etc., which "shall be the sole evidence permissible on the part of the person so producing the same to establish a right to entry into the United States." *Held*, that a Chinese person who fails to produce such a certificate cannot establish a right to enter by any other evidence.

Petition for *Habeas Corpus* to release a Chinese person, who has been denied the right to enter the United States.

Philip Teare, for petitioner.

John T. Carey, U. S. Atty., and *Charles L. Weller*, Asst. U. S. Atty.

HOFFMAN, J. The petitioner claims the right to land in the United States on the ground that she is the wife of a Chinese actor, and therefore does not come within the prohibition of the treaty and of the act of congress which forbids the coming into the United States of Chinese laborers. By the sixth section of the amended restriction act of 1884 it is provided, in substance, that—

"Every Chinese person other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who may be about to come to the United States, shall obtain the permission of and be identified as

so entitled by the Chinese government, etc.; in each case to be evidenced by a certificate issued by such government, which certificate shall be in the English language, etc. * * * The certificate provided for in this act, and the identity of the person named therein, shall, before such person goes on board of any vessel to proceed to the United States, be viséd by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representatives, etc. * * * Such certificate, viséd as aforesaid, shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of customs in the port of the district of the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States, whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right to entry into the United States."

No such certificate has been produced or was obtained by the petitioner in this case. It is contended on her part that the certificate is declared to be the sole evidence permissible on the part of the person so producing the same, and that, inasmuch as this person has not produced any certificate, parol testimony is admissible to show that she does not belong to the prohibited class. The language of the act is certainly infelicitous, but its meaning is obvious. It is that the certificate is required to be produced by all Chinese persons, other than laborers, claiming the right to enter this country; and such certificate is to be the sole evidence of their right to land. Unless, therefore, the whole section is to be disregarded, and the obvious intention of congress frustrated, the certificate must in all cases be exacted. To say that because the applicant has utterly neglected to comply with the law, and has produced no certificate, therefore her right to land may be established by other evidence, would be an absurd conclusion, founded upon the mere letter of the statute, and in obvious contravention of its spirit and meaning. The petitioner must be remanded.

UNITED STATES v. PENN.

(Circuit Court, E. D. Virginia. July, 1880.)

CRIMINAL LAW—JURISDICTION OF FEDERAL COURTS—ARLINGTON NATIONAL CEMETERY.

Const. U. S. art. I, § 8, cl. 17, giving congress the exclusive right of legislation over all places purchased by the United States, with the consent of the state in which the same are situated, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, confers no jurisdiction upon the federal courts to try a person for a petty larceny committed in the National Cemetery on the Arlington estate, which was purchased by the United States at a tax-sale, without the consent of the state of Virginia.

At Law. Information against Dennis Penn for a petty larceny committed in the National Cemetery on the Arlington estate, Alexandria county, Va. On plea to the jurisdiction, and demurrer thereto. Plea sustained.

The United States purchased the Arlington estate during the war at a tax-sale, and has held possession ever since, but jurisdiction thereof was never ceded by the state of Virginia. The plea was based upon this fact.

L. L. Lewis, for the United States.

Charles E. Stuart, for defendant.

HUGHES, J. The eighth section of the first article of the constitution of the United States, in the seventeenth clause, gives the right of exclusive legislation to the United States, to exercise authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. The purchase of lands for the United States, for public purposes, does not of itself oust the jurisdiction of such state over the lands purchased. *U. S. v. Cornell*, 2 Mason, 60. The constitution prescribes the only mode by which they can acquire land as a sovereign power; and therefore they hold only as an individual when they obtain it in any other manner. *Com. v. Young*, Brightly, N. P. 303; *People v. Godfrey*, 17 Johns. 225; *U. S. v. Travers*, 2 Wheeler, Crim. Cas. 490; *People v. Lent*, Id. 548. If there be no cession by a state, the state jurisdiction still remains. *Com. v. Young*, 1 Hall, Law J. 47; 1 Kent Comm. 403, 404; and Story, Const. § 1127, where Judge Story says:

"If there has been no cession by the state of the place, although it has been constantly occupied and used, under purchase or otherwise, by the United States, for a fort, arsenal, or other constitutional purpose, the state jurisdiction still remains complete and perfect."

It seems too plain for doubt, much as we may regret the fact in this particular case, that this court has no jurisdiction in the premises; and the demurrer accordingly must be overruled, and the plea sustained.

UNITED STATES v. PARTELLO.

(Circuit Court, D. Montana. November 23, 1891.)

1. INDIANS—FEDERAL JURISDICTION—RAPE IN "INDIAN COUNTRY."

Rev. St. U. S. § 5345, provides for the punishment of rape committed in any of the places mentioned in section 5139, and the latter section specifies, among others, "any fort * * * or district of country under the exclusive jurisdiction of the United States." Section 2145 declares that, "except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed within the sole and exclusive jurisdiction of the United States * * * shall extend to the Indian country." Held that, as the punishment of rape is not specified in the title mentioned, a rape committed in "the Indian country" is punishable under section 5345.

2. SAME—WHAT IS "INDIAN COUNTRY"—RESERVATIONS.

Prior to the admission of Montana as a state, the Crow Indian reservation situated therein was part of the "Indian country," within the meaning of Rev. St. § 2145, extending the general criminal laws of the United States over the Indian country.

3. SAME—EFFECT OF ADMITTING TERRITORY.

Act. Cong. Feb. 22, 1889, providing for the admission of Montana and other territories into the Union, provides, in section 4, that "the people inhabiting said proposed states do agree and declare that they forever disclaim" all right to the lands therein held by Indian tribes, and that until the Indian title is extinguished the same shall remain subject to the disposition and "under the absolute jurisdiction and control" of congress, and this provision was incorporated into the constitution of Montana. Held that, in view of the fact that the United States, by the treaty of 1868 with the Crow Indians, agreed that no persons except certain employees of the government should ever be permitted to "pass over, settle upon, or reside in" the reservation thereby set apart to them in Montana, the jurisdiction reserved to the United States was intended to apply to persons, as well as to the lands themselves; and hence, under Rev. St. U. S. § 2145, which extends the general criminal laws of the United States to "the Indian country," the federal courts have jurisdiction to punish a rape committed on the reservation by a white man against a white woman.

4. SAME—CONSTITUTIONAL LAW.

The people of Montana had full power, under the constitution, to thus relinquish to the United States all jurisdiction over the Indian reservations.

5. SAME—FEDERAL PURPOSE.

In view of the fact that the United States has always assumed control over the Indians, as the wards of the nation, to the exclusion of the states, the relinquishment by the state of jurisdiction over the Indians' reservation was for a "federal purpose."

At Law. Prosecution of Fred Partello for rape. On demurrer to a plea to the indictment. Demurrer sustained.

Elbert D. Weed, U. S. Atty.

Rufus C. Garland, for defendant.

KNOWLES, J. In this case the defendant, Fred Partello, is charged in an indictment found by a grand jury, impaneled in this court, with the crime of rape, committed upon a white woman within the limits of the Crow Indian reservation, state of Montana. Defendant interposed a plea to the indictment, and specified as a ground therefor that this court had no jurisdiction of the offense charged, by reason of the fact that the defendant is a white man, and the person on whom the offense was committed is a white woman. The United States interposed a demurrer to this plea. Defendant urges that as it is admitted that defendant is a white man, and the woman upon whom the offense was committed, or it is charged was committed, is a white woman, the offense was cognizable, if at all, in the state courts of Montana. A portion of section 5339 of the Revised Statutes of the United States provides:

"Every person who commits murder—*First*, within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States; * * * *second*, or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state; *third*, or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death."

Section 5345 of said Statutes provides:

"Every person who within any of the places, or upon any of the waters, specified in section fifty-three hundred and thirty-nine, commits the crime of rape shall suffer death."

These two provisions of the statute, construed together, make the crime of rape committed in a place within the exclusive jurisdiction of the United States an offense against its laws.

Section 2145 of said Revised Statutes provides:

"Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

The crime of rape is not provided for in that title, and it is a crime for which the general laws of the United States provide a punishment, as I have shown, when committed in a place within the exclusive jurisdiction of the United States, and hence must be an offense against such laws when committed in the Indian country. The next point, then, for determination is, what is Indian country? In the case of *Bates v. Clark*, 95 U. S. 204, the supreme court held:

"The simple criterion is that, as to all lands thus described, it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of congress, unless by the treaty by which the Indians parted with their title, or by some act of congress, a different rule was made applicable in the case."

This rule as to what constituted Indian country was affirmed in the case of *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. Rep. 396; and of the above definition the supreme court said:

"In our opinion, that definition now applies to all the country to which the Indian title has not been extinguished, within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a state, not excepted from its jurisdiction by treaty or by statute at the time of its admission into the Union, but saving even in respect to territory not thus excepted, and actually in the exclusive occupancy of Indians, the authority of congress over it under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it."

In the case of *U. S. v. Le Bris*, 121 U. S. 278, 7 Sup. Ct. Rep. 894, the supreme court held that "the reservation of the Red Lake and Pembina Indians in Polk county, Minn., is Indian country." In the case of *U. S. v. Martin*, 14 Fed. Rep. 817, Judge DEADY held that "Indian reservations" were "Indian country." Many other decisions from the United States circuit court might be cited to the same effect.

Considering the Crow Indian reservation, which will hereafter be described, and the above definitions of "Indian country," and there can be no doubt but it belongs to that character of country denominated

"Indian," unless the admission of Montana as a state in the Union changed its character in this respect. The point is presented, then, did this admission of Montana as a state in the Union cause the Crow Indian reservation to cease being that character of a region classed as Indian country? The able counsel for defendant maintains that it did, and that it came under the jurisdiction of the state, at least to the extent of allowing it to punish offenses committed by one white man against another white man. In other words, whatever jurisdiction the United States had over this Indian reservation before Montana was admitted into the Union was abrogated and repealed by the act of admission, and the state of Montana acquired full authority over the same, and the right to legislate for the inhabitants thereof, except as to those cases pointed out for national legislation in the constitution of the United States, or which are implied from the constitutional right of congress to regulate commerce among the Indian tribes; hence no longer could congress exercise the combined power of a state and national government over said reservation, but only the powers which pertained to a national government. The point here presented is, it appears to me, one of considerable difficulty and importance, and to some extent the court is left without adequate judicial determinations for the decision of the same.

Let us consider whether or not there could be any limit upon the authority of the state government over this reservation by any proceeding on its part coupled with reservations in the act admitting Montana into the Union as a state.

In the case of *U. S. v. McBratney*, 104 U. S. 621, the supreme court, while holding that the act admitting Colorado into the Union so modified the term "Indian country" that the United States had no jurisdiction of the crime of murder committed by one white man upon another on the Ute reservation, used this language as to the admission act of Colorado: "And the act contains no exception of the Ute reservation, or of jurisdiction over it;" clearly intimating that it might have made a difference with the rule established in that case, if it had. In the case of *Ex parte Crow Dog*, *supra*, it will be observed that this language was used in defining Indian country: "Excluding, however, any territory embraced within the exterior geographical limits of a state not excepted from its jurisdiction by treaty, or by statute, at the time of its admission into the Union." Here it is intimated that, if by a statute, at the time of admission of a state in the Union, any portion of the same was excluded thereby from the jurisdiction of the state, such portion of said state would remain Indian country. It would seem, also, from that decision, that, although a portion of a state was not excepted from the jurisdiction thereof by treaty or statute, yet, if occupied by Indians, congress might have jurisdiction over the same under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it. Under the last power, it would have to appear that the offense charged in some way interfered with commerce with the Indian tribes. But the right to legislate for Indian country was not so limited. In the case of *U. S. v. Ward*, 1 v.48f.no.8—43

Woolw. 17, Justice MILLER, while holding that the act admitting Kansas into the Union repealed the jurisdiction of the United States over any portion of the state which had before that time been classed as Indian country within its borders, which was not excepted from the limits of the state by treaty with the Indians and some provision in the admission act, says:

"And the converse of this proposition is inferable; that is, that congress intended to and did concede to the new state, and it acquired and holds irrevocably, except as it sees fit to surrender the same, full right and authority to legislate to enforce her laws and to exercise plenary jurisdiction over all such parts of her territory as were not covered by such treaties."

Here it is intimated that, if Kansas had seen fit to surrender its jurisdiction over any portion of her territory to the United States, it would not have plenary jurisdiction over the same.

Taking these decisions together, and there is an intimation that in the act, in admitting a state into the Union, there might be a statute or a treaty by which a portion of the territory of such state might remain under the jurisdiction of the United States, or the state might cede its jurisdiction over certain territory to the United States. Judge DILLON, in the case of *U. S. v. Yellow Sun*, 1 Dill. 272, said of the opinion of Justice McLEAN, in *U. S. v. Bailey*, 1 McLean, 234, upon which the counsel for defendant places much reliance:

"In view of the peculiar relations of the Indian tribes, I think I ought to observe that I am not at present prepared to yield assent to the opinion which Mr. Justice McLEAN seems to have entertained in *Bailey Case*, that congress had no power to pass the act of 1817, (3 St. 383;) that is, that congress could not, if it saw fit, make punishable in national courts offenses committed by or against Indians upon reservations in state limits. And it might be worth the consideration of congress whether some such legislation might not be expedient."

Here is an intimation that, in the opinion of that distinguished jurist and writer, congress might enact a statute punishing a white man for an offense committed upon an Indian, upon a reservation within the limits of a state, and this right is not placed upon the power to regulate commerce among Indian tribes. This would be the assertion of jurisdiction over a white man upon an Indian reservation by the United States in matters other than those within the peculiar and specific jurisdiction of the general government.

Let us see what congress and Montana have done toward conferring the jurisdiction of the United States over the Crow Indian reservation. In an act entitled "An act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments, and to be admitted into the Union on an equal footing with the original states," etc., approved February 22, 1889, in reference to the convention in each territory named, organized to form a constitution for the proper state, we find the following, in section 4:

"That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated public lands ly-

ing within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. * * * But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations."

In compliance with this provision of the statute under which Montana was admitted into the Union, the convention that framed the constitution adopted by the people of Montana provided by ordinance as follows:

"That the people inhabiting the said proposed state of Montana do agree that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States they shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; * * * that the ordinances of this article shall be irrevocable, without the consent of the United States and the people of the state of Montana."

It is evident that the lands referred to in this ordinance, and the lands in the statute mentioned, over which the congress of the United States was to retain absolute jurisdiction, were the Indian lands to which the Indians held but the right of occupancy. The question here presented is, what did congress intend by the clause, "and said Indian lands shall remain under the absolute jurisdiction and control of the United States;" and what did the convention that framed the Montana constitution intend by it? This provision does not occur, as far as I have been able to investigate, in the acts providing for the admission of any other states into the Union than in the one above referred to. And I am not apprised that any ordinances similar to the one named above were ever adopted by any other states than those enabled to form constitutions under the same act which gave that privilege to the people of Montana. In the first part of the portion of section 4 of said act quoted above it appears that, as an individual proprietor, the United States was fully protected in regard to its rights to Indian lands, and the Indians were protected in their rights of occupancy. It does not seem that the clause under consideration could add anything to the rights of the United States in regard to these lands as a proprietor. In Montana there were no Indian lands save those included in Indian reservations, except some lands held by certain of the Flat Head Indians in the Bitter Root valley. These lands were held in severalty, and they had a title from the United States to the same different from that of the right of occupancy. Evidently they were no part of the Indian lands referred to. As I have said, these were lands to which the Indians held only the title of occupancy, and which the United States reserved the right to dispose of, not lands granted to Indians in severalty. It is reasonable to suppose that congress passed

the above act, and the people of Montana adopted the above ordinances, with reference to the fact that Indian lands proper were those included in the Indian reservations. It was agreed by the ordinance above referred to that congress was to retain the absolute jurisdiction and control over these Indian lands within the Indian reservations in Montana. The word "jurisdiction," as used in the above clause, when applied to congress, means the power of governing such lands; to legislate for them; the power or right of exercising authority over them. These are the definitions of this word which will be found in Webster's Dictionary. When we speak of the right to govern certain lands, we not only mean the right to do some thing with the land itself, but to legislate for and control the people upon said lands, as well as to legislate concerning the land itself. When we say congress has the right to legislate for a place within its exclusive jurisdiction, we mean for the people who are there, as well as concerning the land itself. In the case of *U. S. v. Ward, supra*, Mr. Justice MILLER, after speaking of the treaty with the Shawnee Indians which excluded their reservation from the state of Kansas, and after declaring to some extent the effect of the act admitting Kansas into the Union, said, further:

"Or, rather, to express the matter more exactly, all territory which was not covered by such treaties was included within the state, its jurisdiction, and within its territory, and this irrevocably and exclusively."

In a treaty with the Crow Indians made by the United States in 1868, after describing the tract of land set apart as a reservation for these Indians, there is this clause, in reference to this tract:

—"Shall be and the same is set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no person except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish any portion of the territory of the United States except such as is embraced within the limits aforesaid."

Now, if it should be held that, in the language of Mr. Justice MILLER in *U. S. v. Ward, supra*, the act of congress admitting Montana into the Union awarded it "all territory, which was not covered by such treaties, [as that with the Shawnees, which the Crow treaty is not,] was included within the state, within its jurisdiction, and within its territory, and this irrevocably, unqualifiedly, and exclusively," what became of this treaty with the Crows, so solemnly entered into? In its main features it was broken by that act, with that construction forced upon us. Did congress intend to do this? Is it not more reasonable to infer that congress intended by the clause referred to to reserve the power to observe that treaty and others of a similar character? It does appear to me that not only the language of said clause, but the circumstances which con-

fronted congress, must have been such as to leave no room to doubt that it was the intention that such Indian reservations as the Crow should be left under the jurisdiction and control of the national government, as long as the lands therein remained Indian lands.

It was urged upon the court, upon the argument of this case, that the people of Montana would have no right to agree as they did in the ordinance before mentioned, and permit a portion of its territory to remain under the jurisdiction of the national government.

In the case of *Railroad Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. Rep. 995, the supreme court, while holding that a state could not cede any of its lands to a foreign country because of the rights of the national government, said:

"In their relation to the general government, the states of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the state, they are not those of a different country, and the two—the state and general government—may deal with each other in any way they may deem best to carry out the purposes of the constitution."

And it was held in that case that a state could cede to the United States for federal purposes a tract of land within its limits in a manner not provided for specifically in the constitution of the United States. It would seem that there is no legal objection to the agreement made by the people of the state of Montana in convention assembled to the effect that congress should retain jurisdiction and control over the Indian reservations within its borders.

Was this relinquishment of jurisdiction and control a federal purpose? The United States, from the earliest organization of the national government, has assumed control over the several Indian tribes in the United States, and has denied such control to the state governments. In the case of *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. Rep. 1109, the supreme court held that the Indian tribes were subject to the control of the United States, and could be made subject to its laws; that the states have no power to subject Indians to their laws as long as the Indians maintain their tribal relations; that the Indians owe no allegiance to the states within which their reservations may be established, and the state gives them no protection. It was also pointed out that the United States had undertaken to control Indians no longer by treaties, but by laws; and that this right did not come wholly from the power of congress to regulate commerce among the Indian tribes, but from the fact that congress had always assumed the control over them, as the wards of the nation, and as dependents upon the national government, and had always refused to accede such powers to the states. It appears to me, with such a view of the law, the United States would have the right to retain and reserve lands within a state upon which to place these wards,—these dependents,—with a view to their government, and that the states would have the right to agree to such a reservation. It would be an anomaly in government if it should be conceded that the United States has full right to

govern the Indians, and yet has no right to any lands upon which to place them with that object. Considering what was said of the relation of the Indians to the state governments in *U. S. v. Kagama, supra*, with such a view, we would behold a government without a country. The United States is not in this helpless position which such a contention would maintain. As an incident to the right to govern such people by its own laws would be the right to hold lands upon which to locate and maintain them. It was also urged that, while the United States could have jurisdiction over such lands as far as the Indians are concerned, it would have no right over white men found within an Indian reservation, such as the Crow reservation. The statute and the ordinance we have been considering say the jurisdiction and control is absolute, not a divided jurisdiction or control; and it would seem to me that this is proper. Any other view might bring on collisions between the authorities of the two governments. The white men it was contemplated who would be upon this reservation would be employes or officers of the national government; and with the view of protecting the Indians, the United States should have control over the white men upon an Indian reservation as well as of the Indians. The Crow Indian reservation, notwithstanding the act admitting Montana into the Union, remains, then, Indian country, absolutely within the jurisdiction of the United States. The general criminal laws of the United States were then in force upon it. With this view, the defendant, it must be held, was properly charged. The demurrer to the plea to the indictment is sustained.

FALK v. BRETT LITHOGRAPHING CO.

SAME v. BROWN *et al.*

(Circuit Court, S. D. New York. December 31, 1891.)

1. COPYRIGHT—PHOTOGRAPHS.

A photograph of a woman and child, with the child's fingers in its mouth, taken by the photographer after arranging them in positions best calculated, in his judgment, to produce an artistic effect, is subject to copyright. *Lithographic Co. v. Sarony*, 4 Sup. Ct. Rep. 279, 111 U. S. 53, followed.

2. SAME—INFRINGEMENT.

One who copies a copyrighted photograph, by simply reversing it, for use as an advertising lithograph, is guilty of infringement, though he makes a few minor changes in the positions.

In Equity. Separate suits by Benjamin J. Falk against the Brett Lithographing Company in the one case, and Davis S. Brown and Delaplaine Brown in the other, for infringement of a copyrighted photograph. Decrees for complainant.

Isaac N. Falk, for plaintiff.

J. T. Hurd and *A. W. Tenney*, for defendants.

WHEELER, J. This suit is brought upon a copyright of a photograph of Josie Sadler and her child, with the child's finger in her mouth, taken by the plaintiff after arranging them in good positions according to his judgment, and after the child had put its finger in her mouth, which he thought improved the position, and took advantage of, as photographers usually take photographs. The defendant in the first case had copied the position, features, and most of the photograph by reversing it, and changing some minor details, into advertising lithographs for the defendants in the other case. The principal defenses to both are that the plaintiff is not sufficiently shown to have been the author of the photograph, and that the defendants have not infringed.

That a photograph may be the subject of a valid copyright for the photographer as the author of it is well shown and seems to be settled in *Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. Rep. 279. The chief difference between that case and this as to this point is that the artist did not do so much in preparing the subjects here as was done there. But enough was done here by placing the persons in position, and using the position assumed by the child at the proper time to produce this photograph, and the plaintiff thereby produced it. Other photographs may have been or may be taken of some other woman and child, or of this woman and her child in similar positions, or the same as near as may be, but none of them will be exactly like this. He is, and no one else can be, the author of this. The amount of labor or skill in the production does not seem to be material if the proper subject of a copyright is produced, and the producer copyrights it. The defendants have not merely copied the woman and child, as they might have done with their consent, but they have used the plaintiff's production as a guide for making others, and have thereby substantially copied it as he produced it, and infringed upon his exclusive right of copying it. So the validity of the copyright and infringement of it seem to be sufficiently made out. Let decrees continuing the injunctions and for an account be entered.

HAUGHEY v. MEYER.

(Circuit Court, E. D. Missouri, E. D. December 28, 1891.)

1. PATENTS FOR INVENTIONS—NOVELTY—UTILITY.

Letters patent No. 379,644, issued March 20, 1888, to Michael Haughey, for an improved device to prevent interfering by horses, and consisting of a boot buckled around the leg just above the pastern joint, and having attached to it short pendant straps on which are strung small rubber balls, covers a new and useful invention.

2. SAME—PRIOR USE—EVIDENCE.

Although the defendant in a suit for infringement adduced considerable evidence of prior use, the fact that he was unable to produce a single device antedating the patent deprived his evidence of the certainty required to overthrow a patent.

In Equity. Suit by Michael Haughey against Leopold Meyer for infringement of a patent. Decree for complainant.

The letters patent in controversy in this case are No. 379,644, dated March 20, 1888, and were granted and issued to the complainant, Michael Haughey, for a new, improved, interfering device for horses. The claim of this patent broadly covers the use of a dangle or pendant, attached to an interfering boot, and is as follows, viz.:

"The interfering device consisting of the pendant made of rubber, wood, or other suitable material, loosely jointed to the strap passing around the leg of a horse, substantially in the manner shown and for the purposes set forth."

The infringement complained of in this case consisted in the sale and use of an interfering boot—which was shown in evidence to have been made by a manufacturer in Newark, N. J.—provided with a pendant, whereby it infringed the broad claim of the patent.

Edward J. O'Brien, for complainant.

T. C. Woodward, for defendant.

THAYER, J., (*orally*.) This is a suit to restrain the infringement of a patent covering a device to prevent horses from interfering. The device consists of a strap, or, rather, a boot, so made as to be buckled around the limb of a horse, just over or above the pastern joint, and to this boot is attached a short pendant consisting of a leather string, on which are strung several small rubber balls. It is claimed that, by the use of this device on a horse that has contracted the habit of interfering, the habit may be cured. The patent creates the presumption of novelty and utility, and there is considerable testimony in the case strengthening the presumption. Several horsemen testify from experience as to the usefulness of the invention in correcting the habit of interfering.

The defense made by the defendant, that is to say, the only defense relied upon, is that of prior use, and want of novelty. It is claimed that a device similar to the patented device, and embodying the same principles, had been in use for 20 or 30 years before the date of the alleged invention. The defense has not been made out to my satisfaction. It seems to me that, if a similar device had been in use before the date of the invention, (as witnesses claim,) it would have been quite possible for the defendant to have produced a sample of the device, which, as he claims, antedated the complainant's patent. Although the defendant took a great deal of testimony to establish prior use, yet he did not succeed in producing a single sample boot that antedated the complainant's letters. Therefore the defense of prior use and want of novelty has not been established by that kind of evidence and with that certainty which the law requires, and complainant is accordingly entitled to a decree.

WILSON v. ANSONIA BRASS & COPPER CO.

(Circuit Court, S. D. New York. December 28, 1891.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—LAMP-BURNERS.

Letters patent No. 316,422, issued April 21, 1885, to George H. Wilson, for an improvement in lamp-burners, consisting of a wick-carrier, with inwardly projecting teeth at the top and bottom for holding the wick and giving it a positive movement as desired, and having slots in the sides for admitting air to the interior for an argand burner, show an essential and useful improvement over all other burners, and are therefore valid.

2. SAME—INFRINGEMENT—EQUIVALENTS.

A burner having a wick-carrier like that of the patent, except that the wick is held by stitches at the lower end, constitutes an infringement, as the stitches are merely the mechanical equivalent of the teeth.

In Equity. Suit by George H. Wilson against the Ansonia Brass & Copper Company for infringement of a patent. Decree for complainant.

E. H. Bullard, for orator.

Edwin H. Brown, for defendant.

WHEELER, J. This suit is brought upon letters patent No. 316,422, dated April 21, 1885, and granted to the orator for an improvement in lamp-burners. The patented improvement consists principally in a wick-carrier, with inwardly projecting teeth at the top and bottom ends for holding the wick and giving it a positive movement as desired, and slots in the sides for admitting air to the interior, for an argand burner. The defenses are want of novelty and non-infringement. The proofs show styles of burners, some having one thing, and others another, similar to the plaintiff's, but none having a wick-carrier holding the wick firmly at each end for moving it up and down evenly all round, to properly adjust the flame, and also admitting air to the interior, as his does. The difference between his and all others is small, but it seems to be essential and useful, and therefore patentable. The defendant's burner has a wick-carrier like the plaintiff's in all respects, except that the wick is held by stitches at the lower end instead of by teeth. The stitches appear to be an equivalent there of the teeth, and the carrier appears to be an infringement. Let a decree be entered for the orator.

SUN VAPOR STREET LIGHT CO. *v.* WESTERN STREET LIGHT CO. *et al.*

(Circuit Court, N. D. Iowa, E. D. January 7, 1892.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—METHOD FOR SUPPLYING STREET-LAMPS WITH OIL.

The first claim of letters patent No. 222,856, issued December 23, 1879, to Henry S. Belden, for a method of supplying street-lamps with oil, consisting in providing the lamps with removable reservoirs of a number greater than the lamps, and providing a conveyance for transporting filled reservoirs, and substituting them for the emptied ones, is not infringed by a device for transporting filled reservoirs and substituting them for the emptied ones, which does not use the case or rack for conveying the reservoirs described in the Belden patent.

2. SAME—OIL RESERVOIR.

The second claim of letters patent No. 236,211, issued October 9, 1883, to Alfred L. Mack, for an oil reservoir having its bottom set in to form a flange to fit over and upon a suitable tank adapted for permanent connection to the service pipe of a lamp, said bottom having an opening provided with a screw-cap, and air and feed pipes connected thereto, is not infringed by a device which does not combine a screw-cap with the feed and air pipes, and which does not use a second pipe as a feed-pipe, the patent being limited to the entire combination, none of its elements being new.

41 Fed. Rep. 43, affirmed.

In Equity. Bill of review.

Charles R. Miller and Lake & Harmon, for complainant.

Henderson, Hurd, Daniels & Kiesel, for defendants.

SHIRAS, J. The present proceeding was instituted for the purpose of obtaining a review of the conclusions reached on the original hearing of this cause, and which are shown in the opinion reported in 41 Fed. Rep. 43. As stated in that opinion, the complainant company is the owner of the letters patent No. 222,856, issued to Henry S. Belden, and No. 236,211, issued to Alfred L. Mack, and the defendant company is charged with infringing the first claim of the Belden patent, and the second and third claims of the Mack patent. Upon the bill of review and the accompanying evidence counsel for complainant have very fully and ably reargued the questions considered at the original hearing, claiming that as to both patents the court in the decision heretofore rendered gave too narrow a construction thereto.

So far as the Belden patent is concerned, all that is shown in the evidence is that the defendant company uses detachable reservoirs, in number greater than the lamps in use, and conveys the same back and forth in a wooden box, with compartments so arranged as to keep the reservoirs in an upright position. Unless the Belden patent is to be construed to be broad enough to cover all means of utilizing the idea of having more reservoirs than lamps, so that a filled may be substituted for an empty reservoir, I do not see how it is possible to sustain the charge of infringement of the first claim of the Belden patent. The box used by defendant for the transportation of the reservoirs is not a copy or imitation of the rack described in the Belden patent, and in fact the argument of complainant in this particular really shows that the claim made is for the use of more than one reservoir for each lamp.

If complainant is entitled to protection under this first claim of the Belden patent, it would be entitled to demand it if it appeared that defendant's reservoirs were carried to and fro in the hands or pockets of its employees. The specifications in the Belden patent clearly show that before that date detachable reservoirs were in use in connection with street-lamps, and which were taken from the lamp-post to a store-house to be filled and returned. It may have been a valuable improvement in the method, but it was not invention, to utilize the already known plan of having more than one reservoir, so that, when the empty one was removed, it could be replaced with another, filled and ready for use. The finding in the original opinion that it does not appear that the defendant infringes the Belden patent must therefore be reaffirmed.

Upon the question of infringement of the second claim of the Mack patent, it is now pressed in argument that the valuable feature therein is the use of an air-pipe so arranged that air can pass through it into the upper part of the reservoir, when the same is in place, and thus the bubbling caused when the air passes through the oil is prevented, and a steady flow of oil from the reservoir to the tank results, thus securing a steady flame. It is evident that the second claim in the Mack patent was intended to secure a reservoir of the form and with the attachments therein described, that is to say, a reservoir having its bottom set in to form a flange or rim, having an opening provided with a screw-cap, and air and feed pipes connected therewith. The claim covers this combination, and the drawings and specifications show that it embraces a reservoir with the set-in bottom, having therein an opening covered with a screw-cap through which passes an air-pipe and a feed-pipe. I do not think this claim can be enlarged to cover any and all means by which air may be admitted to the top of the reservoir, without passing through the oil, but that it must be confined to a reservoir having the combination therein set forth, to-wit, an opening in the bottom, through which the reservoir is filled, and which opening is then closed with a screw-cap having attached thereto an air-pipe and a feed-pipe. In all the claims of the patent we find it provided that the air and feed pipes are to be connected to the screw-cap, the purpose being that they may be covered or closed with a valve or stopper, so that evaporation will be prevented as well as the passage of dirt into the reservoir. I do not think it is shown that Mack was the original inventor of any one or more of the elements forming the reservoir and its attachments described in the patent in question, and therefore claim second of the patent must be held to be for a combination of known elements, and must be limited to the form therein described, one of the main features of which is the screw-cap having secured thereto an air-pipe and a feed-pipe. In the lamps of the defendant company, the feed-pipe shown in the Mack combination is not used, nor is the air-pipe secured to the screw-cap, and it therefore cannot be held that the Mack combination is infringed. If the contention of complainant in this particular is well founded, then it would follow that the use, in any way or form,

of a pipe to convey the air into the reservoir above the oil would infringe the second claim of the Mack patent, and I do not think such a construction of the claim is allowable. The decree originally entered dismissing complainant's bill will therefore be affirmed, and it is so ordered.

THE HAVILAH.

PRATT v. THE HAVILAH.

COOMBS *et al.* v. SAME.

(Circuit Court of Appeals, Second Circuit. October 31, 1891.)

CIRCUIT COURT OF APPEALS—ADMIRALTY APPEALS.

Act Cong. Feb. 16, 1875, "to facilitate the disposition of cases in the supreme court," provides that after the passage thereof the circuit courts in deciding admiralty causes shall make separate findings of fact and of law, and that, on appeal to the supreme court, the review shall be limited to questions of law apparent on the record or presented by a bill of exceptions. *Held*, that although the act establishing the circuit court of appeals (Act Cong. March 3, 1891) declares that "all provisions of law now in force regulating the methods and system of appeals and writs of error" shall regulate appeals and writs of error to that court, yet the act of 1875 does not apply to appeals in admiralty from the existing circuit courts to that court, and the same may be heard without separate findings of fact and of law, and without bills of exceptions, as in appeals from the district to the circuit courts.

Appeal from the circuit court of the United States for the southern district of New York.

Libel by Edwin N. Pratt, as master, etc., of the schooner Helen Augusta, against the brig Havilah, her tackle, etc. Decree below for libellant. Lincoln Coombs and others, claimants, appeal. Heard on motion to dismiss the appeal. Motion overruled.

Henry Arden, for the motion.

Robert D. Benedict, opposed.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. This is an appeal from a decree of the circuit court affirming a decree of the district court for the southern district of New York in an admiralty cause. 33 Fed. Rep. 875. The cause was heard by the circuit court subsequent to July 1, 1891. A motion has been made to dismiss the appeal. The motion proceeds upon the ground that no findings of fact were made by the circuit court upon the decision of the cause; that no exceptions appear in the record; and that this court, in reviewing appeals in admiralty, is limited to a determination of the questions of law arising upon the record, and to such rulings of the court below, excepted to at the time, as are presented by a bill of exceptions. Prior to the act of February 16, 1875, "to facilitate the disposition of

cases in the supreme court and for other purposes,"¹ neither special findings of facts nor exceptions were a necessary part of the record upon an appeal in an admiralty cause, and the hearing in the supreme court and in the circuit court was a trial *de novo*. It was the purpose of that act to relieve the supreme court from the necessity of deciding questions of fact in admiralty causes, and the provisions whereby findings of facts and conclusions of law were required to be separately stated by the circuit courts had no application to cases which could not, because the amount in controversy was insufficient, be reviewed by the supreme court. *Vitrified Pipes*, 14 Blatchf. 279; *Richards v. Hansen*, 1 Fed. Rep. 67. Obviously that act does not apply to an appeal to the circuit court of appeals. The eleventh section of the act of March 3, 1891, establishing the circuit court of appeals, provides that "all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals." By the act appeals in admiralty henceforth lie direct from the district court to the court of appeals, and no method or system of review by findings or bill of exceptions was in force for the review by appeals in admiralty from the district court when the act was passed. It would be unreasonable to hold that congress intended a different practice to apply to the limited number of cases where appeal lies from the circuit court to the circuit court of appeals (solely because they were pending and undecided when the act was passed) from that which would apply to appeals in admiralty from the district court. As the act of 1875 provided a method and system of review, through appeals, only for such cases in the circuit court as went to the supreme court, there seems no good reason for extending the general language of the eleventh section of the new act to cover cases in the circuit court which are not to go to that tribunal.

¹The act of 1875 provides, among other things, "that the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. * * * The review of the judgments and decrees entered upon such findings by the supreme court upon appeal shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law."

THE RIVER MERSEY.

NORTH AMERICAN DREDGING & IMPROVEMENT CO. v. THE RIVER MERSEY.

(District Court, S. D. New York. January 8, 1892.)

1. ADMIRALTY—PRACTICE—SUBMITTING CAUSE ON PLEADINGS.

Upon the submission of the cause on the pleadings, averments of new matter in the answer, or matters alleged in the libel and denied generally, must be wholly disregarded, as unproved, except in so far as they may be admissions against interest.

2. DERELICTS AT SEA—DANGEROUS OBSTRUCTIONS—DESTRUCTION OF BY OTHER VESSELS—MASTER'S PERSONAL TORT.

A scow in tow of a steamer on a voyage from Charleston to Nicaragua having broken adrift off Fortune island in July, 1890, was drifting in the track of steamers going up and down the coast for over three weeks, when she was taken in tow by the defendant steamer, and on the following day set fire to for the purpose of destruction. The libelants, according to the libel, had notice from time to time during this interval of the whereabouts of the scow, but gave no evidence that they made any efforts to rescue her, or that they intended to do so. *Held*, that the inference from these facts was that the scow was abandoned by the owners, to be dealt with by other vessels that might meet her as prudence should dictate; that by the nature of the vessel she was an obstruction dangerous to navigation; and there being no evidence of her value, or that she was worth salvage, *held*, that there was no presumption, in the absence of evidence, that the act of the master of the River Mersey in destroying this obstruction was either tortious or negligent; but that it was presumptively a beneficial service in the public interest, for the safety of life and property at sea,—a work similar to that in which the public vessels of maritime nations, including our own, are more or less engaged. *Held, also*, that the master's act, if tortious, was a personal tort, and not being done for the benefit of the ship, or in the course of navigating the ship, or within the scope of his powers as representative of the owners, neither the owners nor their property were liable.

In Admiralty. Libel by the North American Dredging & Improvement Company against the steam-ship River Mersey to recover for the destruction of a scow, the property of libelant.

Wheeler, Cortis & Godkin, for libelant.

Convers & Kirlin, for claimants.

BROWN, J. The above libel was filed to recover for alleged damages to the libelant for setting on fire a scow belonging to the libelant, which was adrift at sea. The scow was one of four which, while on a voyage from Charleston to Nicaragua in tow of the steamer G. W. Jones, broke adrift on the 14th day of July, 1890, when about off Fortune island, one of the West Indies. No evidence was introduced on either side in support of the allegations of the libel or answer. The case was submitted upon the pleadings. The answer admits that the scow was picked up on the 6th of August, about 3 P. M., and taken in tow until noon of the following day. The scow had then been drifting to the north-eastward for a little over three weeks. The libel alleged "that the libelant, on or about the 16th of July, 1890, received notice that said scow had gone adrift; that at various times thereafter the libelant received from incoming steamers and other vessels notice of the whereabouts of the said scow, and kept itself generally informed both of the position and condition thereof; that about the 7th or 8th of August, 1890, the libelant received

reports of said scow and of her position from the steamers which had sighted said scow; that the information received by the libelant showed that the scow was about 80 miles off shore, about opposite Fernandina, Fla.; that immediately upon receiving said information the libelant chartered a powerful tug, the Wade Hampton, at Charleston, and dispatched said tug in search of the scow; * * * and that but for the wrongful act of the steamer River Mersey, and those on board of her, as above set forth, she would have been able to pick up and save said scow." The libel further alleges that the scow was taken in tow upon a salvage service, and that the salvors wrongfully discontinued the service, and set fire to the scow. The answer denies that she was taken upon a salvage service, but alleges that, being in the track of vessels going up and down the coast, "she was very dangerous to navigation; and as she would continue to be so, drifting along with the current, the master thought it prudent to remove her, by towing her as far as possible to the northward and westward inside of the Gulf stream, where he intended to set her adrift. Next day, at noon, having ascertained the position of the steamer, and that very little progress had been made during the time the scow was in tow, and as the weather was gloomy and the sea rising a little, the master decided to cast the scow adrift; and, as she might have been the means of great loss of property and perhaps lives, he had her set on fire, so as to destroy her, and so remove a dangerous obstruction to navigation. It was never the intention of the master to take the scow in port, as he did not think her worth salvage." As neither side have put in any evidence, none of the averments of either that are not admitted can, under rule 51 of the supreme court, be considered as facts, except those in the nature of admissions against interest. I cannot, therefore, assume that the libelants sent out a tug, as alleged, to find the scow; or that they ever had any intention of making any efforts to rescue her after they learned, about July 14th, that she was adrift; and, as they admit that they had had knowledge of her general whereabouts for about three weeks before she was set on fire, this knowledge, with no effort or intent to reclaim her being shown, must be treated as equivalent to an abandonment of her, authorizing those who might meet her to deal with her as prudence should dictate. So, also, there is an entire absence of any evidence indicating that the scow was of any market value, or that she was worth salvage, in her abandoned and derelict condition. Without such proof no decree should be given. Libels in admiralty are not entertained for merely nominal damages. On the other hand, from the nature of the vessel itself, which was a scow low in the water, showing little to attract attention, and from the position in the ocean assigned to her by both the libel and the answer, it is self-evident that she was an object of special danger to life and property in the numerous vessels pursuing the usual course of navigation in going up and down the coast. The destruction of such dangerous obstructions in the fairways of the sea, either when abandoned, or when not proved to be worth saving, is not tortious or actionable, but rather a praiseworthy and beneficent service. The removal of such obstructions, now numerous in the Atlantic, and threat-

ening destruction to life and property through the utter impossibility of taking any adequate precautions against them at night, in darkness, or in storm, has become a matter of international concern. Every year more or less collisions and loss are caused by them. See 3 Pro. Mar. Conf. 308-317, 482. Directly interested as all private individuals engaged in commerce may be in removing such dangerous obstructions whenever met, the work is often attended with such difficulty and delay, and interruption of the voyage, that private hands cannot be relied on to perform the work. For some years past, therefore, the public vessels of different maritime countries, including our own, have been more or less engaged in clearing the seas of these obstructions. The work of our own navy in this field is not by virtue of any statutory authority, but under the law of necessity, for the protection of life and property, and for the manifest public good. Against such interests, no mere technical rights of property in derelict or abandoned vessels can be set up in a court of admiralty; and a removal of such objects, if justifiable when done by public vessels, is equally justifiable when done under similar circumstances by private hands. So far as I have been able to ascertain, no rules have been prescribed for the government of our public vessels, as to what derelicts shall be destroyed at once, or what shall be allowed a longer time for possible salvage rescue. This seems to be left to the judgment of the individual officers in command, having reference to the nature, condition, and circumstances of the derelict. Not only does the general judgment of the representatives of maritime nations approve of this work, but its prosecution with more vigor has been earnestly advocated. 3 Pro. Mar. Conf., *ubi supra*. That no private rights should be held infringed by this service, when it is carried on with reasonable judgment, I have no manner of doubt. The neglect by the owners to take immediate steps to recover dangerous derelicts in the pathways of commerce, when their position is reasonably known, ought to be treated as an abandonment of them, as I have already said, to be dealt with according to the best judgment of those in whose way they come. The derelict in this case was, as the pleadings state, a scow. Such a craft shows but little above the water, and is very peculiarly perilous in a much frequented pathway which is subject to the most violent tempests and storms. Had the master supposed the scow worth salvage after having taken her in tow, there is no conceivable motive why he should not have continued on with her. I base nothing, however, upon the unproved averments of the answer. But without further explanation than the libel itself affords, I must hold that the destruction of an object of that kind, in such a place at sea, of no proved value, and presumptively abandoned by the owners, does not afford any presumption of negligence or wrong, and is not actionable. Even if the master's act were unjustifiable and tortious, still I think this libel *in rem* against the vessel could not be maintained; because the act of the master in setting the scow on fire, if not justifiable for the reasons above stated, was a purely personal tort of his own, for which he and those who participated in the act were alone liable. The act was not done in the service of the ship, or for any benefit to the ship, or by

any act of negligence in the navigation of the ship; nor was it done in the execution of any duty of the master to the ship, or to her owners; nor was the act within the scope of the master's duties or powers as the representative of the owners. Neither the owners, therefore, nor their property, can be held legally answerable for it. Libel dismissed, with costs.

THE ELECTRON.

ELECTRO-DYNAMIC Co. v. THE ELECTRON.

BIGLER v. THE ELECTRO-DYNAMIC Co.

(District Court, S. D. New York. December 10, 1891.)

1. ADMIRALTY JURISDICTION—SUPPLIES—DAMAGES FOR BREACH OF CONTRACT.

A contract for supplies to a vessel being a maritime contract, a court of admiralty has jurisdiction to give damages for a breach of the contract as to the quality of the supplies furnished, or for misrepresentations, or other breaches in the performance of it.

2. SAME—PRACTICE—RULE 53—COUNTER-CLAIM—SECURITY BY LIBELANT.

In a suit *in rem* for the price of such supplies, the defendant, having given security, is entitled, under rule 53, to security from the libellant, upon filing a cross-libel to recover damages for breaches of the same contract on which the libellant sues.

In Admiralty. The Electro-Dynamic Company of Philadelphia libeled the yacht Electron to recover for machinery furnished. James Bigler filed a cross-libel, and moved for stay until security is filed.

Wilcox, Adams & Green, for motion.

Robinson, Bright, Biddle & Ward and *Mr. Ward*, opposed.

BROWN, J. In the first above libel the claim is for \$2,106.08, with interest, the balance of a bill alleged to be due "in and about the refitting and repairing" of the yacht Electron, belonging in Philadelphia, by furnishing her with a quantity of electrical machinery for the purpose of propelling her by electricity. The yacht was arrested and released on security given, and has answered, alleging misrepresentations and various breaches in the performance of the contract under which the repairs were furnished, and an offer to return the articles. The cross-libel alleges substantially the same misrepresentations and breaches, and claims damages by reason thereof in the sum of \$4,553.04. Under the fifty-third rule of the supreme court in admiralty, she now moves that the respondents' proceedings in the original libel be stayed until security is given for the damages claimed in the cross-libel. The defense to the original libel is the same as the ground of claim in the cross-libel. The case is therefore within the fifty-third rule of the supreme court in admiralty, as construed by this court in the case of *Vianello v. Credit Ly-*

onnais, 15 Fed. Rep. 687. It is urged, however, that the cross-libel is for a demand which could not be entertained in admiralty, because it is merely an action for damages for the breach of a contract for supplies. No doubt, if the court was without jurisdiction of the cause of action stated in the cross-libel, the motion should not be granted; but, though actions for damages and for misrepresentations and breaches of contracts for supplies may not be frequent, I cannot regard them as beyond the proper jurisdiction of the admiralty. In the case of *The Eli Whitney*, 1 Blatchf. 360, though it was held that an action *in rem* would not lie for false representations which had been the inducement to the execution of a charter-party, there is no intimation that an action *in personam* would not lie for such a cause. The contract in this case, being for supplies, is a maritime contract, within the ordinary jurisdiction of the admiralty courts. Upon such a contract, and all its incidents, the rights and remedies of the parties are reciprocal. The contract being maritime, the admiralty, says CURTIS, J., in *Church v. Shelton*, 2 Curt. 271, 274, "will proceed to inquire into all its breaches; and all the damages suffered thereby, however peculiar they may be, and whatever issues they involve." See, also, *Cox v. Murray*, Abb. Adm. 342; *The J. F. Warner*, 22 Fed. Rep. 342; *The W. A. Morrell*, 27 Fed. Rep. 570; *The Barcooa*, 44 Fed. Rep. 102. In the latter case the action was for damages for breach of the stipulations of a charter-party, and, as respects jurisdiction, is indistinguishable from the present, though the form of remedy in this case is *in personam* only. The cross-libel is therefore properly brought, and falls within the rule; and the motion for stay of proceedings on the original libel, until security is given, is granted.

THE TOM LYSLE.

MCDONALD v. THE TOM LYSLE.

(District Court, W. D. Pennsylvania. December 23, 1891.)

1. PAYMENT ON ACCOUNT—APPLICATION TO ITEMS.

When a payment is made upon account, without an application by either party to specific items, the law will apply it to the oldest items.

2. RIVER PILOTS—COMPENSATION—PLEADING—SET-OFF.

On a libel by a pilot for wages, where the libelee merely files an answer, no affirmative judgment can be had for damages caused by the pilot's negligence; and, where the services are rendered under several distinct contracts, the right to set up such damages as a defense is confined to the wages earned under the particular contract during the performance of which the negligence occurred.

3. SAME—KNOWLEDGE AND SKILL.

A river pilot is bound to be familiar with the channel of the river, and with the various obstructions to navigation, and to have the degree of skill ordinarily possessed by others of his class, and he is liable for damages occasioned by the want of such knowledge and skill, or by negligence in applying them, but not for damages occasioned by an error of judgment on his part.

4. SAME—NEGLIGENCE.

When a river pilot in charge of a tow adopts the proper course to avoid an imminent danger, he is not liable for damages caused by a failure of the boat to promptly obey her paddle-wheel, owing to an improper stowage of her fuel.

5. SAME—GETTING OUT OF CHANNEL.

A river pilot who gets far out of the channel, when one shore lighted by electric lights is in full view, is liable for damages resulting to his tow, even though the other shore is obscured by steam from the siphon pump.

In Admiralty. Libel by a river pilot for wages.

George C. Wilson and *David S. McCann*, for libelant. *P. C. Knox* and *E. W. Smith*, for claimants.

REED, J. The libelant's claim is for \$185, being a balance alleged to be due him for services as pilot. He claims \$25 for five days' service at Logstown in June, 1891, \$10 for a trip to Industry in July, 1891, \$100 for a trip to Louisville in July, 1891, and \$90 for a second trip to Louisville in July and August, 1891, making a total of \$225, and allows a credit of \$40. The answer admits the correctness of the various charges, except the item of \$25 for services at Logstown, but claims a further credit of \$10. In my judgment, the testimony warrants the conclusion that the libelant's claim for the services at Logstown should be allowed. As to the credit, it appears that the firm of John A. Wood & Son, who are the owners of the boat, paid libelant \$50 on general account. They owed him \$10 for services, other than those in suit, and he applied that much of the payment, as he had a legal right to do, to the payment of the other claim, giving them credit for \$40 upon the claim in question. This credit, in the absence of application by either the debtors or creditor, the law would apply to the oldest claims, so that it pays the Logstown claim and the Industry claim in full, and reduces the claim for trip to Louisville in July to \$95, leaving that much of that claim and all of the claim for the second trip to Louisville unpaid. The respondents, however, in their answer, which they term an "answer and cross-libel," further defend upon the ground that, upon the second trip to Louisville, the tow, while in his charge as pilot, was twice injured, first at Deadman's island, where a barge containing coal was grounded and damaged, the respondents, as its owners, suffering a loss of \$300, and again near Pomeroy, Ohio, where a boat containing coal was lost with its contents, the respondents suffering a loss thereby of \$2,232.50; and these injuries, they claim, occurred through the negligence and carelessness of the libelant, and they seek to set off these damages against libelant's claim. As the case stands, this claim cannot be the subject of a set-off, so that the respondents could have a decree against the libelant for the balance, (*Ward v. Chamberlain*, 21 How. 572; *The Dove*, 91 U. S. 381;) but they may set up such acts of negligence by way of defense to the libelant's claim, the law implying, from the contract for service, faithful service on the part of the employe, and an amount of care and skill proportioned to the character of the work which he has engaged to perform, and, if he perform it negligently and unskillfully, it is a breach of contract, and

the loss sustained by the employer may be shown by way of defense, as going directly to the consideration. *Glennon v. Manufacturing Co.*, 140 Pa. St. 594, 21 Atl. Rep. 429. The general rule is thus stated in 2 Pars. Shipp. & Adm. 433:

"Admiralty has no jurisdiction of an independent set-off, and those usually allowed are where advances have been made upon the credit of the particular debt or demand for which the plaintiff sues, or which operate by way of diminished compensation for maritime services on account of imperfect performance, misconduct, or negligence, or as a restitution in value for damages sustained in consequence of gross violations of the contract. A loss arising from the gross neglect of a mariner may be set off in answer to a demand for wages."

But this set-off in this case would be only to the extent of the wages claimed. *The North Star*, 106 U. S. 17, 1 Sup. Ct. Rep. 41; *The Dove*, *supra*; *Ebert v. The Reuben Doud*, 3 Fed. Rep. 520; *Nichols v. Tremlett*, 1 Sprague, 361; *Snow v. Carruth*, *Id.* 324. And as each hiring in this case was upon a separate contract, the alleged negligence cannot be set up as a defense to any other than the wages claimed for the second trip to Louisville. *The Pioneer*, 1 Deady, 58. So that the libellant is, at all events, entitled to a decree for \$95, the balance due, as stated above, for services prior to that trip. The question, then, remains whether the respondents have established their defense of negligence on the part of the libellant.

The duties of pilots are thus stated in *Ailee v. Packet Co.*, 21 Wall. 389:

"The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. * * * The pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers, he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all land-marks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sand-bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of said bars newly made, of logs or snags or other objects newly presented, against which his vessel might be injured."

In *Campbell v. Williamson*, 1 Phila. 198, his responsibilities are thus stated:

"He should be a person of great and accurate knowledge of the difficulties and dangers of the particular navigation in which he is employed; well acquainted with the rules which arise out of the rights of others navigating the same waters, and always ready to regard those rights; cool and collected in dangerous and trying circumstances; not given to recklessness and passion in order to prove his courage; and always careful of the vessel committed to his guidance. * * * The legal liability of a pilot corresponds with the

high responsibility of his position. He is under obligation to his employers, as well as to third persons, to have and exercise proper care and skill in the navigation of the vessel. He is liable to his employers, and in collision cases to third persons, for any injury arising from his carelessness and unskillfulness. * * * Pilots are bound to exercise ordinary skill and care, according to the rules of navigation. But the care required, in the plain and ordinary course of navigation, is not the same as required in difficult circumstances. Circumstances of extraordinary danger require extraordinary care; and the fact that the pilot had to pass coal-boats in a somewhat narrow channel imposed upon him a degree of care different from what would have been required if he had had the channel to himself. Still this is but ordinary care, under the circumstances. Now, if the pilot exercised ordinary care and skill for the purpose of avoiding the collision, and yet failed in the attempt, he is not liable to his employers, though they have paid for the damage done by the collision. It is settled that, if the occupation be one requiring skill, the failure to exert that needful skill, either because it is not possessed or from inattention, is gross negligence." *The New World v. King*, 16 How. 469.

The general rule is stated in Cooley on Torts, 647, as follows:

"Every man who offers his services to another, and is employed, assumes to exercise in the employment such skill as he possesses with a reasonable degree of diligence. In all those employments where peculiar skill is requisite, if one offers his services, he is understood as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment, and, if his pretensions are unfounded, he commits a species of fraud upon every man who employs him in reliance on his public profession. But no man, whether skilled or unskilled, undertakes that the task he assumes shall be performed successfully and without fault or error. He undertakes for good faith and integrity, but not for infallibility, and he is liable to his employer for negligence, bad faith, or dishonesty, but not for losses consequent upon mere error of judgment."

The distinction between an error of judgment and negligence is not easily determined. It would seem, however, that if one, assuming a responsibility as an expert, possesses a knowledge of the facts and circumstances connected with the duty he is about to perform, and, bringing to bear all his professed experience and skill, weighs those facts and circumstances, and decides upon a course of action which he faithfully attempts to carry out, then want of success, if due to such course of action, would be due to error of judgment, and not to negligence. But if he omits to inform himself as to the facts and circumstances, or does not possess the knowledge, experience, or skill which he professes, then a failure, if caused thereby, would be negligence. "No one can be charged with carelessness, when he does that which his judgment approves, or where he omits to do that of which he has no time to judge. Such act or omission, if faulty, may be called a mistake, but not carelessness." *Brown v. French*, 104 Pa. St. 604; *Williams v. Le Bar*, 141 Pa. St. 149, 21 Atl. Rep. 525. When a pilot in piloting a vessel has used his best skill and judgment, he is not liable for her loss, although the result shows that his best judgment was wrong. *Mason v. Ervine*, 27 Fed. Rep. 459.

The testimony shows that the passage at Deadman island is a difficult one, being through a narrow, winding channel, with a bar on the shore

side. A steam-boat towing a fleet of barges or boats should, according to the judgment of the pilots examined, go through this channel by flanking; that is, by holding the boat back, with the fleet in a quartering position to the current, and allowing the current to sweep the head of the fleet around the curving channel, the wheel of the boat acting as a sort of pivot. The testimony of Mr. McMichaels, the other pilot on the boat, shows that the libelant followed this course, but, the boat not being backed soon enough, the front barges were carried upon the bar, which was on the outside of the curve. In other words, the boat was too near the bar before her fleet commenced to swing around. Mr. McMichaels says he called the libelant's attention to this, who said he was backing the boat all he could. It would seem that the boat did not answer as quickly as usual, because her stern was too low in the water, and this is attributed to the fact that her load of fuel was smaller than usual, which threw her bow out of the water. The libelant knew this fact. If the boat had been stopped and backed too soon, the fleet would not have passed through in safety. The libelant seems to have possessed the knowledge of the river and channel required in *Atlee v. Packet Co.*, *supra*. He seems to have exercised his judgment, and to have tried faithfully to carry out the course upon which he had determined as the result of his judgment. At most he committed an error of judgment for which he ought not to be liable. But I think the libelant is responsible for the loss of the boat near Pomeroy. Holding him to the responsibility, skill, and care required in *Atlee v. Packet Co.* and other cases I have cited, the testimony shows a want of care and skill on his part, for which he should be held liable. The boat, with its tow, was out of its channel, with which he was bound to be familiar, and was almost on shore, before he discovered his whereabouts. Granting, what is in dispute, that the steam from the siphon obscured his view of the West Virginia shore, the opposite or Ohio shore, lighted with electric lights, was in full view, and he has shown no excuse for being out of the channel, with that shore to guide him. Even if the steam obscured his vision, and he found he could not steer intelligently, he should have stopped until the siphon was shut off. As the boat sank in a few minutes after the tow rubbed the shore, and the testimony shows the end of the boat was crushed, it is fairly to be inferred that it received injuries at that time, which were the result of want of care and skill on the part of the libelant. As the amount of the loss, on that occasion, far exceeds the amount of wages claimed for that trip, it follows that he cannot recover the sum of \$90 claimed for that trip. He is entitled to a decree for the remainder of his claim.

DOUSE v. SARGENT *et al.*

(District Court, S. D. New York. November 30, 1891.)

1. SHIPPING OWNER PRO HAC VICE—WAGES.

A part owner, having agreed with the other owners to run the vessel on shares, and pay her disbursements, is owner *pro hac vice*, and personally liable to the master, whom he has employed, for all his wages and disbursements.

2. SAME—LIMITED LIABILITY—DISBURSEMENTS.

The vessel being lost, the act of 1884 limiting liability applies in favor of the other part owners as to the master's disbursements, but not as to the master's wages; but the other owners are entitled to indemnity from the owner *pro hac vice*.

3. ADMIRALTY—PRACTICE—AMENDMENT.

The owner *pro hac vice* being sued with others as joint owner, an amendment of the libel was permitted to recover the disbursements for which he only was liable; but, no proper account having been submitted to him by the master, no costs up to the present time were allowed; nor any further proceedings, until an account, with proper vouchers, had been submitted, and opportunity afforded for settlement.

In Admiralty. Action by F. A. Douse against H. M. Sargent and others to recover wages as master.

Wilcox, Adams & Green, for libellant.

Wing, Shoudy & Putnam and *Mr. Burlingham*, for respondents.

BROWN, J. The defendant Gower is liable as an owner *pro hac vice* for the libellant's wages and disbursements, as respects the department which he had agreed with the owners to supply. *Webb v. Peirce*, 1 Curt. 104. I think the defense of a limited liability is good as respects the other owners, the vessel having been lost, and no freight realized; but this defense, under the act of June 26, 1884, (23 St. at Large, p. 53, c. 121, § 18,) does not extend to the master's wages, for which the other defendants, as well as Gower, are also personally liable. But as respects this liability, the defendant Gower would be bound to indemnify the other owners. The fact that Gower was not sued as owner *pro hac vice*, but as a joint, legal owner with the other defendants, does not entitle Gower to a dismissal as respects him. An amendment that might properly state the case against Gower would not present a wholly new cause of action; but would be simply a different mode of stating the respective liabilities of the defendants for the same wages or disbursements. It is, therefore, within rule 24 of the supreme court in admiralty, and the proper amendment should be allowed. But, as respects Gower, a resident of Maine, who claims that no proper account had been submitted to him, and who has never contested his liability for any sum justly due the libellant, the amendment should be without costs of the suit to this time; and no order of reference to increase the expenses of the suit should be ordered in the libellant's behalf until a proper account in detail, together with vouchers therefor, so far as practicable, has been submitted a reasonable time to Gower's counsel, or deposited in the clerk's office for inspection, and opportunity afforded for an amicable adjustment of the amount due.

THE H. G. JOHNSON.

BRAKER *et al.* v. THE H. G. JOHNSON.

(District Court, S. D. New York. November 12, 1891.)

1. COMMON CARRIER—DAMAGE FROM OTHER GOODS—VESSEL'S RISK—BONA FIDE PURCHASER.

A common carrier vessel under the usual bill of lading takes the risk of damage to goods through contact with other goods, when not caused by peril of the sea, as respects a *bona fide* purchaser, though the goods are shipped by the charterer.

2. SAME—LEAKAGE OF OIL.

On delivery of plumbago in barrels shipped under the usual bill of lading, a part were found damaged by cocoa-nut oil, stowed above the plumbago. In other respects the cargo was well stowed. There was no shifting, the usual dunnage, and no extraordinary perils on the voyage. The damage arose either from unfit oil casks, or improper stowage of such casks over the plumbago. *Held*, that the ship took the risk and was liable for damage.

In Admiralty. Libel by H. T. Braker and others against the H. G. Johnson to recover for injuries to freight.

George A. Black, for libelants.

Owen, Gray & Sturges, for claimants.

BROWN, J. In November, 1890, Delmege, Reid & Co., being charterers of the British bark *H. G. Johnson*, shipped on board of her at Colombo 2,145 barrels of plumbago, which they had previously sold to the libelants, for which a bill of lading was signed by the master, reciting the receipt of the goods "in good order and well conditioned," and agreeing to deliver the same in like good order at New York, to the order of Winter & Smilie, agents, "the act of God, the queen's enemies, fire, and perils of the seas" excepted. Winter & Smilie were the agents of the libelants. On the delivery of the plumbago at New York, 466 of the barrels were found damaged by cocoa-nut oil, a part of which had been stowed above the plumbago. The libel was filed to recover this damage. The evidence leaves no doubt that the damage arose from the leakage of the oil. Aside from the placing of oil casks over the plumbago, the cargo was in general well stowed. There was no shifting of cargo on the voyage. There was the usual dunnage, and the ship encountered no extraordinary perils. The claimants' witnesses ascribed the leakage to the poor quality of the casks in which the cocoa-nut oil was shipped, the casks proving to have been not well-seasoned, but green, and subject to shrinkage during the warm weather of the passage. The oil, as well as the plumbago, was shipped by Delmege, Reid & Co., but the master superintended the stowage and arrangement of the cargo. The bills of lading in this case import the ordinary contract and liability of a common carrier. They contain no exceptions save those above stated. In the case of *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 437, 9 Sup. Ct. Rep. 469, Mr. Justice GRAY, in delivering the opinion of the court, says:

"By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship carrying goods for hire, whether employed in internal, in coasting, or in foreign, commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies."

These bills of lading are to the same effect. There is nothing in them that serves to protect the ship from liability for damage arising from other goods. This damage did not happen from any peril of the seas, as the master himself testifies. The damage is directly traceable either to unfit oil casks, or to improper stowing of such casks over the plumbago, or to the lack of suitable attention to the leakage through the deck and in the hold during the voyage. Upon such bills of lading, and in the absence of any other exceptions, the ship takes the risk of such accidents as respects *bona fide* purchasers and consignees of the goods to whom she issues bills of lading, even though the goods were shipped by the charterers. *The T. A. Goddard*, 12 Fed. Rep. 174; *The Antoinette C.*, 5 Ben. 564. The libelants are in the situation of *bona fide* purchasers, paying for the goods on the faith of the bills of lading issued to their agents, Winter & Smilie. Decree for the libelants, with costs.

THE ZEALANDIA.

(District Court, D. California. January 18, 1886.)

SHIPPING—DAMAGE TO CARGO—PERILS OF THE SEA.

Where a cask of oil, which is lashed securely as against all ordinary weather, breaks loose during an extremely violent gale, and causes injury to other goods, the damage must be attributed to a peril of the sea, especially when it appears that such accidents are not infrequent.

In Admiralty. Libel for damages to cargo.

J. D. Redding, for libelants.

Milton Andros, for claimants.

HOFFMAN, J. The proofs show, I think, to a demonstration, that the very great damage sustained by the hides in question in this suit could not have been caused by the negligence of the carriers. If any confidence can be placed in human testimony, we must believe that the ship was stanch and dry, and that no water found access to the hides by the leakage of the vessel. This is shown, not only by the testimony of the master and all his principal officers, but by the evidence of the very capable and reliable surveyors, who examined the after-hold with the special object of ascertaining whether any signs of leakage could be discovered. It also appears that the vessel has conveyed several shipments of hides from Sydney to this port, stowed in the same place and same manner as the hides in question, without damage. She has also made two voyages since delivering the hides, with cargo in the after-hold, which was de-

livered in good order, the vessel in the mean time having undergone no repairs whatever. It is impossible, I think, to attentively peruse this testimony without coming to the conclusion that this extraordinary and unprecedented condition of the hides when delivered, whatever may have been the cause, cannot be attributed to the fault of the carrier. The damage to the skins was caused by this breaking adrift of a cask of oil in the between-decks. The testimony shows that the ship encountered weather of extreme violence; that the cask was securely lashed, and broke away during a tempest,—an accident, it is said, of not infrequent occurrence. I should have thought that an accident of this character might be prevented by the exercise of proper care on the part of the carrier, but on the proofs I feel obliged to decide that in this case it must be attributed to perils of the sea. Libel dismissed.

THE NATHAN HALE.

THE GERTRUDE.

ABELL v. THE NATHAN HALE AND THE GERTRUDE.

(District Court, S. D. New York. December 17, 1891.)

PERSONAL INJURIES TO EMPLOYE—DIVIDING TOW UNDER WAY—NEGLIGENCE—MUTUAL FAULT.

It is imprudent and hazardous to divide a tow under way in a tide-way and in a high wind, to be picked up by other boats; and this being done without necessity, off the Battery, and a hand having his foot cut off by a coil of rope which rendered while making fast to the drifting tow, held negligence in the tug for which it was answerable. But the court being of the opinion that the hand's attention was to some extent given to the naval parade at the Ericsson funeral, and that the hand was partly in fault, allowed him \$700 only.

In Admiralty. Edward S. Abell sued the tugs Nathan Hale and Gertrude to recover for personal injuries.

Hyland & Zabriskie, for libellant.

Samuel Park, for claimants.

BROWN, J. In the afternoon of August 23, 1891, the libellant, who was captain of the barge Susquehanna, then in tow along-side of the steam-tug Gertrude, had his foot cut off at the ankle by getting caught in a coil of the rope which was rendering, while he was making fast two other barges on his port side. The three barges were bound for the North river. They had come down the East river with six or seven other barges bound for Amboy, in tow of the Nathan Hale and the Gertrude. At about 3 o'clock in the afternoon, when they arrived off the Battery, or a little beyond, the Gertrude was assigned to detach the three barges, while the rest of the tow went to Amboy. The Gertrude accordingly first took on her port side the libellant's barge Susquehanna before

she was dropped from the tow, and then she ordered the other two barges, which were in the tier next astern, to cast off from the main tow, which was under way. The weight of evidence is clearly to the effect that the tug and the Susquehanna did not proceed to take up the other two barges until they had dropped 200 or 300 feet astern of the main tow. There was a strong north-west wind, and the tide was ebb. When the two barges were some 25 or 30 feet from the Susquehanna, and nearly abreast of her, the captain of the latter was ordered by the master of the Gertrude to throw them a line to make fast. It is the customary duty of the captain of the barges to obey the orders of the tug-masters in heaving lines or in making fast their own or other boats in the necessary changes, when the boats of the tow have different destinations. The two barges were light, and they were drifting backwards at the time when the order was given. A line was thrown to them, and by a loop at once made fast on the nearest barge. The captain of the Susquehanna then put the line through his stem chock, and got one turn about the bitt, which was about eight feet from the chock; and while attempting to make a second turn, as he testified, the line rendered as the barges were drifting astern, and his foot got caught in the coil, which drew his foot up against the bitt, and severed the foot at the ankle. I find more than usual embarrassment upon the facts of the case, not only from the contradiction between the witnesses in regard to facts which it should seem ought to be equally well known to each, but from the different versions of the accident by the libelant himself, whose original libel agrees with some of the defendants' witnesses in the important particular, if true, that the accident occurred while the line was allowed to render for the purpose of letting the barges drop astern after they had been previously made fast to the Susquehanna. The amended libel, however, asserts that the accident occurred in the first attempt to secure the two barges to the Susquehanna, and several of the defendants' witnesses sustain this account. The probabilities of the case afford little aid, because the whole conduct of the tug in relation to the two barges seems upon any theory to have been unreasonable and naturally improbable. Upon the whole, I think the weight of the testimony sustains the statements of the amended libel in this particular, and that the accident took place when the line was first thrown to the two barges, and they were 200 or 300 feet astern of the main tow. The weight of evidence is further clearly to the effect that the method pursued in this case, namely, by casting off the two barges from the main tow in the ebb-tide and in a high north-west wind, before any lines had been made fast to them, as might have been done, was an unusual, improper, and dangerous mode of handling the boats; and that it imposed unnecessary risks and actual danger upon the men employed in the attempt to stop or "snub" the two barges while they were drifting astern of the Susquehanna in the high wind. The testimony of the captain of the Gertrude, in effect, confirms this; for he insists that he did make fast the lines to the two barges before he ordered them cast adrift, though some parts of his testimony and the weight of evidence are to the contrary. The necessarily

hurried execution of orders under such circumstances, and the difficulty of the work, tend naturally to such accidents as this. The tug is answerable for the unnecessary and unjustifiable method adopted by her captain in handling the boats, and she must therefore be held liable as contributing to the accident. *The Frank and Willie*, 45 Fed. Rep. 494. There is strong evidence, however, that the libelant was not giving his undivided attention to the lines, but was in part looking at the parade of the numerous vessels in the bay at that time in attendance upon the funeral of Ericsson. The libelant emphatically denies this. But as he has no one to confirm his own testimony on this point, and the story of the opposing witnesses is so natural under such circumstances, I do not feel warranted in awarding the libelant full damages on his own testimony alone, when thus contradicted, upon the theory that he was wholly free from fault. The libelant is not, however, for that reason, wholly cut off from relief in a court of admiralty. The accident was severe; he is a cripple for life; and, though the evidence does not justify a full decree, yet, upon the principles approved in the case of *The Max Morris*, 187 U. S. 1, 11 Sup. Ct. Rep. 29, 24 Fed. Rep. 860, I allow him the sum of \$700; for which a decree may be entered, with costs.

THE ELSIE FAY.

PIHLAG v. THE ELSIE FAY.

(District Court, S. D. New York. January 6, 1892.)

PERSONAL INJURIES TO SERVANT—NEGLIGENCE—INSUFFICIENCY OF PROOF.

The libelant suing for damages for personal injuries to his knee-pan, and the mode in which the accident happened not being satisfactorily explained, and amid numerous contradictions, *held*, that the claim was not established by a fair preponderance of proof, and the libel was dismissed without prejudice.

In Admiralty. Libel by John A. Pihlag against the schooner Elsie Fay to recover for personal injuries.

Alexander & Ash, for libelant.

Wing, Shoudy & Putnam, for claimants.

BROWN, J. The libelant was a seaman on the schooner Elsie Fay. He testified that on the morning of the 27th of January, 1890, before light, as he was placing the pump handle in the small boat which was lashed on deck athwartships a little aft of the mainmast, the lashing of the boat broke, because of its unfitness and rottenness; and that the libelant, in catching hold of the main boom to save himself from being hurt by the boat, had his knee thrown by the boat up and against the boom, so as to injure permanently the knee-pan, and disable him from further duties as a seaman. The testimony is full of contradictions of a distress-

ing character. My impressions of the libelant personally, from his appearance on the stand, were favorable to his integrity and honest testimony. But the contradictions of the libelant as to various circumstances are so many; the libel has so little support from other witnesses; the manner in which the accident is said to have happened, I find to be so difficult to appreciate; and, the libelant being found in the boat, there is such likelihood that the injury to the knee-pan may have happened from his fall into the boat, if he did fall into it, as he alleges,—that I find it impossible to hold that the libelant has made out his case by a fair preponderance of proof. The break of the boat is proved; but that break is not one likely to have been made in the way the libelant describes, but agrees rather with the defendants' theory. On the other hand, there are circumstances which it would seem that the defendants might have explained, but which they have not explained, especially how the break in the planks of the small boat actually occurred; and, if it occurred through any seas shipped, how any such seas sufficient to break the boat could have escaped notice at the time. Under all the circumstances of the case, I cannot render any satisfactory judgment; and I must therefore dismiss the libel, without costs, and without prejudice to the libelant.

THE KAATERSKILL.

HAMILTON *et al.* v. THE KAATERSKILL.

(District Court, S. D. New York. January 7, 1892.)

SALVAGE—FIRE ON DOCK—TOWAGE—MASTER'S SELF-SACRIFICE.

A fire breaking out about noon in a hay and straw store-house, within 50 feet of the bulk-head at Coxsackie, in the North river, where the large passenger steamer Kaaterskill was lying without steam up, the ferry-boat Coxsackie, from the adjoining slip, on moving out for her own safety, was called back to tow the steamer away, and thereupon, within two or three minutes, got along-side and towed the steamer to a place of safety. On contradictory testimony, *held*, that the steamer at the time when the Coxsackie took hold of her, was not out of the way of great danger, and but for her help would probably have been greatly damaged or wholly destroyed; and the steamer being worth from \$100,000 to \$140,000, and the ferry-boat \$3,000, *held*, \$3,500, a reasonable salvage award; and it appearing that, when the ferry-boat's master went to the help of the Kaaterskill, his own hotel, very near the burning warehouse, was threatened by the fire, and was afterwards consumed, *held*, that his conduct in going to the relief of the Kaaterskill, instead of attending to his own property, belonged to the class of heroic and self-sacrificing actions, and deserved recognition as such; and \$1,200 of the award was allowed to him, the ferry-boat not having incurred any damage or danger in the service.

In Admiralty. Libel by David M. Hamilton and others against the steam-boat Kaaterskill to recover salvage.

Benedict & Benedict, for libelants.

Wing, Shondy & Putnam, for claimant.

BROWN, J. The above libel was filed in behalf of the owners of the ferry-boat Coxsackie, and all others interested, to recover salvage for res-

cuing the steam passenger-boat Kaaterskill from a fire which broke out about noon on Sunday, August 23, 1891, upon the dock at Cocksackie, on the North river, where the Kaaterskill was then moored. The fire originated in a large hay and straw store-house, the easterly end of which was within 50 feet of the bulk-head where the Kaaterskill lay. The fire was very rapid, and half a dozen other buildings on the dock were speedily consumed. The Kaaterskill was about 285 feet long. Her stem was pointing down river, and was within 5 or 6 feet of the line of the ferry slip immediately below, in which the Cocksackie was then lying. Persons on both boats perceived the fire at about the same time. The Kaaterskill was not under steam; but the ferry-boat, having steam up, immediately started out of the slip to get out of danger. When from 100 to 250 feet out beyond the Kaaterskill, she was hailed by the captain of the latter to come back and help her away. The captain of the ferry-boat immediately ordered his boat turned about, and within a couple of minutes, the tide being low ebb, and near slack, came back to the bow of the Kaaterskill, and made fast to her by a hawser, and towed her down river out of danger. There is great contradiction among the witnesses as to the position of the Kaaterskill at the time when the Cocksackie took hold. I am satisfied, however, that the stem of the Kaaterskill was not down to the lower side of the ferry slip, so that she was by no means at that time out of extreme danger. The paint on the star-board side of the Kaaterskill was blistered. Many of the spiles on the north side of the ferry slip were scorched or charred. Had not the after-part of the Kaaterskill been well out of the way of this part of the bulk-head at the time when the easterly end of the hay and straw store-house fell in, I have no doubt that she would have immediately taken fire from the mass of flame and heat which that fall let loose; and in that event she must have been very greatly injured, if not wholly destroyed, as she had no adequate means of putting out fire. The evidence shows that the end of that building fell in from 2 to 4 minutes after the Cocksackie began towing the Kaaterskill away. For the fast steamer the General was about a mile and a half up river when the fire broke out, and came down at full speed, arriving at the ferry slip within 5 minutes; and at that time, as her witnesses testify, the east end of the store-house had already fallen. The witnesses for the Kaaterskill say that, at the time when the Cocksackie took hold, the Kaaterskill had been shoved away from the bulk-head first by hand, and afterwards by the use of poles, probably about 10 or 12 feet. If that was her position, she was probably in the outer margin of the eddy, which upon the ebb-tide makes up along the bulk-head, and had begun to set a little down river with the slight ebb there. When the ferry-boat passed out of the slip, however, the Kaaterskill had not been moved; and in the short interval of a couple of minutes before the Cocksackie took hold of her it is not credible that she could have been shoved out by hand and got down river the considerable distance which many of her witnesses testify to. I find, as sworn to by the witnesses of the Cocksackie, that when they came up and took hold of the Kaaterskill she was not so far down as to prevent the

Coxsackie from entering her own slip had she chosen. Her whole after-part was therefore liable to take fire as soon as the mass of flame should pour out from the east end of the falling warehouse, not more than 60 feet distant. The service rendered by the Coxsackie was therefore of the greatest value to the Kaaterskill. She was in extreme danger, and nothing but the help of the Coxsackie, in my judgment, could have saved her from great injury, if not destruction. Though the Coxsackie was a very small boat, of only 77½ tons, worth about \$8,000, she had been employed before to assist the Kaaterskill in moving, and her service in this instance was sufficient for the purpose. The service was, however, short, probably less than half an hour all told, and without danger to the Coxsackie. One circumstance, however, deserves special mention. The master of the ferry-boat, who was a part owner of her, was also the owner of an hotel situated within 75 feet of the burning warehouse and threatened by the fire. Acting upon the selfish motives that are apt to control the conduct of most men under such circumstances, he would, after getting his ferry-boat as soon as possible to the nearest point of safety, have hastened to look after the safety of his hotel, without turning aside to help others. Instead of doing this, he answered the summons of the Kaaterskill, and, after this salvage service, dropped her in the stream as soon as she was safe, and hurried to his hotel, to find it consumed. This conduct belongs to the class of self-sacrificing and heroic actions, and should be compensated as such. The Kaaterskill was worth from \$100,000 to \$140,000. I think \$2,500 will be a moderate and suitable award for the service rendered, of which \$1,200 should be awarded to the master for the reasons above stated, \$1,000 to the owners of the Coxsackie, and \$300 to the other two officers of the Coxsackie, in proportion to their wages, with costs. A decree may be entered accordingly.

THE ANNIE S. COOPER.

UNITED STATES v. THE ANNIE S. COOPER.

(District Court, E. D. Louisiana. December 15, 1891.)

SHIPPING REGULATIONS—LIGHTS—TOWING LOG-RAFT.

Rev. St. U. S. § 4233, rule 4, providing that "steam-vessels, when towing other vessels, shall carry two bright white mast-head lights vertically, in addition to their side-lights, so as to distinguish them from other steam-vessels," applies to a steam-tug towing a raft of logs, though such raft may not come strictly within Rev. St. U. S. § 8, declaring that "the word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

In Admiralty. Libel of information against the steam-tug Annie S. Cooper for failure to carry the lights required by law while towing a log-raft. Libel dismissed.

C. S. Rice, for claimant.

Wm. Grant, for the United States.

BILLINGS, J. A libel of information has been filed against this steam-tug for not carrying the lights required by law, viz., rule 7. It is not charged that she had not the lights required by the statute for a steam-tug which had in tow a vessel, viz., rule 4, hereinafter set forth. It is charged that she had in tow a raft of logs, and not a vessel. The question, therefore, is narrowed down to this: Under section 4233 of the Revised Statutes, does rule 4 of that section include a steam-tug towing a raft of logs? That rule is as follows: "Rule 4. Steam-vessels, when towing other vessels, shall carry two bright white mast-head lights vertically, in addition to their side-lights, so as to distinguish them from other steam-vessels." The first question presented is whether, under rule 4, a raft of logs is a vessel. Section 3 of the Revised Statutes (1873) thus describes vessels: "The word 'vessel' includes every description of water-craft or other artificial contrivance used or capable of being used as a means of transportation on water." A raft of logs is a contrivance whereby the logs themselves are kept together, and thus made capable of being transported. They are not the means, and the whole structure is not a means of transporting anything but the things which make up the structure. Therefore a raft of logs might not be strictly a vessel. But, in interpreting a rule, we must look at the reason of the rule. The object of the rule was to require steam-tugs having things in tow to carry certain lights to enable all other vessels to know that they were not steam-vessels without tows. The different light is required of the steam-tug having something in tow to enable all vessels to keep out of the way of the tows. Steam-tugs having rafts in tow are not, by the statute and rules, distinguished from other steam-vessels, unless they are meant to be included within the scope of this rule. Can it make any difference with the danger to other vessels whether the tow is technically a vessel or a raft of logs? Clearly not. The reason of the rule makes it include vessels and rafts of logs, or anything else which steam-tugs are wont to tow. In my opinion, a steam-tug, while towing a raft of logs, as to lights, is governed by rule 4, and not by rule 7. I think, therefore, the exception to the libel is well founded, and should be maintained. Let the libel be dismissed.

MORGAN *et al.* v. EAST TENNESSEE & V. R. Co.

(Circuit Court, N. D. Georgia. March Term, 1883.)

REMOVAL OF CAUSES—CITIZENSHIP OF RAILROAD CORPORATIONS.

When a railroad charter gives the company a right to sell its road within the state to any company incorporated by another state, the purchasing company to have "all the rights and privileges" of the seller, a non-resident company, which purchases the road to form an extension of its line, does not thereby become a resident corporation, so as to take away its right to remove a cause from the state to a federal court.

On Motion to Remand to the state court from which the cause was removed. Motion refused.

W. H. Dabney and *R. T. Fouché*, for the motion.

J. W. H. Underwood, opposed.

McCAY, J. This was a suit commenced in the superior court of Floyd county, Ga., against the Virginia & East Tennessee Railroad Company, and upon the petition of the defendant, claiming that it was a corporation of the state of Tennessee, had been removed to this court for trial. Plaintiff now moves to remand the case, on the ground that the defendant, though a corporation of Tennessee, is also a corporation of Georgia, and that this court has no jurisdiction of the controversy, since the parties are all citizens of Georgia. The question turns upon the following facts: The defendant was incorporated by the legislature of Tennessee, with authority to build and operate a railroad from Cleveland, Tenn., to the Georgia line, and to extend its road to Dalton, Ga., by consent of the Georgia authorities. By various acts of the legislature of Georgia this privilege was granted, and the road built, but no expressed corporate rights in Georgia were by these acts conferred. The company got the right to extend and operate its road to Dalton on certain conditions, and, so far as this extension of the original road to Dalton is concerned, the right of the company has always been so treated. In 1874 or 1875 a railroad extending from Dalton, Ga., to Selma, Ala., known as the "Selma, Rome & Dalton Railroad," was sold under due process of law for the benefit of its creditors, and was bought by certain persons, who afterwards, so far as that portion of the road lying in Georgia is concerned, were incorporated under the name of the "Southern Railroad Company of Georgia." One of the provisions of this charter was as follows:

"Sec. 6. That the said company shall have power to lease or sell their property within the state of Georgia to any other railroad company within the state of Georgia, and also to such railroad companies of other states as, by the laws of such state, may be so authorized, and upon such terms as may be agreed upon by the board of directors and approved by a majority in interest of the stockholders of this company; and the said company so leasing or buying shall have and possess all the rights and privileges of this company."

Under this section of the charter the company sold that part of the Selma, Rome & Dalton Railroad lying in Georgia to the East Tennessee

& Virginia Railroad Company, which has been, and now is, in possession of and engaged in operating said road. It may be added in explanation of the situation that this road from Dalton through Rome to the Alabama and Georgia line is in direct extension of the original road of the East Tennessee & Virginia Railroad Company from Cleveland to Dalton. It is contended by the counsel for plaintiffs that, under these circumstances, the defendant is a Georgia corporation, and has, therefore, no right to remove the suit to this court. It is admitted that under the laws of Tennessee the East Tennessee & Virginia Railroad Company was authorized to make the purchase of this road, so that at last the question depends upon the construction to be given to the sixth section of the act incorporating the Southern Railroad Company of Georgia, and giving it special power to sell its property, and declaring that the purchasers shall have all the rights and privileges of the Southern Railroad Company of Georgia. It is claimed that this section, not only by reason of the nature and object of it, but by its expressed terms, casts upon the East Tennessee & Virginia Railroad Company corporate rights in the state of Georgia, and that the defendant is therefore a citizen of Georgia, and the case not removable. Nothing is better settled than that a grant to a corporation is to be strictly construed; that it takes nothing by any legislative act except what was expressly granted. If this be true of grants to a corporation, it would seem to be more emphatically true of the grant of corporate rights. If, therefore, by a fair construction of this sixth section of the charter of the Southern Railroad Company of Georgia, its terms are fairly covered without including in it the right of the purchasing company to be a corporation, then the corporate right is not granted. Suppose the purchase had been by some Georgia railroad, acting under a Georgia charter, could it for a moment be contended that the Georgia company would become a new corporation? Suppose, again, this Georgia Southern Railroad Company of Georgia had only leased the East Tennessee & Virginia Railroad its road, would the Georgia Southern cease to exist as a company, and the East Tennessee have its chartered rights? The words used in this section are to be taken altogether. The Southern Railroad Company of Georgia is authorized to sell or lease its property, not its corporate existence; and the latter words are to be construed in reference to the former. The purchasers are to get all the powers and privileges the old company has over its property,—the thing sold, and the only thing it had a right to sell. Now, the corporation of another state may, by the consent of the legislature, under a license, enjoy any kind of property or franchise without becoming a corporation. It may own land, construct railroads, carry on the business of a common carrier, make contracts of insurance, and do almost any conceivable legal act which the legislature may license it to do. In the numerous sales of railroads under chancery decrees nothing is sold but the property. The corporate right is not the subject of sale. Such a right—the right to be a corporation—depends upon the legislative will, and is not to be sold or mortgaged, except by legislative consent. And this distinction between the property rights

of the corporation and its corporate existence is clear, and well recognized by all writers on corporation law; and this view is sustained by the highest authorities. In *Railroad Co. v. Harris*, 12 Wall. 65, the supreme court of the United States held that an act of the legislature of Virginia granting to the Baltimore & Ohio Railroad Company the same rights and privileges in Virginia as were granted it by its Maryland charter did not make it a corporation; that it had only a license to do such acts in Virginia as it had a right to do in Maryland. And in the same case it appeared congress had granted to the Baltimore & Ohio Railroad the right to build a branch in the District of Columbia, with the same rights, benefits, and immunity as were provided by its Maryland charter, and the court held even this not to be a grant of corporative authority, but only a license to do in the District such acts as it might do under its charter in Maryland. The same doctrine is laid down by District Judge KEY, May, 1882, in Middle Tennessee. *Callahan v. Railroad Co.*, 11 Fed. Rep. 536. This question is also, I think, essentially involved in the case of *Railroad Co. v. Koontz*, 104 U. S. 5. In that case a Maryland corporation had leased and was operating a Virginia railroad under a contract, without any legislative authority from either state. The Maryland company was sued in Virginia, and undertook to remove the case to the United States circuit court. This the Virginia court refused, on the ground that, as this Maryland company was exercising rights of a corporation in Virginia, it was to be treated as a Virginia corporation; and this ruling was approved by the Virginia supreme court, and by writ of error was carried to the supreme court of the United States for review. That court said the matter stood on the same footing as if there was legislative authority for the lease, since the state had not complained, and it in terms decided that, while the Maryland company was without doubt suable in Virginia, yet as it still was not a Virginia, but a Maryland, corporation, it had a right to remove its cause, under the act of congress, to the federal court. The case of *Railroad Co. v. Cury*, 28 Ohio St. 208, is to the same effect, and I am unable to see why, on principle, a law of a state granting to a foreign corporation the right, privilege, and immunity to operate a railroad makes the grantee any more a citizen of the state than does a law authorizing a foreign corporation to make other contracts or do other acts as home corporations may, or as citizens may, which is the law, expressed or implied, of almost all contracts in all the states of the Union, and is true by comity, even as regards foreign corporations proper, over almost all the civilized world. I am therefore of the opinion that the motion to remand must be denied, and the case stand for trial in its proper order on the docket of this court.

GREENER v. STEINWAY *et al.*

(Circuit Court, S. D. New York. November 20, 1885.)

TAXATION OF COSTS—DOCKET FEES.

When a demurrer to a bill in equity is sustained, a docket fee of \$30 is taxable in favor of defendant.

In Equity. Exceptions to clerk's taxation of costs.

Ralph W. Morrison, for plaintiff.

George W. Cotterill and Arthur v. Briesen, for defendants.

SHIPMAN, J. The exception to the clerk's taxation of costs, in disallowing a docket fee of \$20, upon a decree for costs in favor of the defendant, upon a successful demurrer to the complainants' bill, is sustained. The defendant's right to a docket fee of \$20 is sustained upon the authority of *Wooster v. Handy*, 23 Blatchf. 112, 23 Fed. Rep. 49; *The Anchoria*, 23 Fed. Rep. 669; *McLean v. Clark*, Id. 861; *Price v. Coleman*, 22 Fed. Rep. 694; and *Scharff v. Levy*, 112 U. S. 711, 5 Sup. Ct. Rep. 360.

SAENGER v. NIGHTINGALE *et al.*

(Circuit Court, D. Georgia. April Term, 1883.)

1. MORTGAGES—PAYMENT—EVIDENCE—STATEMENTS IN INTEREST.

In a suit to set aside a foreclosure sale, letters written by the mortgagor before the foreclosure, and tending to show that the mortgage debt had then been entirely paid, are inadmissible to bind the purchaser when there is no evidence of a conspiracy between him and the mortgagor to keep the mortgage alive after payment, in order to defraud subsequent lienholders. Such letters are merely unsworn statements, made in the interest of the writer.

2. SAME—RIGHTS OF SECOND MORTGAGEE.

The fact that the assignee of a mortgage which constitutes a valid and subsisting lien transfers the same to the children of the mortgagor without consideration gives no ground of complaint to the holder of a second mortgage.

3. SAME.

The fact that a mortgage was foreclosed by the assignee thereof in the name of the original mortgagee, after such assignee had transferred the mortgage to the mortgagor's children, gives the holder of a second mortgage no right to attack the title of such children as purchasers at the foreclosure sale.

4. LIMITATION OF ACTIONS—RIGHTS OF SECOND MORTGAGEE.

Act Ga. 1869, declaring that all proceedings to recover debts due before June 1, 1865, shall be begun by January 1, 1870, is not available in favor of a second mortgagee, to defeat the title of the purchasers at the foreclosure of a first mortgage, though, as between the parties to it, the first mortgage was barred thereby before its foreclosure.

In Equity. Bill by H. M. Saenger against William Nightingale and others to set aside a sheriff's deed made in pursuance of a foreclosure sale. Decree for defendants.

H. B. Tomkins, for complainant.

R. E. Lester and W. S. Bassinger, for defendants.

MCCAY, J. This was a bill filed by complainant against William M. Nightingale and others on the following statement of facts: On the 30th of January, 1855, P. M. Nightingale, the father of the defendants, made a mortgage to Charles Spaulding of Cambress island, in the county of McIntosh, Ga., to secure \$100,000. The mortgage also included a number of slaves, the debt being for the purchase money of the land and slaves. The \$100,000 was evidenced by certain bonds due at various dates from 1856 to 1862. Of this debt \$35,000 was paid. In March, 1856, this mortgage was transferred by Spaulding to E. Mollineaux. In March, 1870, Mollineaux's executor and the mortgagor adjusted this debt thus: A certain plantation known as "Dungeness" was deeded by Nightingale to the Mollineaux estate, and a certain allowance made to Nightingale in consequence of the emancipation of the slaves, and it was finally agreed that the mortgage debt should stand at \$51,250. In 1872 the executor of Mollineaux, in the name of Spaulding, for his use, proceeded to foreclose the mortgage in the state court, and in November, 1872, a judgment of foreclosure was rendered; and under this judgment the property was sold at sheriff's sale in McIntosh county, and bought by the defendant William Nightingale, for himself and the other children of P. M. Nightingale, the mortgagor; and in pursuance of said sale they were put in possession of said property, and they are now holding and claiming the said property as their own. This mortgage had been duly recorded under the laws of Georgia within a few days after its date. Previously to this foreclosure, a transfer of the mortgage had been made by those interested in the Mollineaux estate to the defendant William Nightingale, and the other children of the mortgagor, in consideration of their release of the Mollineaux estate of any claim they had or might have to the Dungeness property; previously sold by their father to the Mollineaux estate in part satisfaction of the mortgage debt. On the 6th of December, 1869, P. M. Nightingale, father of the defendants, became indebted to the complainant in the sum of \$30,000, and to secure the same mortgaged to him Cambress island.

The object of this bill is to set aside the sheriff's deed to the Nightingales under the foreclosure of the first mortgage, and to subject the property to the lien of the mortgage held by the complainant. The bill charges that the first mortgage was fully paid off or settled before a foreclosure, and fraudulently kept open; but at the hearing there was not only no evidence to sustain this charge, but, on the contrary, it was shown that the deed to Dungeness and the adjustment for the emancipation of the slaves left still due on the first mortgage about \$51,250. On the trial various letters of P. M. Nightingale, the mortgagor, were offered, in order to show by his statement that the first mortgage was settled; but the court rejected the letters as not competent to show, as against the defendants, such settlement. They are only the unsworn statements of one interested to make them, and are not evidence at all against the mortgagor, or against one purchasing at the foreclosure sale; unless there was evidence, which there is not, of a conspiracy between

the defendants and P. M. Nightingale to keep open this mortgage after it was settled.

It was contended that there was no consideration for the transfer of the mortgage to the Nightingale children; that there is no evidence that they had any claim to Dungeness; but I think that is wholly immaterial. If the mortgage was valid at the time, and unpaid, it would make no difference to the complainant even if the transfer made no pretense of consideration.

It was also insisted that the foreclosure of the first mortgage was void because the transfer was made before the proceeding for foreclosure commenced. The foreclosure was in the name of the original mortgagee, and was not objected to by any person having an interest in the mortgage. Any person having such interest would have a right, if he saw fit, to foreclose in the name of the original mortgagor. If the real owners of the mortgage have not and do not complain, what is that to the complainant? These facts, as well as the consideration of the transfer, the delay in the foreclosure, are all matters to be considered in determining whether or not the mortgage was paid off, or in any way settled; but the evidence of Mr. Lawton and his partner is so plain and positive as to leave no doubt that after the deed to Dungeness, and after the adjustment for the emancipation of the slaves, there was still due on the original mortgage debt over \$50,000. Nor does it make any difference if Mrs. Mollineaux, who, it seems, was quite a wealthy woman, and an especial friend of the family, took little care to press for her money. Nay, it seems to me, if her debt was really unpaid, she would have a right, since it was the oldest lien, to keep it, and deliberately and intentionally and openly use it for the purpose of preserving the old home of the children of the family. If the mortgage debt was a subsisting lien, and older than the complainant's mortgage, it would be no concern of his for whose benefit it was used. Her transfer of it for a small consideration, as for the quitclaim deed to Dungeness, or even as a gift, to the Nightingale children, are facts which, with other circumstances, if any such were in proof, might go to give color to the charge that the mortgage was paid off, or in fact was settled; but the evidence fails to show this, or to give any other facts to be aided by her conduct in the premises.

At last, therefore, this case, as I think, stands alone upon the point made by the complainant, and admitted by the answer, to-wit, that the first mortgage became due before the 1st of July, 1865, and was not foreclosed until some time in 1872, and that, therefore, the mortgage debt, as well as the mortgage, was barred by the statute of limitations of the Georgia legislature, passed in 1869. That act provides that all proceedings to recover any debt due before the 1st of June, 1865, shall be begun by, on, or before January 1, 1870, or the right of action should be perpetually barred. This mortgage debt was due before the 1st of June, 1865, and the proceedings to foreclose were not commenced until more than a year after the statutory bar attached, so that it comes within the terms of the statute; and, had the mortgagor set up this defense to the foreclosure, so far as it now appears, it must have been successful.

The case as presented is therefore as follows: Complainant has an un-foreclosed mortgage. The defendants are in possession, claiming title under a sheriff's sale, made by virtue of a foreclosed mortgage: but to which judgment of foreclosure the mortgagor might, had he seen fit to do so, have pleaded the limitation act of 1869, and defeated the foreclosure. The claim of this bill is that the complainant has now a right to intervene, to say to the defendants that the mortgage under which they claim title was, at the date of the proceedings to foreclose, barred by the statute of limitations; and, as his mortgage was then, and still is, a subsisting, *bona fide* lien, he has a right to foreclose and sell notwithstanding their purchase. I do not think the complainant is estopped in any legal right he might have by the judgment of foreclosure. Under the laws of Georgia, he is not either a necessary or a proper party to the foreclosure, and he is not bound by the judgment. The cases decided by the supreme court of Georgia upon this point do not exactly settle that the complainant is not bound by the judgment, because in them the mortgagor, at the commencement of the proceeding, had parted with all his title to the property; and the court in its decisions laid stress upon the gross injustice of permitting the mortgagor, after he had sold his equity of redemption, and at the time when he had no interest at all in the land, by any act of his to bind a party having a lien on the property. Still I am inclined to the opinion that the principle of these decisions is based on the fact that the second mortgagee, not being a party to the judgment, nor a privy to it, is not bound by it. These cases, however, do establish that a purchaser of the mortgagor's title is not bound by any judgment against the mortgagor had under proceedings commenced after the date of his purchase, and, if the holder of such a judgment, or of any other claim, attempts to interfere with his purchase, he has the same right of defense as the mortgagor would have. It is, without doubt, well established as a general proposition that pleas of usury, of the statute of limitations, and the like, are personal pleas or privileges, and that no person can take advantage of them but the one primarily interested. One creditor cannot set up that another creditor's debt is usurious, or barred by the statute, or is subject to any other plea of a personal and privileged character. There is, however, a well-established exception to this rule, to-wit, that a purchaser of the title from the mortgagor, unless it be one of the cases where he is estopped as being a party or privy to the judgment of foreclosure, may always, when it is attempted to set the judgment of foreclosure in motion against his title, attack it by setting up the same defenses as the mortgagor might have done had he seen fit so to do. This doctrine is based upon plain principles of justice and common sense, to-wit, that a purchaser of property from any one has the right to resist any claim against it, just as his vendor might, except in such cases as by the rule of law he is estopped; and that in a judgment foreclosing a mortgage against the mortgagor, in proceedings begun after the date of his purchase, he is not estopped unless he be a party to the judgment. This rule has been adopted and enforced in Georgia. It will, however, be noticed that in all these cases

the defendant was the purchaser of all the mortgagor's rights; that he had the title to the premises, subject, of course, to the mortgage, so far as it would be an irresistible claim as against the mortgagor. There are, so far as I can find, no cases, except the California cases, giving this right to a subsequent mortgagor who has not the title,—who has only a debt with a mortgage lien. He does not stand in the position of the defendants. He does not have the title to the premises, with the right incident to every title,—to defend it against all claims, whenever they come, except in the cases where, under a settled rule of law, the grantor has by his acts estopped him; as if, for instance, before his purchase the grantor had submitted to a judgment. In such a case, being a purchaser after the commencement of the proceedings, he is a privy to the judgment, and is therefore bound by it just as his grantor would be.

Without question, there are several California cases where this privilege is also allowed to a subsequent mortgagee, but these cases are anomalous, and are made by the court to depend on the peculiar language of the California statute. The first case is *Lord v. Morris*, 18 Cal. 482, though under the facts of that case it would be clear, even under the Georgia cases, the second mortgagee would have a right to set up the statute. The second mortgage was not made by the maker of the first mortgage. He had sold the fee to the third party, and it was the mortgagee of these purchasers who was permitted to insist that the first mortgage was barred by the statute. They had a right to stand in the shoes of their mortgagor, and, as he was a purchaser of the title from the first mortgagor, they had the same right he had. It is true the court, in delivering its opinion, does announce the general rule that, by reason of the peculiar character of the California statute a different rule prevails in that state from other states and in England; and one of the leading peculiarities to which the judge refers is that the California statute bars the mortgage whenever the debt is barred; and he specifically refers to the case of *Elkins v. Edwards*, 8 Ga. 325, as an instance how the Georgia statute differs from the peculiarity of the California statute on which that court bases its opinion. In that case the mortgagor had made a subsequent promise to pay the debt and keep up the mortgage, but the court held that, as at that time he had parted with his title, no act of his could give validity to the barred lien. In the case before us, Nightingale, the father, was still the owner of the title when he allowed this judgment of foreclosure to go against him. There are other California cases referred to, to-wit, *Coster v. Brown*, 23 Cal. 142, and *Grattan v. Wiggins*, Id. 16, but in both these cases, though the language of the court extends to a mere mortgagee, yet, in fact, the parties who were permitted to plead the statute were the persons who had bought the title from the mortgagor, and were, under decisions in this state, (Georgia,) entitled so to plead. Upon the whole, therefore, I am of the opinion that the subsequent mortgagee has no more right to plead the statute, as though he stood in the shoes of the debtor, than any other creditor. He has no title to the land. He has nothing but a mortgage lien. The Georgia courts have decided that a judgment creditor could not set up, as against

another judgment creditor, that the debt of the latter was tainted with usury, and there is nothing in a Georgia mortgage putting the mortgagee in a better position than a judgment creditor. It is true he has a lien on the land, but so has the creditor by judgment. It is true, also, that our courts have said of the mortgagee that, if he obtains his mortgage without notice of a secret lien, he is for his protection to be treated as a purchaser; not that he is a purchaser, but that he is to be treated as such for his protection. But he has yet no title, nor was it the intent of these decisions so to hold, because the statute, in express terms, says that in Georgia the mortgagee has no title, but only a lien. I am therefore of the opinion that a decree ought to be entered for the defendants, the children of P. M. Nightingale, denying the prayer of plaintiff's bill.

UNITED STATES v. FRY.

(District Court, E. D. Louisiana. January 14, 1892.)

VIOLATION OF CUSTOMS LAW—LANDING "MERCHANDISE."

The compass of a steam-ship, being part of its apparel and tackle, is not "merchandise," within the meaning of Rev. St. U. S. § 2873, imposing a punishment upon the master of a vessel for being concerned in landing any merchandise without the permit required by the preceding section. *U. S. v. Chain Cable*, 2 Story, 362, followed.

At Law. Information against F. G. Fry, master of the steam-ship Rhine, for a violation of the tariff laws. Judgment for defendant.

Wm. Grant, U. S. Dist. Atty.

Ernest T. Florance, for defendant.

BILLINGS, J. This is an information whereby the United States seeks to recover \$400 from the defendant, who was master of the British steam-ship Rhine, as a penalty for a violation of section 50 of the act of 1799, (sections 2872-2874, Rev. St.¹) The case shows that the defendant was master of the Rhine; that a compass, which was a part of the apparel and tackle of the vessel, being by law a necessary adjunct of the life-boat, was, without the knowledge of the master, stolen by one of the mariners, and taken on shore without any permit, and not in open day. The question submitted by the defendant's attorney is whether the com-

¹Section 2872 provides: "Except as authorized by the preceding section, no merchandise brought in any vessel from any foreign port shall be unladen or delivered from such vessel within the United States but in open day,—that is to say, between the rising and the setting of the sun,—except by special license from the collector of the port and naval officer of the same, where there is one, for that purpose, nor at any time without a permit from the collector and naval officer, if any, for such unloading or delivery." Section 2873 provides that, "if any merchandise shall be unladen or delivered from any vessel contrary to the preceding section, the master of such vessel, and every other person who shall knowingly be concerned" therein, shall be liable to a penalty, etc. Section 2874 provides that "all merchandise so unladen or delivered," contrary to the preceding sections, shall be forfeited, etc.

pass was merchandise, within the meaning of section 2873 of the Revised Statutes. This question was decided by Justice Story in *U. S. v. Chain Cable*, 2 Story, 362, against the United States. He held that appurtenances or equipments of a ship are not merchandise. I find no authority to the contrary. On the other hand, the defendant's counsel has cited several authorities tending to establish that merchandise includes only cargo. My conclusion is that the judgment must be in favor of the defendant.

UNITED STATES v. PEACE *et al.*

(Circuit Court, E. D. North Carolina. January 11, 1892.)

INTERNAL REVENUE—TAX ON SPIRITS—DISTILLERY WAREHOUSES.

Rev. St. § 8298, as amended by Act Cong. March 28, 1880, requires distillers to give a bond conditioned to pay the tax on spirits stored in distillery warehouses "before removal" therefrom, or within three years from the date of the bond. *Held*, that the destruction of such spirits by fire, while in the warehouse, does not constitute a "removal," so as to make the tax payable before the expiration of the three years.

At Law. Action against James C. Peace and others upon a distillery warehouse bond.

Charles E. Cook, U. S. Atty.

Thomas Strayhorn, for defendants.

SEYMOUR, J. The action is brought on a distiller's warehouse bond to recover the tax on certain spirits destroyed by fire in the warehouse. The fact of the destruction of the spirits does not release the distiller or his surety from liability for the tax. *Farrell v. U. S.*, 99 U. S. 221. The only question in the case is whether the tax is payable immediately upon the destruction of the spirits, or not until the expiration of three years from date of entry in the bonded warehouse. The present action was brought within the three years, and the question arises upon a special verdict.

The bond in suit, like all others of the same character, follows the phraseology of the statute, and is conditioned for the payment of the taxes due on the spirits described in it "before such spirits shall be removed from the warehouse, and within three years from the date of entry." The contention is as to the construction of the words, "removed from such warehouse." The verb, "to remove," bears in common usage two meanings: To cause a thing to change place, or to cause it to cease to exist; and, in the second meaning given, would include destruction by fire. The doubt in the matter *sub lite* does not, however, depend upon the abstract definition of the term, but upon the question of whether the removal contemplated by the statute must not be a removal by the distiller. The provisions of the statutes relating to the bonding of distilled spirits deemed material to the question of construction under con-

sideration are contained in sections 3248, 3251, 3271, 3272, 3274, 3287, 3293, and 3294 of the Revised Statutes, and in section 4 of Act March 28, 1880, amendatory of section 3293, *supra*. See Supp. Rev. St. (2d Ed.) 286. Section 3248 provides that the tax shall attach to the article of distilled spirits as soon as it is in existence; section 3251, that it is to be paid by distiller before removal from distillery warehouse; section 3271, that every distiller shall provide, at his own expense, a warehouse to be situated on and constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture, which, when approved by the commissioner of internal revenue, is declared a bonded warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue store-keeper assigned thereto by the collector of internal revenue; section 3272, that whenever the commissioner is of opinion that any warehouse is unsafe he may discontinue its use, and require the merchandise therein to be transferred to some other warehouse; section 3274, that the warehouse shall be in joint custody of the store-keeper and the proprietor thereof; section 3287, that all distilled spirits shall be drawn from the receiving cistern into casks, and be immediately removed into the distillery warehouse; section 3293, that the distiller on the first day of each month, or within five days thereafter, shall enter the spirits in the prescribed form, and give bond with surety, etc., conditioned to pay the tax before removal from the warehouse, and within one year from the date of the bond; section 3294, that any distilled spirits may, on payment of the tax, be withdrawn from warehouse. By the act of March 28, 1880, distiller is required to pay the tax within three years from date of entry for deposit. The act further provides—

"That the tax on all distilled spirits hereafter entered for deposit in distillery warehouses shall be due and payable before and at the time the same are withdrawn therefrom, and within three years from the date of entry for deposit therein; and warehousing bonds hereafter taken under the provisions of section 3293, Rev. St., shall be conditioned for the payment of the tax before removal from the distillery warehouse, and within three years from the date of said bonds."

A collation of these sections leads irresistibly to the conclusion that the removal from the distillery warehouse spoken of must be a removal by or under the authority of the owner of the commodity. The tax attaches to the article, and becomes a lien on it, from the instant that it comes into existence. For the convenience of its owner, payment is postponed for three years, unless the owner removes it earlier. It is difficult to conceive that the destruction of the spirits by accident, and without fault on the part of the distiller, would be made by congress cause for hastening payment of the tax. It is true that, the thing on which government had a lien for its dues being destroyed, its security is lessened, and made to depend on the solvency of the distiller and his bond, and that between private parties such a condition of affairs would be considered an inducement to hasten collection. That such is not the way in which the legislature considered the matter as between govern-

ment and the distiller may be fairly inferred from the legislation looking to distiller's relief, when not in fault, in this class of cases. But I do not think it necessary to go beyond the words of the statute for the sense in which the term "removal" is used. Section 3272 provides for a transfer in certain cases from one warehouse to another. Evidently the tax would not be at once due on such a removal. Section 3294 uses the word "withdraw" as the equivalent of "remove." "The distilled spirits may, on payment of the tax, be withdrawn from," etc. And amended section 3293, after saying that the tax shall be due before and at the time the spirits are "withdrawn," directs that the bond for payment of the tax shall be conditioned for its payment before "removal" from the distillery warehouse. The statute thus itself construes the word "removal" to mean "withdrawal." A withdrawal cannot be the work of chance or accident. It must be the act of an intelligent agent.

I am, then, of the opinion that the tax on the spirits, for payment of which the bond in suit was given, was not due when the suit was instituted. Let an order be drawn in accordance with this opinion, and following the entry made at the trial.

COTTRELL v. TENNEY *et al.*

(Circuit Court, N. D. Illinois. January 4, 1892.)

1. PLEADING—CONSPIRACY TO WRECK CORPORATION—SUFFICIENCY OF DECLARATION.

A declaration by a stockholder against the officers of a corporation charged a conspiracy to wreck the company, and alleged that in pursuance thereof they caused judgment notes to be made without consideration, and had judgments entered thereon; that subsequently "executions were issued thereon, and levied on the property and assets of said corporation, and that afterwards said defendants falsely represented to said court that such judgments were a legal and binding obligation on said company, and thereby procured an order of said court for the sale of all the assets of said corporation, and that the proceeds of such sale be applied to said judgments;" in consequence whereof the plaintiff's stock was rendered valueless. *Held*, that as these allegations showed that the sale was not made under the executions in the ordinary course of enforcing judgments, but was in virtue of some ancillary proceedings, the declaration was insufficient in not setting out enough thereof to show whether such proceedings were of a nature to bind the stockholders.

2. LIMITATION OF ACTIONS—PLEADING—ANTICIPATING DEFENSE.

An averment in a declaration that defendants fraudulently concealed the cause of action from plaintiff, not stating the facts constituting such concealment, is not sufficient to take the case out of the operation of the statute of limitations, and renders the declaration demurrable, even though it was not necessary for plaintiff to attempt to avoid the effect of the statute.

At Law. Action by Calvert P. Cottrell against Daniel K. Tenney and others for conspiracy to wreck the John B. Jeffrey Printing Company, whereof complainant was a stockholder. Heard on demurrer to amended complaint. Sustained.

Grosscup & Wean, for plaintiff.

Tenney, Church & Coffeen, for D. K. Tenney.

Barnum & Barnum, for Jeffrey Printing Co.

BLODGETT, J. This case is now before the court upon a demurrer to the amended declaration. The amended declaration contains three counts. The first two counts set out, in substance, that plaintiff was the owner of 75 shares of the capital stock, of the value of \$7,500, of the John B. Jeffrey Printing Company, a corporation organized under the laws of Illinois, and doing business in the city of Chicago, as a printing company; that some time before the 1st day of May, 1884, the defendants conspired together to wreck said company, and despoil it of its property, and, in pursuance of such conspiracy, unlawfully caused judgment notes to be made, which were wholly without consideration moving to said company, which amounted in the aggregate to about \$50,000, and on the 1st day of May, 1884, unlawfully, and in pursuance of said conspiracy, caused judgments to be entered in the superior court of Cook county, in this city, upon said so-called judgment notes; that, after the entry of said judgments, executions were issued thereon and levied upon the property and assets of said corporation, and that afterwards said defendants falsely represented to said court that said judgments were a legal and binding obligation upon said company, and thereby procured an order of said court for the sale of all of the assets of said corporation, and that the proceeds of such sale be applied on said judgments, and that, in pursuance of such order, the property of said corporation, all and singular, was offered for public sale, and the said defendant Tenney became the purchaser thereof, and indorsed or applied the amount of purchase money he had bid therefor upon said judgments, and afterwards, and in pursuance of said conspiracy, said Tenney conveyed, all and singular, the property so purchased to a new corporation, which had been organized for that purpose, and thereby deprived the said John B. Jeffrey Printing Company of all its assets, and made the stock of plaintiff wholly valueless. The third count is substantially like the first two, except that it does not charge that the judgment notes were given without consideration, but charges that certain proceedings were had in the superior court wherein, by order of said court, the proceeds of said property were applied on said judgments. In all three of the counts it is alleged that the defendants fraudulently concealed the cause of action from the plaintiff until a short time before the commencement of this suit. Enough appears in all three of these counts to give the court to understand that the sale of the assets of the John B. Jeffrey Company was not made to the defendant Tenney upon the execution, and in due course of the enforcement of the judgments at law, but that, on the contrary, such sales were made by virtue of some ancillary or other proceedings had in said court.

Having charged a sale by virtue of certain judicial proceedings, I am clear the plaintiff should have set out enough of those proceedings to enable the court to determine whether they were such proceedings as bound the stockholders of the defendant company. For aught the court can surmise or guess from the statements made, these proceedings may have been instituted under the sections of the Illinois law in regard to corpo-

rations providing for winding up insolvent corporations, it being nowhere averred, in either count of this declaration, that this John B. Jeffrey Printing Company was solvent and able to pay its debts. In the third count there is no allegation but what these judgments were issued in due course of business, for the purpose of securing a legitimate indebtedness of the said corporation, and hence I fail to see how the facts alleged can amount to a fraudulent conspiracy to wreck the corporation.

The transactions complained of seem to have occurred in the early part of the year 1884, more than five years before the bringing of this suit, and presumably the plaintiff has put the averment in regard to fraudulent concealment of the plaintiff's cause of action into each of these counts for the purpose of taking the case out of the operation of the statute of limitations. I do not think this averment of fraudulent concealment is sufficient. It is made almost in the precise language of the statute, but it seems to me that the plaintiff should have stated in what the fraudulent concealment consisted, so that the defendant would be able to meet and answer such allegations by plea and proof. Probably it was not necessary for the plaintiffs in their declaration to have attempted to evade the effect of the statute of limitations, but they might have left that to the defendant to elect whether or not the defendant would insist upon the bar of the statute; but, if the plaintiff attempts to take the case out of the operation of this statute, he should set up facts which, if proven, would effectually accomplish that purpose; in other words, he should state in what the fraudulent concealment consisted. For these reasons the demurrer to each count of the amended declaration is sustained.

IVES v. CANBY.

(Circuit Court, D. Delaware. December 19, 1891.)

WILLS—SPECIFIC AND DEMONSTRATIVE LEGACIES.

A bequest of "\$2,000 of the South Ward Loan of Chester, Pennsylvania," by a person owning \$10,000 worth of bonds known by that designation, is a demonstrative, and not specific, legacy, and is not adeemed by the payment of the bonds before the testator's death.

At Law. Action by Alfred S. Ives against William Canby, executor of Lucinda H. Bradford, to recover a legacy. Judgment for plaintiff.

George H. Bates, for plaintiff.

Willard Hall Porter, for defendant.

WALES, J. This is an amicable action for the recovery of a legacy, and the case comes before the court on a statement of facts agreed to by the counsel on both sides. Lucinda H. Bradford made her will on the 26th day of February, 1879, and appointed the defendant her executor.

Mrs. Bradford died on the 5th of September, 1888, and on the 1st day of October in the same year her will was duly probated, and letters testamentary thereon issued to the defendant. The third clause of her will is in these words:

"Item. I give, devise, and bequeath to Alfred Stille Ives, the second child of Dr. Robert Ives and Maria, his wife, of New Haven, Conn., his heirs and assigns, forever, two thousand dollars of the South Ward Loan of Chester, Pennsylvania."

At the time of making her will the testatrix owned and possessed securities known as the "South Ward Loan of Chester, Pennsylvania," of the value of \$10,000, represented by bonds numbered and dated as follows: Bond No. 97, for \$4,500, dated July 2, 1870, payable in 10 years from that date; bond No. 80, for \$4,500, dated July 1, 1870, payable in 15 years from that date; and bond No. 83, for \$1,000, dated July 1, 1871, payable in 10 years after that date. All of these bonds were paid off prior to the death of the testatrix. After the payment of all the debts due from her estate, and all of the other legacies, there were sufficient assets in the hands of the defendant, as executor, for the payment of the legacy to the plaintiff.

The question presented by these facts is whether the legacy of \$2,000 to the plaintiff is a specific legacy, and was therefore adeemed by the payment of the bonds during the life-time of the testatrix. The question is not a new one. The definition of a "specific legacy" has long been settled, and the present controversy can be determined by a reference to the authorities, without further discussion. A specific legacy is attended with some advantages and with some disadvantages. If, at the time of the death of the testator, the subject of the legacy is found among the assets of the testator, it must be paid to the legatee by the executor in preference to the general legacies, and is not liable to contribution for the payment of debts due from the estate, if there should not be a sufficiency of assets for that purpose, and for the payment of other legacies in full; and, moreover, such legacy is payable at once, and, where it is a money legacy, with interest from the death of the testator. On the other hand, if the property so specifically bequeathed is not in the possession of the testator at the time of his death, by reason of its previous payment, sale, or destruction, it is adeemed, and the gift fails. The courts have inclined against construing legacies as specific, in order to guard the legatee against the risk of ademption, and that the legacy may be liable to contribution and abatement, if the assets are insufficient to pay the debts and also to satisfy the general pecuniary legacies. It is therefore important to ascertain the intention of the testator, and such intention must always be either expressed in reference to the thing bequeathed, or otherwise clearly appear from the will, to constitute a specific legacy. This is elementary. Mrs. Bradford's will contains no word or phrase, other than what is found in the third clause, that shows her intention in reference to the payment of this legacy. In those cases in which legacies of stock, or shares, or money due on a bond, have been held to be specific, some expression has been found from which an intention

to confine the bequest to the particular shares or debt could be inferred. It seems to be settled, says an eminent authority, that mere possession by the testator, at the date of his will, of stock or annuities, of equal or larger amount than the bequest, will not (without words of reference, or an intention appearing upon the will that he meant the identical stock of which he was possessed) make such bequest specific. *Rop. Leg. c. 5, § 5.* In *Davis v. Cain*, 1 Ired. Eq. 309, the bequest was of 25 shares of capital stock of the State Bank of North Carolina. The testator owned 25 such shares. The court said the legacy was not specific. If the testator had said "my" 25 shares, it would have been specific. In *Robinson v. Addison*, 2 Beav. 515, a testator, having 15½ Leeds & Liverpool canal shares, bequeathed 5½ such shares to A., 5 such shares to B., and 5 such shares to C. There was no description or reference in the will to show that the testator intended to give the particular shares which he held at the date of his will. At his death he possessed no Leeds & Liverpool canal shares. The master of the rolls said:

"In the gift the testator has used no words of description or reference, by which it appears that he meant to give the specific and particular shares which he then had. If he had meant to give only the shares which he had, he might have designated them as 'his.' He intended his legatees to have so many canal shares; but, not giving the specific shares he had, he gave nothing which was distinguished or severed from the rest of the testator's estate, but, in effect, gave such an indefinite sum of money as would suffice to purchase so many shares as he had given, those shares being any such shares as could be purchased, and not certain and particular defined shares."

In *Dryden v. Owings*, 49 Md. 356, the testator at the time of making his will, and at the time of his death, had in his possession eight state of Missouri bonds, of the value of \$8,000. His will contained this legacy: "I give and bequeath to Virginia M. Owings \$8,000 in the state of Missouri bonds." One year after the death of the testator his executrix delivered to the legatee \$8,000 in state of Missouri bonds, but the latter claimed that the legacy was specific, and that she was entitled to interest on the bonds from the testator's death. The court decided that, according to well-settled rules of construction, in order to constitute a specific legacy, it is necessary for the testator to distinguish or identify the stock or thing given by saying "stock now in my possession," "or now standing in my name," or some other equivalent expression marking the *corpus* of the stock bequeathed, and showing that the testator meant that identical stock, and no other, should pass to the legatee. In *Ludlam's Estate*, 13 Pa. St. 188, cited by the defendant's counsel, the testator devised to his nephew "one thousand dollars of the United States six per cent. stock or loan of the year 1812, standing in my name on the books of the loan-office, Pennsylvania, as per certificate No. 269." The loan had been paid to the testator in his life-time. The court then held that this was a specific legacy; that it was not a bequest of \$1,000, payable out of the stock held by him, but \$1,000 of stock which stands in his name in the loan-office certificate 269. It is the very thing itself,—the *corpus* of the stock. The same court, in *Armstrong's Appeal*, 63 Pa. St. 312, used the following language:

"A demonstrative legacy is the bequest of a certain sum of money, with the direction that it shall be paid out of a particular fund. It differs from a specific legacy in this: that, if the fund out of which it is payable fails for any cause, it is nevertheless entitled to come on the estate as a general legacy; and it differs from a general legacy in this: that it does not abate in that class, but in the class of specific legacies."

Had the legacy to the plaintiff been restricted to \$2,000 "of my South Ward Loan of Chester," or had the testatrix given \$2,000 of the debt belonging to her on one of the bonds in her possession at the date of her will, particularly describing the bond by number and date, showing that she intended to give to the plaintiff that amount of a specified debt, a different case would have been presented; but, in the absence of any such expressed or implied intention to make this a specific legacy, it must, under the rules established for the construction of similar bequests, be held to be a demonstrative legacy, and payable out of the assets of her estate. *Savile v. Blacket*, 1 P. Wms. 777; *Chaworth v. Beech*, 4 Ves. 565; *Smith v. Fitzgerald*, 3 Ves. & B. 5; *Gillaume v. Adderley*, 15 Ves. 384; *Giddings v. Seward*, 16 N. Y. 365; *Newton v. Stanley*, 28 N. Y. 61; *Norris v. Thomson*, 16 N. J. Eq. 222. See, also, American note to *Ashburner v. Macquire*, 2 White & T. Lead. Cas. 646, and 3 Amer. Dec. 667.

Judgment will be entered for the plaintiff for the sum of \$2,266.66, that amount being the principal of the legacy, with interest from the 1st day of October, 1889, with costs of suit.

UNITED STATES v. REYNOLDS.

(District Court, E. D. South Carolina. January 8, 1892.)

PENSIONS—PROCURING PAYMENT—EXCESSIVE COMPENSATION.

At the instance of an ignorant pensioner, an attorney filled out the vouchers necessary to obtain the first payment, forwarded them to the proper pension agent, received the latter's check, procured the pensioner's indorsement thereto, and drew the money. Held that, although he had no hand in procuring the allowance of the pension, he was still a "person instrumental in prosecuting the claim," within the meaning of Rev. St. U. S. § 5485, which makes it a misdemeanor for such a person to retain a greater compensation than is allowed by the pension laws.

At Law. Indictment of Thomas J. Reynolds for wrongfully withholding pension money. On motion to instruct the jury to return a verdict of not guilty. Denied.

B. A. Hagood, Asst. U. S. Atty.

S. J. Lee, for defendant.

SIMONTON, J. The defendant is indicted under section 5485, Rev. St. U. S. The indictment charges that the defendant, a "person instrumental in prosecuting the claim" of one Jack Danner for pension, wrongfully withheld from him the sum of \$10. Danner was a private

in 83d infantry, United States colored troops. He was put upon the pension rolls 11th August, 1890. His papers were all prepared and his claim established by Mrs. E. A. Crofut, pension attorney at Beaufort, S. C. In June, 1891, blanks were sent to Danner for the purpose of enabling him to obtain his first payment of pension. He took these to the defendant, who is an attorney at law and notary public at Beaufort. The defendant filled them out and took the necessary affidavit, and at the instance of Danner sent the voucher to the pension agent at Knoxville, with directions that Danner's address was to the care of T. J. Reynolds, at Beaufort. The pension agent sent the check to the care of defendant. When it came, he procured the indorsement of the check by Danner, collected the money, and paid Danner its face value, less \$10. Danner is grossly ignorant and illiterate. The defendant says that Danner lent him this money. Danner denies this entirely. A motion is made that the jury be instructed to find defendant not guilty. The position is that the pension claim was prosecuted and established through Mrs. Crofut, as attorney, and, even if Danner's statement be true, defendant was not "a person instrumental in prosecuting a claim for pension." The pensioners deserve and receive at the hands of the government the most careful and tender consideration. Many of them are helpless; often they are ignorant, and exposed to extortion. For this reason congress has enacted laws for protecting them from the rapacity of their agents, not only in the steps necessary for the establishment of their right to be upon the pension rolls, but also in every proceeding which must be taken in order to obtain the installments of their pension. The defendant was instrumental in prosecuting the claim of Danner, within the terms of the section. The case must go to the jury.

LEIB v. ELECTRIC MERCHANDISE Co., et al.

(Circuit Court, N. D. Illinois. January 4, 1892.)

PATENTS FOR INVENTIONS—NOVELTY—ELECTRIC RAIL-CONNECTORS.

Letters patent No. 434,087, issued August 12, 1890, to Charles Leib for an electric rail-connector, consisting of a short metallic wire with each end passing through a bolt or rivet, which is firmly inserted into a hole drilled in the rail, are void for want of novelty over the Gassett & Fisher patent of May, 1880, in which the connecting wire is coiled round the heads of the rivets, instead of passing through them, as well as the Westinghouse patent of July 31, 1883, and the Winton patent of April 14, 1885, in which the ends of the wires are directly inserted in holes in the rails.

In Equity. Bill by Charles Leib against the Electric Merchandise Company and others for infringement of a patent. Bill dismissed.

Phillips Abbott and W. E. Furness, for complainant,

F. W. Parker, for defendants.

BLODGETT, J. This is a bill in equity for an injunction and accounting, by reason of the alleged infringement of patent No. 434,087, granted

August 12, 1890, to Charles Leib, for an "electric rail-connector." The purpose of the device is to secure a more continuous electrical connection between the rails of electric railroads, whereby a more perfect electric circuit is secured. Briefly described, the rail-connector in question consists of a short metallic wire, each end of which is passed through the head of a bolt or rivet, and these rivets firmly inserted in holes drilled into the rails to be connected. The claims of the patent are:

"(1) A rail-connector comprising a rod or wire having pins extending transversely across its ends, the rod passing through the pins, substantially as set forth. (2) A rail-connector comprising a rod or wire having tapering pins extending transversely across its ends, and projecting beyond the rod or wire at all sides thereof, substantially as set forth."

The patentee says in his specification:

"My invention * * * is designed to obviate defects in the methods and devices heretofore employed; and it consists in making terminals or pins which enter the rails integral, or practically so, with the connecting wire or bar which extends from one to the other."

The defenses insisted upon are: (1) Want of patentable novelty; (2) that defendants do not infringe.

The proof in the case seems to establish the proposition that these wire connections between rails of the track of an electric railway are not indispensable to the operation of an electric railway, but that better work by the motors is secured by a wire connection of the rails than by relying solely upon the connection of the rails by the fish-plates; the metallic contact of the fish-plates being liable to become impaired by rust or the loosening consequent upon the vibration or jar of the rails and plates from use.

Upon the question of novelty, the defendants have introduced several prior patents, showing the state of the art prior to the device covered by the patent in question; the proof showing that the complainant first conceived his device, now covered by his patent, in 1889. The earliest device cited by the defendants is what is called "the Bain jumper connection," used to connect telegraph wires as early as 1870, which shows an insulated wire cable passing through the heads of a stud, at each end, and with insulated handles, and these studs, being connected with the telegraph wires to be connected, allow an electric circuit through the wire cable.

The next device in order is the patent of May, 1880, to Gassett & Fisher, in which the inventors say:

"It has been found in practice that the usual chairs or fish-plates do not in dry weather afford sufficiently good metallic continuity to form a good conductor, chiefly on account of the oxidation of the surfaces. To obviate this, elastic contact-pieces have been used, intended to be caused to rub by the deflection of the rails, and thus always afford a contact surface of bright metal. It is known, however, that a conductor composed of many pieces in contact with one another, as a wire spliced, but not soldered at many points, offers more resistance than one of continuous metal similar in all other respects to the first. * * * Our invention consists in punching or drilling holes in the flanges

of adjacent rails at convenient points near, but so as not to interfere with, the rail-joint, and driving into these holes the ends of a wire-connector long enough to reach between them and span the rail-joint, the said connector being provided at its ends with driving-studs a trifle larger in diameter than the holes, and tapering, so that when they are forcibly driven into the holes in the rail they form a perfect and permanent contact therewith, and, on account of the taper, fit so tightly that they cannot be driven out or removed except by a special instrument for drawing them, thus removing from them any scale or loose or tarnished surface, and leaving the surface thereof bright where it comes in contact with the rail, such bright metallic surfaces, forced together, insuring a perfect electric connection. The ends of the wire-connector are coiled around the said driving-studs just under their heads, and the whole end then dipped in molten solder or other suitable metal."

Here we find a device which is, in principle of operation and mechanical construction, exactly like that described in the complainant's patent, except that the ends of the connecting wire are wound around the head of the stud or rivet which is inserted in the rail, instead of being inserted in the head of the rivet, as called for in complainant's patent. The difficulty to be overcome and the end to be attained by such a connection is clearly set forth in this old Gassett & Fisher patent, and the only difference is that, in the old device, the ends of the wire were closely wrapped or coiled around the head of the stud which was driven into the hole in the rail, and the stud and coil dipped in molten solder, so as to insure metallic contact and satisfactory conducting qualities.

The Westinghouse patent of July 31, 1883, shows a wire-connector, one end of which is inserted in each rail to be connected. The only essential difference of construction between this device and that covered by the complainant's and the Gassett & Fisher patent is that the ends of the wire are inserted directly in the rails to be connected, instead of inserting the ends of the wire in a hole in the stud, or coiling the wire tightly around the head of the stud, and driving the stud into the holes drilled in the rails. One of the forms of construction of the complainant's patent, as shown in Fig. 2 of his drawings attached to his patent, was to upset the end of the connecting wire, and swage it up, so as to form on it two pins adapted to be driven into holes in the rails, thereby dispensing with the studs or rivets, and making his connector from one piece of metal. In other words, the connector and the rivets or studs, which entered into the holes drilled in the rails, were integral. I cannot see, if this patentee could construct his device of a single piece of metal, one end driven into the hole in one rail and the other end driven into the hole in the other rail, how it is possible to distinguish the device, either as an invention or as a mechanical structure, from that covered by the Westinghouse patent. Westinghouse took a single wire, bent a short portion of each end at a right angle, and inserted this short right-angled piece in the holes drilled for that purpose in the rails. He does not provide for upsetting or swaging the ends of the wire, but that would be a mere mechanical operation, desirable or not, according to the size of the wire used, or the size of the holes drilled in the rails.

There could be no invention in the mere matter of swaging up or upsetting the ends of the wire in order to form a larger stud, or what takes the place of a stud at the ends of the wire. Then, there is the Winton patent of April 14, 1885, which shows a rail-connector consisting of a wire, the ends of which are firmly driven or pressed into holes drilled or punched in the flanges of the rails to be connected. As Leib does not direct as to what part of the rail the hole is to be drilled in for the purpose of the wire-connector, and leaves the location of the hole for the connector to the choice of the constructor or mechanic, I cannot see wherein this device differs in principle from that covered by the complainant's patent. And the same may be said of the Stitzel & Windel patent of June, 1888, where the device is substantially the same. The proof also shows that the complainant, as early as 1886, made and put in use a rail-connector, which consisted of a metallic wire, each end of which was inserted in a metallic block, and through this block was driven a stud or bolt, to be inserted in the holes in the rails. This metallic block, into which the ends of the wire were inserted, was but a continuation of the wire, and, while it may not have been as durable as that covered by the complainant's patent, it still, in all essential particulars, embodied the principle of the complainant's patent.

I think the proof shows that the complainant's form of construction for a rail-connector, when one is used, is more simple and less expensive than any of the previous forms shown, unless it be that shown by Westinghouse. But the changes which the complainant made are only mechanical changes, and do not introduce any new principle or mode of operation into his connector which was not known in the older art. After Gassett & Fisher had shown their device for making a connector from rail to rail by means of the wire wound round the head of the stud driven into holes drilled into the rail, they would have undoubtedly had the right, in practice, to have fastened their connecting wire to the stud, by inserting it into holes made in the head of the stud, as an equivalent for their coil, because the hole through the head of the stud was but another mode of fastening the wire and the stud in close metallic contact. And the coil which passed around the head of the stud was in all respects the same as the hole made in the head of the stud into which the coil was inserted, so far as the principle of operation was concerned. For these reasons I am forced to the conclusion that the device covered by this patent is not novel, and that this cause should be dismissed for want of novelty in the patent; and the bill will be dismissed for want of equity.

O'BRIEN v. 1,614 BAGS OF GUANO.

(District Court, D. Virginia. June 8, 1882.)

1. SHIPPING—CHARTER-PARTY—CANCELLATION.

A charter-party made November 22d provided for a voyage from Liverpool to Norfolk and back, the vessel to bring over a cargo of guano, "freight free, and all other conditions as per charter-party," the charterers to furnish her at Norfolk with a full cargo of cotton, etc., at 80 shillings per registered ton, which was above the current rate; charter to commence "when the vessel is ready to receive her cargo at the place of lading," and the charterers to have the right of canceling the contract if she failed to arrive at Norfolk by the 16th of February. The vessel, through no fault of her own, failed to arrive until April 4th, which was too late to use the guano that year, and the charterers canceled the contract. *Held*, that the voyage commenced at Liverpool, and the cancellation applied to the part already performed, as well as that remaining; and, as the guano was evidently brought free in consideration of the high return freight expected, the charterers were bound to pay reasonable freight thereon.

2. ADMIRALTY PRACTICE—SET-OFF.

Under a libel on the guano for the freight, the charterers could not claim a set-off for damages caused by the delay, as a set-off is unknown to admiralty except as a credit on the particular transaction which is the subject of the libel.

In Admiralty. Libel by Edward O'Brien against 1,614 bags of guano, for freight thereon. Decree for libellant.

Sharp & Hughes, for libellant.

Walke & Old, for claimant.

HUGHES, J. This is a libel on 1,614 bags, part of a cargo of 1,000 tons, of guano and 287 tons of cotton ties, brought by the ship John Bryce from Liverpool to Norfolk. It was taken out on this residue of cargo while still on the ship, for the sum of \$1,561.83, claimed to be due to the ship for freight on the said cargo. The libel is founded on a charter-party entered into in the city of Norfolk on the 22d of November, 1881, between Lamb & Co., agents of the ship John Bryce, and the Seaboard Cotton Compress Company, of Norfolk, which stipulated for "a voyage from the port of Liverpool, England, to Norfolk, Va., and then direct to Liverpool, England," and which recites that the ship was then lying in the harbor of Liverpool. On the part of the vessel, it provides, among other things, that the ship shall bring 1,000 tons of salt or (and) guano free from Liverpool to Norfolk, to be unloaded at charterers' expense, with charterers' option of 800 tons additional, at 5 shillings per ton. And in adopting, by reference to, the stipulations of a previous charter for another ship of the same owner, (the O'Brien,) it stipulates, in effect, that if the vessel should not arrive at Norfolk by the 16th of February, 1882, and "prepare for entering on this charter," the charterers should have option of canceling the same. No other consequence in the nature of a penalty or forfeiture is provided in the charter for the event of the ship's default in arriving at Norfolk by the 16th of February. There is also a provision that "this charter shall commence when the vessel is ready to receive her cargo at the place of loading, and notice thereof is given" to the charterers or their agent. On the part of the charterers, it is stipulated, among other things, that they will "furnish the said vessel a full and entire cargo of cotton or (and) other lawful

merchandise from Norfolk, and that they will pay thirty shillings per registered ton for freight on the shipment to Liverpool."

It was shown in the evidence that the ship John Bryce had but recently arrived in Liverpool with a cargo when this charter-party was entered into; that, after unloading, she had to be put upon a dry-dock, to repair the copper upon her bottom, which produced delay; that the ship did not set sail from Liverpool until the 18th of January, 1882; that the weather was bad during the voyage, from which cause she was at sea 76 days; and that she did not arrive at Norfolk until the 4th of April, or 57 days after the time fixed in the charter-party for her being in readiness to take on cargo. It was proved that the ordinary time of passage varied from 25 to 50 days, and that in leaving Liverpool, on the 18th of January, she had but 29 days within which to make the voyage to Norfolk. It was not proved or contended that the delay of the ship in reaching Norfolk was owing to fault on her part. It was proved that the ordinary rate of freight from Liverpool to Norfolk was 10 shillings per ton. The ship took on at Liverpool 1,000 tons of guano and 287 tons of cotton ties. The bill of lading for the guano recites that the cargo was to be delivered to the order of the shippers in Liverpool, or their assignees, "they paying freight for the said goods at the rate of freight free, and all other conditions as per charter-party," and is dated at Liverpool on the 7th of January, 1882.

It appears from the evidence that 30 shillings was the maximum freight paid for cotton from Norfolk to Liverpool, and that to vessels chartered while in Liverpool less rates (29 or 28 shillings) had been obtained last fall and winter; that to vessels chartered in Norfolk freights were always less than when chartered in Liverpool; that during last winter as low as 26 shillings had been paid to such vessels; and that after the 16th of February last, the charterers, respondents in this case, had in no case paid to such vessels as much as 30 shillings for freights from Norfolk to Liverpool.

The ship not having arrived at Norfolk by the 16th of February, 1882, the charterers exercised the privilege which they had reserved, and canceled the charter. They made tender of four shillings a ton as freight on the ties, and since the filing of this libel have deposited in the registry of the court the sum of \$279.26 as the net amount admitted to be due on that account, together with the costs of this proceeding which had accrued up to the time of the deposit. The libellant claims at the rate of five shillings per ton for the whole cargo. The respondent claims that, notwithstanding the cancellation of the charter, the libellant is still bound to deliver the guano free of freight. It is conceded that there has been no transfer of the ownership of the cargo since it was shipped, and that it is still the property of the charterers. There is no pretense that there was any fall in the price of guano between the 16th of February and the 4th of April, 1882. It was claimed and proved, however, that the guano arrived too late to be used by the truck farmers in the vicinity of Norfolk on the crops of the present year.

The single question in this case is whether, after canceling the charter

as to the voyage from Norfolk to Liverpool, the charterers can claim that its provision requiring the 1,000 tons of guano from Liverpool to Norfolk to be brought free still binds the ship. It is plain, and will not be contested, that the inducement which led the owner of the ship to bring the guano to Norfolk free was the stipulation of the charterers to pay the high price of 30 shillings per ton for the "full and entire cargo," which the ship was to receive at Norfolk. The charterers, by canceling the charter, deprived the ship of the full cargo and the high freight, for which she came to Norfolk. The inducement which brought the ship here being thus withheld, was she still bound to render, without compensation, the service which she had promised in consideration of the expected cargo and freight? If this was her bargain, then she must stand by her bargain. But there is nothing in the charter-party which expressly, or by implication, settles this question one way or the other. What was the effect, then, of the cancellation of the charter-party? It in terms provided for "a voyage from Liverpool to Norfolk, and thence direct to Liverpool;" treating as an entirety the trip both ways. The charter, in terms, provides that it is to "commence when the vessel is ready to receive her cargo at the place of loading, and notice given the charterers," which, in this case, as 1,287 tons of cargo were first received on board the ship at Liverpool, commenced at Liverpool. In this respect this charter differed from that of the ship O'Brien, to which it refers; which latter, in terms, provided only for a voyage "from Norfolk to Liverpool." The cancellation of the O'Brien's charter, if it had been canceled, might probably with reason have been construed as affecting only the voyage from this port. But the present charter treats, in terms, as one voyage, the round trip from Liverpool back to Liverpool. So that, to cancel it in Norfolk, when it was already nearly half executed, would have a different effect from that which a cancellation might have had in the O'Brien case. This charter-party gave the right to the charterers, in case of the ship's default, to cancel at Norfolk "the charter." It did not give the right to cancel a part of the charter and retain the rest. It did not impose any forfeiture, or penalty, or duty, or service on the ship, for default in arriving at Norfolk by the 16th of February, except alone that it authorized the charterers to cancel the instrument in its entirety. If the parties had intended a further forfeiture or consequence, they ought to have expressed it in the instrument. When parties to an instrument take pains to insert one provision as a result of a default, that fact excludes all implications as to other provisions. The maxim, *expressio unius est exclusio alterius*, is the leading maxim in the construction of all writings, whether contracts, deeds, or statutes. The cancellation of the charter-party was therefore an abrogation of every stipulation it contained, whether in favor of one party to it or the other. The charterers were no longer bound to furnish a cargo, or to pay 30 shillings per ton of freight to the ship; and the ship was no longer bound, *quoad* the charterers, to transport the guano free. The cancellation of the charter gave to the ship the right to claim freight upon the guano on the basis of *quantum meruit*.

Mention was made at bar of the expression employed in the bill of lading, holding out that the guano was shipped "freight free, and all other conditions as per charter-party." If there had been an assignment of the guano by the consignees, and, on its arrival in port, these other *bona fide* owners had claimed it of the ship "freight free," a strong equity might have been presented in behalf of these third persons. But even they were put on their guard by the express reference to the charter in the bill of lading; and even they could not have claimed, in contravention of the charter, release from the freight against the ship herself, however conclusive their claim may have been against the consignees, from whom they had received an assignment of the bill of lading. As against even *bona fide* assignees of the bill of lading, the ship could hold the cargo for the freight, if entitled to hold it against the charterers; for it was but the other day decided by the United States supreme court, in *Pollard v. Vinton*, 105 U. S. 7, that a bill of lading differs essentially from a bill of exchange or promissory note in the hands of a third party. The court said that, notwithstanding a bill of lading "is designed to pass from hand to hand with or without indorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense. It is an instrument of a twofold character, at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel; in the latter, it is a contract to safely carry and deliver." See, also, *Fechtenburg v. The Woodland*, 104 U. S. 180. Therefore, even if there had been no reference on the face of the bill of lading, in this instance, to the charter-party, the transfer of the bill and of the property in the cargo to a third party by the charterers would not have defeated the rights of the ship in the cargo. It could libel the cargo *in rem* for the freight as long as it held custody of it; and only in case it had delivered the cargo to the assignee of the bill of lading, would it have lost the right to libel *in rem*. Even after such delivery it would have had the right to proceed in admiralty by libel *in personam* against the charterers in their character as the charterers in this charter-party.

On the whole case, I think that the libelant is entitled to recover a fair freight for the guano. The evidence shows that that would have been ten shillings per ton. In a spirit of compromise, he claims only five shillings, and that amount will be decreed. Under the charter, the charterers stipulated that the unloading in Norfolk should be at their own expense. Their claim in their answer of the right to deduct this expense is negated by their own stipulation. Aside from this agreement, however, I think a freight of five shillings per ton, net, should be allowed the libelant, and I will so decree.

I hardly need to add that, if the charterers have experienced any loss

from the late arrival of the guano which was brought by this ship, their damages cannot be the subject of a set-off in this proceeding, but must be sued for in another proceeding, if sued for at all. Set-off is a statutory right, unknown to admiralty, except as a credit on the particular transaction which is the subject of the libel.

THE MAJESTIC.

THE NANNIE LAMBERTON.

NELSON v. THE MAJESTIC AND THE NANNIE LAMBERTON.

(Circuit Court of Appeals, Second Circuit. December 14, 1891.)

1. SHIPPING—INJURY BY SWELL FROM STEAM-SHIP.

An ocean steam-ship, passing up New York bay, when near Bedloe's island overtook and passed a tug with a heavily laden canal-boat lashed on either side. A displacement wave produced by the steam-ship, three feet or more high, struck the tug, and threw her with such force against one of her tows as to break in the side of the tow. The steam-ship's officers testified that she passed the tug half a mile to the westward, and that her speed had been 11 or 12 knots an hour, but was reduced to 7 knots at a point below Bedloe's island. The weather was fine, and the bay smooth, and there was nothing to render navigation of the bay by the tug and her tows on that day imprudent. *Held*, that the steam-ship was liable for the injuries to the tow, and that it was no defense that her displacement waves did not render navigation in the bay more perilous for tugs and tows than would a high wind, nor that she was navigating at a speed customarily adopted by vessels of her class. 44 Fed. Rep. 813, affirmed in part.

2. SAME—DUTIES OF OVERTAKEN TUG—TOWAGE.

The tug was not in fault for failure to turn the stern of her tows directly to the wave, she being the overtaken vessel, and her master having the right to assume that the steam-ship would take proper steps to avoid disaster; and this, though the master saw the wave some little time before it struck, as he might reasonably expect a decrease in the wave before it would reach his vessel. 44 Fed. Rep. 813, reversed in part.

In Admiralty.

Appeal from the circuit court of the United States for the southern district of New York. Libel against the steam-ship Majestic and the steam-tug Nannie Lamberton for damage to the canal-boat Emma while in tow of the tug. Decree against the claimants of both vessels. Both appeal. Decree affirmed as to the Majestic, but reversed as to the Nannie Lamberton.

George De Forest Lord, for the Majestic.

Edward D. McCarthy, for the Nannie Lamberton.

Josiah A. Hyland, for libellant.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. By the decree of the district court for the southern district of New York, damages were awarded in favor of the libelants against both claimants, for injuries sustained by the canal-boat

Emma, on June 4, 1890. In the afternoon of that day the Emma was navigating the waters of the upper bay of New York, bound from the Erie Basin, Brooklyn, to Hoboken, N. J. She was lashed to the star-board side of the tug Nannie Lamberton; another boat, the Mildred, being lashed to the tug's port side. The Emma was loaded with a full cargo of grain. She was a good, stanch river boat, and, so far as appears, entirely fit to navigate the upper bay in ordinary weather. It was a clear, pleasant day, with but little wind, and the waters smooth. There was nothing in the situation when her voyage began to call for any different method of towing, as by a hawser, or to render it imprudent for such a craft to venture forth. The tug and tows had reached a point beyond the northerly line of Buttermilk channel, a little to the north-east of the bell-buoy, off Governor's island, when they were struck by a displacement wave from the steamer Majestic. The wave was encountered broad-side, or nearly so. It threw the tug against the side of the Emma with such force that the side of the latter, a little aft of amid-ships, was broken in, and she thereby sustained the injuries complained of. The Majestic is 582 feet long, 57 feet beam, drawing on this occasion 20 feet forward, and 22 to 23 feet aft. She has twin screws, and is one of the fastest boats that travel on the ocean. She was bound in from sea for pier 39, North river, and passed the tug and tows to the westward. The witnesses for the libellant and the tug testified that she passed them at a distance of 700 to 800 feet. The officers of the Majestic fix the distance at half a mile, or more, but this is an inference from their recollection as to the steamer's usual course. None of them saw the tug and tows either before, at, or immediately after collision. The witnesses for the libellant and the tug estimate the speed of the steamer at from 12 to 15 miles an hour. The officers of the Majestic testified that her speed from quarantine up was 11 to 12 knots, until at a point below Bedloe's or Liberty island it was reduced to 7 knots. The swells which struck the tug and tow were three feet or more high. The first of them rolled on to the deck of the Emma, which was that distance above the water. It was, according to the master of the tug, who has navigated the upper bay for four years, a bigger swell than is usually thrown out by steamers; a fact he attributes to the effect of a double screw, though the steamer's officers say there is no difference between the waves generated by double and by single screws. The captain of the Majestic testified that, at the lower rate of speed, her displacement wave would have no effect whatever at the distance of 1,000 feet. The fact that the tug and tows were in shallow water no doubt increased the swells, but it seems probable that the wave which did the damage was thrown off while at the higher rate of speed, and that the steamer passed considerably nearer than half a mile. Be that as it may, however, it is plain, upon the proof, that a wave was thrown up by the steamer, which made navigation unsafe for the canal-boat, although she was, so far as appears, a proper craft to navigate the waters of the upper bay, and was attached to her tug in a proper way for towing with the natural conditions of wind and waves, such as they were that day. If, when moving

at seven knots an hour, and the distance of half a mile, the *Majestic* produces such results, then there is something in her size or build which makes it necessary for her officers to be watchful of craft they pass at that distance, as well as of those in the immediate vicinity, and to regulate her motions accordingly. It will not do to say that the swell she throws is no higher than such as are produced by a high wind in these waters. A high wind had not, on this particular day, rendered the bay unsafe for river craft. They were entitled to navigate there, and the proposition cannot be maintained that harbor waters may be put at all times and at all seasons in as perilous a condition for smaller craft, by the rapid movements of large ocean steamers, as they are occasionally by the prevalence of a gale of wind. Such waters are not to be appropriated to the exclusive use of any one class of vessels. We do not mean to hold that ocean steamers are to accommodate their movements to craft unfit to navigate the bay, either from inherent weakness, or overloading, or improper handling, or which are carelessly navigated. But of none of these is there any proof here, and, in the absence of such proof, we do hold that craft such as the libellant's have the right to navigate there without anticipation of any abnormal dangerous condition, produced solely by the wish of the owners of exceptionally large craft to run them at such a rate of speed as will insure the quickest passage. To hold otherwise would be virtually to exclude smaller vessels, engaged in a legitimate commerce, from navigating the same waters. Nor will it do to say that the *Majestic* was navigating in the way and at the speed customarily adopted by vessels of her class. If such way and speed cause injury to a seaworthy craft of a kind properly in these waters, and properly handled, the custom will have to be modified, or the privilege paid for. Nor is there anything in the suggestion that the swells of the steamer could have been safely met, end on, and therefore were not dangerous, for she was an overtaking vessel, and threw her swells upon the tug and tows from a quarter whence they were not bound to look for danger.

The district court held the tug also in fault because she did not turn the tow's stern directly to the wave. In this opinion we cannot concur. She was not bound to look out for danger from an overtaking vessel. As the overtaken vessel, she was to keep her course. No regulation required signals from her. It was broad daylight, and she was plainly visible. Her master did, in fact, see the *Majestic* some time before she came abreast of the tow, but he was entitled to assume that she would take proper measures to avoid disaster; and, though he saw the wave some little time before it struck, he might reasonably have anticipated that it would decrease in traversing the space it had to travel. We are unwilling to lay it down as a rule of navigation that tugs, toying in harbors, must always turn the sterns of their tows to the swells cast by overtaking steamers.

The decree is reversed, and the case remanded, with instructions to enter a decree against the *Majestic* and her stipulators for the libellant, for the full amount of her damages, with interest from the date of the

report of the commissioner in the district court, and for her costs in the district court, and for the owner of the Nannie Lamberton for costs of this court.

THE JOHANNE.¹

LORENTZEN v. THE JOHANNE.

(District Court, S. D. New York. November 30, 1891.)

CARRIERS—NEGLIGENT STOWAGE—CASES OF HOUSEHOLD GOODS.

Cases of household goods, shipped under a bill of lading which contained the exception, "not accountable for damage and breakage," were stowed in the lower hold of the brig J., and were delivered damaged by water taken on by the ship in heavy weather. The brig was old, and her construction was such as to necessitate more than usual care in the stowage of merchandise liable to be damaged by water. The master had notice that the cases contained household goods. *Held*, that it was negligence to stow such goods near the bilge in the hold of a vessel of such construction and age, and the ship was liable for the damage.

In Admiralty. Suit to recover for damage to cargo.

J. P. Kirlin, for libellant.

Wing, Shoudy & Putnam, for claimants.

BROWN, J. Sixteen cases of household goods, shipped at Bremen on the brig Johanne, were found, on discharge at New York, to have been damaged by water. The bill of lading recited that the cases were received in good order and condition, and, besides peril of the seas, contained the exception, "not accountable for damage or breakage." They were not broken, but had been in water so much that permanent water-marks were left upon the sides of some of the cases, and the contents, consisting of furniture and books, were water-stained. The vessel was old, and her bottom had not been generally overhauled for four years. She encountered two severe storms on the passage. In the face of the evidence submitted, I cannot find that she was generally unseaworthy; but she was certainly liable to incur more than usual leakage, and her great breadth, of 35 feet, for her size, also required more than usual care in the stowage of any merchandise liable to be damaged by water. The cases of furniture were not stowed between-decks, but in the lower hold, on the starboard side of the ship, on top of about five feet of ore. Upon the testimony of the officers, I must assume that the damage to the cases arose from accumulations of water in the hold during the heavy leakage of the ship in the storms which she encountered, and in the list which she had while sailing for long periods on the port tack, during which the cases were more or less in water. The bill of lading shows that the master had notice that the contents of the cases were household goods. In my judgment, he was not justified in stowing such cases in the lower

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

hold and on the side of a brig of such construction and age as this brig; reasonable caution required that he should stow it either between-decks, or, if in the hold, in the center of the ship, where it would not be subjected to water damage, through leaks which such a ship was specially liable to incur. The ship is therefore liable. *The Hadji*, 20 Fed. Rep. 875, 18 Fed. Rep. 459. Decree for libelant, with costs, and an order of reference to compute the amount, if the same be not agreed upon.

THE WEATHERBY.¹

SPRECKELS v. THE WEATHERBY.

(District Court, E. D. Pennsylvania. December 9, 1891.)

GENERAL AVERAGE—ADJUSTMENT—PAYMENT.

A cargo of sugar damaged by a collision was sold in Germany, and the proceeds received by the owners of the vessel, and subsequently paid over to the cargo owner, less a portion retained to cover average charges; the rate of exchange calculated being the rate at the time of the payment by the vessel owner to the cargo owner. After paying the average charges, the vessel owner claimed that he should be allowed the difference between the amount in American money which the amount of English money received would have produced at time of receipt of same by him and the amount of American money actually accounted for. *Held*, as the cargo owner was entitled to this amount when received by the vessel owner, the rate of exchange at that time was that by which the amount of American money due the cargo owner should be determined, the delay being compensated for by interest.

In Admiralty.

Petition by libelant for order on respondent to pay over remainder of money left in his hands after deduction of average charges. Answer of respondent, and cross-petition by respondent to restate account. A cargo of sugar, shipped by Claus Spreckels on the steam-ship *Weatherby*, was damaged by collision; and the proceeds of the sale of the cargo, which was sold in Germany, was remitted to the vessel owner in England on June 15, 1890, and was retained by him until October, 1890, when, in pursuance of a decree of court, the sum in hand was declared to be \$51,842, which, less a sum of \$15,000, retained to cover average charges, was paid over to Spreckels. After adjustment Spreckels claimed \$7,375.46, the difference between the average charges and the \$15,000 retained, together with interest on the amount retained. The vessel owner then moved to restate his account so as to account only for so many dollars as the amount of pounds which came into his hands would have produced on June 15, 1890, at the rate of exchange current on June 15, 1890.

John G. Johnson and Morton P. Henry, for libelant.

Curtis Tilton and John F. Lewis, for respondent.

BUTLER, J. On the question raised by the petition and answer my judgment is with the respondent. On receiving the proceeds of the sugar

¹ Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

sold it was the respondent's duty to transmit its value in American money. His failure to do so rendered him liable to suit for the amount with interest for the delay. His liability could neither be increased nor diminished by the subsequent variation in the rate of exchange. The libelant's entire loss was the detention of the sum he should have received. When it was paid, with interest for the detention, he is made whole. There is nothing in the relation of the parties to affect the result. The respondent was not guilty of fraud or breach of trust, in the technical sense; and the doctrine applied in *Reese v. Bank*, 31 Pa. St. 78; *Musgrave v. Beckendorff*, 53 Pa. St. 310; *North v. Phillips*, 89 Pa. St. 250; and other cases of like character, is, consequently, not applicable here. The error into which the adjusters fell, and led the parties,—by means of which the sum due was stated in the interlocutory order of October 31, 1890, as \$51,842, instead of \$51,343.86, may be corrected in the final settlement, now being made. The order does not stand in the way of such corrections. If the parties agree upon the amount still due (in this view of the libelant's rights) a decree may be prepared accordingly; otherwise the case must go to a commissioner. See adjuster's certificate annexed hereto:

"State of New York, City and County of New York—ss.: Stephen Loines, being duly affirmed, deposes and says as follows: That he is a member of the firm of Wrecks & Loines, average adjusters in New York aforesaid, and that on or about December 31, 1890, his said firm completed and issued an adjustment of general averages and special charges on cargo in the case of the British steam-ship *Weatherby*, Harrison, master, while on a voyage from Hamburg, April, 1890, for Philadelphia, in which statement, acting upon an erroneous impression of the facts, the net proceeds of cargo sold at Hamburg was stated as being \$51,842, whereas the amount should have been stated as \$51,343.86, the latter sum being the equivalent at the rate of exchange current on or about June 15th, 1890, the day of the date upon which the owner of the steam-ship *Weatherby* should have transferred the amount received by him in England as the proceeds of the sale of such cargo (say £10,588-10-11) to the cargo owner in Philadelphia, or say at the rate of exchange of \$4,849.

"STEPHEN LOINES.

"State of New York, City and County of New York. This twenty-third day of November, 1891, before me personally appeared Stephen Loines, to me known, and known to me to be the individual described in and who executed the foregoing document, and he acknowledged that he executed the same for the purposes therein mentioned. In testimony whereof I have hereunto set my hand and affixed my seal of office in the city of New York the day and year last above written.

W. D. DESPARD, Notary Public."

DAMORA v. CRAIG et al.¹

(District Court, E. D. Pennsylvania. November 10, 1891.)

1. CHARTERERS' AGENTS—LIABILITY FOR FREIGHT.

Brokers who have no connection with a cargo, except as brokers to sell same, collect the amounts due, and pay the freight, are not personally liable for the freight.

2. DUTY OF MASTER—COLLECTION OF FREIGHT.

It is the duty of a master who has signed, under the provision of a charter, bills of lading, the freight on which amounted to a greater amount than the charter freight, to accept the freight due under the charter-party, when tendered, and to authorize the agents of the charterer to collect the freight on the bills of lading.

In Admiralty.

Libel by Baldasare Damora, master of the bark *Cuomo Primo*, against John F. Craig and James Craig, trading as John F. Craig & Co. The vessel was chartered to proceed to St. Johns Antigua, and take in a cargo of sugar; the vessel to be consigned to charterers' agents at port of discharge, and, being loaded, to proceed to Delaware breakwater for orders. Master to sign bills of lading at any rate of freight required without prejudice to this charter, but at not less rates than certain rates mentioned. The vessel arrived at the Breakwater, and received orders from Watson & Farr, the charterers' agents, to Philadelphia. The respondents, John F. Craig & Co., effected a sale of the whole cargo, as sugar brokers, to Spreckels & Co., by order of said Watson & Farr, and of the other consignees; and, as agents, paid to the master's agent \$1,000 on account of charter freight, which, with advances made to the master at Antigua, including insurance, left a balance due under the charter of \$298.87, for which a bill was presented by the master's agent. Respondents were directed to pay the amount of charter freight appearing by this bill, requesting the master to authorize Watson & Farr to collect the bill of lading freights, which belonged to the charterers. The captain refused to do so. Watson & Farr found that consignees of the rest of the cargo were willing to settle the bill of lading freights with them without such authorization, and directed respondents to pay the balance of the freight as per bill rendered, which said master's agent refused to accept, and this suit was brought for the full amount of the bill of lading freight. Respondents stated that they were authorized and directed by Messrs. Watson & Farr to tender the charter freight due to the vessel.

John Q. Lane, for libellant.

Morton P. Henry, for respondents.

BUTLER, J. It seems quite clear that the respondents are not liable. The cargo was shipped under a charter, between the vessel and Bennett & Co. Watson & Farr, were the latter's agents; they assumed charge of the cargo on its arrival at the Delaware breakwater, and ordered its delivery to Mr. Spreckels, at Philadelphia, to whom the respondents

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

had sold it, as brokers for Watson & Farr. The respondents had no connection with it except as such brokers. Watson & Farr authorized them to sell, and pay freight, on their account. The suit against them cannot, therefore, be sustained. In view of what has been submitted it is proper to say that the master's position respecting the bills of lading and collection of freight under them—beyond the sum named in the charter—is erroneous. He should have accepted the balance due under the charter, as tendered, and surrendered the bills. That Watson & Farr were the charterers' agents, is clear, and the evidence justifies a conclusion that the master knew it. When he reached the breakwater he took their orders and acted upon them. His subsequent conduct is difficult to understand. As the respondents (for Watson & Farr) have tendered, and now offer to pay into court, the balance due under the charter—\$298.87—and both parties desire the business closed with the disposition of this case, a decree may be entered for this sum—\$298.87—with costs, to the respondents.

THE BAY OF NAPLES *et al.*

HALL *et al.* v. THE BAY OF NAPLES *et al.*

(Circuit Court of Appeals, Second Circuit. December 14, 1891.)

1. AGE—DISCRETION OF TRIAL COURT—REVIEW.

Although the amount of salvage rests in the discretion of the court awarding it, an appellate court may reduce the award, if in making it there was a clear and palpable mistake, or violation of just principles, or a departure from the path of authority.

2. SAME—EXCESSIVE AWARD—EVIDENCE.

A vessel at anchor in New York harbor, laden with petroleum in wooden cases, took fire, and, but for the prompt services of tugs which came to her assistance, would have been totally destroyed in a few moments. The saving to the owners was ascertained to be \$81,400, and \$20,000 was awarded the tugs as salvage. The vessel was of iron, and iron rigged. The salvors encountered no peril to person or property, and the extinction of the fire required no extraordinary exertion on their part. *Held*, that the award of salvage was excessive, and should be reduced to \$12,000.

44 Fed. Rep. 90, reversed.

Appeal from the circuit court of the United States for the eastern district of New York.

In Admiralty. Libel by John Hall and others against the ship Bay of Naples for salvage. Decree for libelants for \$20,000, which was affirmed *pro forma*, on appeal to the circuit court. From the decree of the circuit court the claimant appeals. Reversed.

Wilhelmus Mynderse, for appellant.

Edward G. Benedict, for the tug Charm.

De Lagnel Berier, for the steam-boat John Sylvester.

Charles C. Burlingham, for the tugs Leader, Indian, and Talisman.

Joseph F. Mosher, for the tugs Geo. L. Garlick, M. Moran, and John T. Pratt, libelants and appellees.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. This cause comes here on an appeal from an affirmance *pro forma*, by the circuit court, of a decree made by the district court of the eastern district of New York, awarding salvage to the amount of \$20,000, with costs. Shortly before midnight of September 2, 1889, fire broke out in the cargo of the ship Bay of Naples, in the between-decks, near the fore-hatch. She was lying at anchor below Bedloe's island. Her cargo was refined petroleum, of 150 deg. fire test, packed in 55,600 wooden cases, each containing 2 tin cans of 5 gallons each. A little after midnight, the tug M. Moran, then bound to sea with a vessel in tow, discerned the fire, hastened to the spot, and was asked to give assistance, to which request she promptly responded. Subsequently, and at different times, the ferry-boat John Sylvester, other tug-boats, and, finally, the police-boat Patrol, rendered service in extinguishing the fire. The services consisted of throwing water, handling the hose at the fore-hatch, and towing the Bay of Naples from her anchorage, in deep water, to the flats at Governor's island, where she was beached. The fire was substantially extinguished about 5:30 A. M., and all services were then discontinued. Further details of the situation and of the work done will be found in the opinion of the district court, (44 Fed. Rep. 90,) which correctly sets forth the material facts. The saving to the owners was \$81,400, and the aggregate award was \$20,000, about 25 per cent. The claimant has appealed, contending that the awards are grossly in excess of a fair remuneration as salvage for the services rendered.

Appellate courts rarely reduce salvage awards, unless there has been some violation of just principles, or some clear and palpable mistake. They are reluctant to disturb such award, solely on the ground that the subordinate court gave too large a sum, unless they are clearly satisfied that the court below made an exorbitant estimate of the services. Such is the rule in the supreme court, which, even before the passage of the act of February 16, 1875, limiting its authority to revise a decree in admiralty to questions of law, was always extremely loath to interfere with the amounts awarded, after due examination of the case by two subordinate tribunals; and circuit courts, appreciating the fact that different judges, even when possessing equally enlightened and sound judgments, would rarely form precisely the same estimate, have discouraged appeals, which sought only to substitute the discretion of a circuit judge for that of the district judge. *The Connemara*, 108 U. S. 360, 2 Sup. Ct. Rep. 754; *The Camanche*, 8 Wall. 448; *Rowe v. The Brig*, (STORY, J.) 1 Mason, 372. But it is equally true that, when the law gives a party a right to appeal, he has the right to demand the conscientious judgment of the appellate court on every question arising in the case, and the allowance of salvage originally decreed has, in many cases, been increased or diminished in the appellate court, even where it did not violate any of the just principles which should regulate the subject, but was unreasonably excessive or inadequate. *Post v. Jones*, 19 How. 161. Although the amount to be awarded as salvage rests, as it is said, in the discretion

of the court awarding it, appellate courts will look to see if that discretion has been exercised by the court of first instance in the spirit of those decisions which higher tribunals have recognized and enforced, and will readjust the amount if the decree below does not follow in the path of authority, even though no principle has been violated or mistake made. Instances of such review are found in *Rowe v. The Brig*, 1 Mason, 372, (STORY, J.;) *The Suliste*, 5 Fed. Rep. 99, (BRADLEY, C. J.;) *The Blaireau*, 2 Cranch, 240, (MARSHALL, C. J.;) *The Connemara*, 108 U. S. 352, 2 Sup. Ct. Rep. 754, when the circuit court reduced the amount from 8 to 6 per cent.

The circumstances which are to be taken into consideration in determining the compensation to be made for salvage services are too well known to call for restatement or discussion. The district judge found several of them prominent, in this case, to a marked degree. The facts which operated to induce the making of so large an award are recited in his opinion. The ship and cargo were in imminent danger of total destruction. They were, it is true, in the harbor of New York, but the ship lay where the fire-boats of the corporations of New York and Brooklyn would not go,—being at anchor, not at a dock,—and the fire broke out at a time when tugs generally are laid up, and scarcely a vessel about except a few ferry-boats. With fire in such a cargo it was a question of minutes; a brief delay would have given it such headway as would have put it beyond control. The captain himself, even after the first tugs and the ferry-boat had arrived and got to work, expressed the opinion that his ship could not be saved. The tugs were provided with powerful pumps, were well fitted for the work they undertook, gave their services voluntarily, with great promptness, and were eminently successful, only 283 cases receiving any damage, and the actual loss of oil being only 72 cases. The presence of the police-boat Patrol did not affect the salvage, because, although the fire was still burning when she arrived, it was under control, and certain to be extinguished by the tugs; she only hastened the end.

The evidence fully sustains these conclusions of the district judge, and the service was undoubtedly highly meritorious, and entitled to a liberal reward. On the other hand, the service in question was rendered without exposure or peril to person or property. The Bay of Naples was an iron vessel, with iron masts up to the top-mast heads, and all her rigging was wire. The fire was in the top tiers of cases between decks, and, though the flames occasionally rose up above the hatch, the crews of the tugs and of the ship were able at all times to stand by the fore-hatch and play down into the hold. There was no personal peril encountered by the salvors nor any extraordinary exertion on their part. The district judge so found, and the libelants, upon the argument, conceded such to be the fact. The extent and danger of the services performed, and the risk to which the vessels and other property employed in the service were exposed, are always important ingredients in a salvage service. A somewhat exhaustive examination of the decisions of the federal courts, bearing upon the question of amount of salv-

age, shows that, except in the case of derelicts, where the old moiety rule, though no longer followed, has yet left traces of its influence, and in a few other cases, where there were exceptional circumstances, no such large percentage on so large a net value saved, the property being in like straits, has been awarded, when there has been neither risk of life or property, nor extraordinary exertion in saving it. The case relied on chiefly by the claimant is *The Lone Star*, 34 Fed. Rep. 807, a decision by the same district judge who decided the case at bar, (affirmed in the circuit court, 35 Fed. Rep. 793.) In that case 22 per cent. to 30 per cent. was awarded, but the service rendered in moving the vessel, "enveloped in flames," from the slip, was attended with danger, there being such risk of fire that several tugs applied to by the superintendent to go into the slip refused to do so; and the subsequent service in throwing water upon the steamer, which "was burning furiously," involved some danger to the vessels engaged in the performance, with hard labor and exposure to a north-west gale in freezing weather. The case at bar bears a strong analogy to that of *The Blackwall*, 10 Wall. 1, where an award of \$10,000 for saving property to the amount of \$100,000 was approved by the circuit court and by the supreme court, and to that of *The Avoca*, 39 Fed. Rep. 567, where \$5,000 was awarded on \$70,000 saved.

Upon all the facts we are of the opinion that the amount of salvage awarded by the district court is so much in excess of the usual rate for services of like character, rendered under similar circumstances, as to call for a material reduction, and think that \$12,000 is a liberal allowance. The evidence shows that the ferry-boat *Sylvester* was, for a time, unreasonably obstructive to the police-boat *Patrol*, preventing it from bringing its powerful pumps into service for nearly half an hour. The award to her owners and crew should, for that reason, be reduced one-third. The decree of the circuit court is reversed, and the cause remitted to that court for further proceedings, in accordance with the views above expressed. Costs of this appeal to the appellant.

DUMPER SCOW No. 11.¹

LOVE *et al.* v. DUMPER SCOW No. 11.

(District Court, E. D. New York. November 20, 1891.)

SALVAGE—EVIDENCE—PREPONDERANCE OF PROOF.

Libelants produced two witnesses, themselves libelants, from their tug *R.*, who asserted that after a certain scow, which had been in tow of the tug *T.*, had sprung a leak and sunk, the *R.* had rendered salvage services to her, by pushing her further on the shore and notifying her owners. Their story was flatly contradicted by the witnesses from the tug *T.*, who asserted that, after the scow was left by the *T.*,

¹Reported by Edward G. Benedict, Esq., of the New York bar.

she was never moved by any vessel. *Held*, on this conflict of testimony, that the libelants had failed to prove their case by preponderance of evidence, and the libel should be dismissed.

In Admiralty. Suit to recover salvage compensation.

Wing, Shoudy & Putnam, for libelants.

Goodrich, Deady & Goodrich, for claimant.

BENEDICT, J. This is an action by the owners and crew of the steam-tug Chas. Runyon to recover salvage. Its decision turns upon a question of fact not ordinarily presented in actions of this character. The circumstances are as follows: A dumper scow, while in tow of the tug Talisman, sprung a leak, and sank off Coney island, in the lower bay. After an ineffectual effort by the Talisman to get the scow afloat, she was left by the Talisman where she had grounded. On the next day, or the day thereafter, a derrick was sent down by the owners of the scow to raise her. This derrick was towed down by the tug Chas. Runyon, and by the same tug the derrick, with the scow in slings, was towed up to New York city. For this last service of towing the derrick down, and the derrick and scow to the city, the Runyon was paid. She now claims to have rendered other services prior to the time of towing down the derrick, which entitle her to salvage. The assertion is that on the day after the day when the scow sank, while the tug Runyon was proceeding from Barren island to New York, the scow was observed by those on board her, abandoned; that they proceeded to her, and, finding her afloat, put a hawser upon her, and towed her a mile and a half towards the iron pier, and until she fetched up on the bottom; that, in order to prevent her from floating off again, the Runyon, by pushing against her, shoved her still more aground, and then left her, and proceeded to the city, and there notified her owners of her situation; that about 6 o'clock in the evening of the same day the Runyon went down to the scow again, and, by hooking an anchor on her, succeeded in pulling her somewhere near a quarter of a mile further up on the shore, where she was left fast on the ground, and there remained until raised by the derrick. These services, asserted to have been rendered by the Runyon prior to the arrival of the derrick, and subsequent to the time the scow grounded, are testified to by two witnesses from the Runyon, who are themselves libelants. The claimants produced two witnesses from the Talisman, who were on board the Talisman at the time the scow was sunk, and who assert that the account given by the master and the deck-hand of the Runyon, in regard to any services rendered on the Runyon between the time when the scow was left by the Talisman and the time when she was taken hold of by the derrick sent down by the owners, is wholly false. They assert in positive terms that the scow was never moved by the Runyon or any other vessel between the time when she was left by the Talisman and the time when she was taken hold of by the derrick; that the scow when left by the Talisman was so fast aground that the Talisman, after strenuous efforts, was unable to move her, and that it would not be possible for the Runyon (being of less power than the

Talisman) to move her at all; that it was not possible for the scow to float, for the reason that she was in a sinking condition, and that she in fact sank to the bottom as soon as the chains of the derrick were loosed. Furthermore, those witnesses say that the position where the scow was left by them was carefully observed by them at the time, that ranges were taken, and that they saw the scow when the derrick raised her, and she was then in the same position where she had been left by the Talisman. In this conflict of evidence, the general rule that the libellant, in order to succeed, must prove his case by a preponderance of evidence, is to be applied. Here there is no preponderance of evidence in favor of the libelants, and the libel must therefore be dismissed, with costs.

THE MARIE ANNE.

(District Court, E. D. Virginia. February 10, 1883.)

SALVAGE—TOWAGE SERVICES BY OCEAN STEAMER—YELLOW FEVER—COMPENSATION.

An ocean steamer worth \$150,000, with a valuable cargo, and about 50 men, as crew and passengers, while running on schedule time from New York to Cartagena and other Caribbean ports, encountered a brig, in a practically helpless condition, about 130 miles off Cape Henry. Only three men were on the brig, the captain and the rest of the crew having died of yellow fever. It being considered unsafe to put men aboard her, the brig was towed into Hampton Roads, during a high and dangerous wind, the steamer deviating from her course about three days for that purpose. The brig and cargo were appraised at \$7,845 as the auction value in Norfolk, which was much below their commercial value. *Held*, that \$2,750 should be awarded as salvage in addition to the expenses incurred by the deviation.

In Admiralty. Libel for salvage services performed by the steamer Bellver and crew, in towing the brigantine Marie Anne into Hampton Roads. Decree for libelants.

The other facts fully appear in the following statement by HUGHES, J.: The steamer Bellver, Antonio Planas, master, left New York on the 18th of October, 1882, for Limon, Cartagena, and other ports on the Caribbean sea. At 6 o'clock on the morning of the 20th, she saw the Marie Anne, a French brigantine, showing signals of distress, and went to her. Most of the crew of the Bellver were Spanish, but Rossello, the first mate, spoke French. At the direction of the captain, Rossello spoke to those on board the Marie Anne in their own language. He asked them what they wanted. They replied, "We want to be saved." He asked if their captain was on board. They replied, he was dead. He asked if they had any navigator. They replied, "None," adding, "We are but three;" all the rest of the crew and the captain were dead. They requested to be taken on board the Bellver. When denied, they requested that their vessel and themselves should be taken into port. Their captain and the rest of their crew had died of yellow fever. The captain of the Bellver held a conference with his officers and passengers, and it was decided to tow them into port. They were then about 130 miles off the capes of the Chesapeake. The Bellver had on board a crew of 40 men, 7

cabin passengers, and probably other passengers. She had on a very valuable cargo, paying \$5,000 in freight.

The brigantine had left San Domingo on the 16th of September, 1882, bound for Havre. She was a vessel of 222 tons. After having gone 300 leagues in the Atlantic, on her voyage, she had, on the 6th of October, changed her course, and had been making for Delaware bay ever since. The three men found on her, when met by the Bellver, had neither of them had the yellow fever. According to the testimony of the libellants, and of the health-officer at Norfolk, they were feeble, emaciated, and more or less ill. They had all, from necessity, remained on deck night and day nearly the whole of the time since leaving San Domingo. When hailed by the Bellver the principal sails of the brigantine were up, but were most of them torn, and were badly trimmed. The vessel and sails indicated the possible condition of the crew, though the ship herself was in a seaworthy and sound condition. They had a short time before hailing the Bellver hailed a sail-vessel, but had received no relief. The hawser with which the brigantine was first towed by the Bellver was one of her own, and soon broke under the growing power of the wind, which, already stiff, blew harder and harder for 15 to 20 hours afterwards. When the first hawser broke, two hawsers were used, both belonging to the brigantine; but about 11 o'clock of the night of the 20th the gale having become quite stiff and the sea quite heavy, both these hawsers broke. Afterwards, the Bellver used her own hawser in bringing the brigantine into Hampton Roads. During the night of the 20th, when the two ships had got separated, the Bellver kept near the Marie Anne until morning. The three men on board the latter, having taken heart since their rescue, managed their vessel very well during the night and the period of separation. The brigantine was brought into Hampton Roads on the 21st, and was anchored off Sewell's point. In a few days afterwards she was taken up to the quarantine station near Craney island. The health-officer of Norfolk, Dr. Galt, found two of the men feeble and sick, and anxious to be taken from their vessel to the city hospital; but he was unable to gratify them in this respect because of their vessel being infected with yellow fever. They seemed very anxious to leave her.

The testimony of the witnesses examined respectively for the steamer and the brigantine is conflicting as to the helplessness of the crew of the latter when she was hailed by the steamer, and as to the capacity of her crew to navigate their vessel. The crew of the brigantine were not examined until a month after their rescue, when they had recovered their health, strength, and courage. When first seen by Dr. Galt, the health-officer of Norfolk, they and their vessel were in condition corresponding to the representations of the witnesses examined for the Bellver. On arriving at Hampton Roads, and when the Bellver was about to leave them, they had signed for Capt. Planas, at his request, a testimonial in French, of which the following is a translation:

"We, the seamen of the brigantine Marie Anne, of St. Vaast, on a voyage from Saint Domingo to ———, certify that on the morning of the 20th of October, at six o'clock, we desoried a steamer, and hoisted our flag, requesting

salvage assistance. [‘sauvetage.’] and said vessel, on seeing our signal, bore down upon us, and asked what we wanted, to which we replied, to take us aboard or to conduct us to port, since we had no navigator aboard, and did not know how to save ourselves and our vessel. However, we sign this certificate at the request of the captain of the said Spanish steamer Bellver, in the port of —, where we arrived, conducted by this vessel, on the 22d day of October, 1882.

“The seamen of the brigantine,
COUESPEL.
RASCHIERI.

} The second of the Marie Anne, LE
MARCHAND.”

In their testimony, given a month afterwards, in Norfolk, Le Marchand and Couespel, admitting that they had read and understood this testimonial before signing it, yet denied the truth of its statements. The tenor of their testimony is that they did not need assistance when taken in tow by the Bellver; that they could have easily brought their vessel into port; that at no time had they any thought of leaving her; that they were never in need of salvage service; that their vessel, its sails and rigging, were in good and effective condition; that they themselves were well and strong and hopeful; that Le Marchand was an experienced navigator, possessing a diploma as second mate from the college of St. Malo; that he had taken all necessary observations while the brigantine was at sea, and knew where his vessel was when rescued; and that they in fact, in hoisting a flag of distress and hailing the Bellver, had no purpose of asking for help and for salvage service, but wanted and asked for nothing but “onions, chickens, and vegetables.” The alleged diploma of Le Marchand was not produced, though called for. Their testimony proves far too much in this direction; and I find myself unable to credit it on the two essential points,—whether their vessel needed salvage service, and whether they asked it of the Bellver. The testimony of the libelants and of circumstances is positive to the effect that the vessel was without a navigator; that her crew had no intelligent conception of where they were; that a heavy gale came on soon after she was taken in tow, in which she was likely to have been driven on the dangerous shore north and south of Cape Henry; that they earnestly asked to be taken on board the Bellver; that they required salvage service for themselves and vessel; and that they, owing to their own feeble condition, physical and mental, were in exigent need of it. The brigantine was insured in France for 40,000 francs, (\$8,000.) She was appraised here under orders of this court at \$4,000 as her value in Norfolk. Her cargo, which consisted of mahogany and other woods and some dried fruits, was assessed as worth \$3,645.22 in Norfolk. A statement by items of the expenses of the Bellver incurred by deviation is filed by her counsel, showing these to have been \$1,014.

Butler, Stillman & Hubbard, for libelants.

Sharp & Hughes, for respondents.

HUGHES, J., (*after stating the facts.*) This is admitted to be a case of salvage. An ocean steamer, the Bellver, bound from New York to a port within the tropics, having on board a large crew, a number of pas-

sengers, and a cargo paying a freight of \$5,000, came in sight, on the morning of the 20th October last, of a sail-vessel holding out signals of distress. The steamer went to her relief and found that the vessel, which was the French brigantine Marie Anne, was infected with pestilence; that within a few days past it had lost all except three men of its crew with yellow fever, including its master; that it was floating upon the ocean without chart or navigator; and that it had shortly before been refused relief by another ship; that the three men left on her were practically impotent with long watching, fatigue, and despondency. These men begged to be taken on board the steamer. They demanded that at least their vessel and themselves might be saved, and taken into port. They had sailed from San Domingo, 300 leagues, for Havre, had then changed their course, and had now drifted to within 130 miles of Cape Henry. Counsel for libelants well say that here was a case worse than one of derelict. If it had been merely a ship abandoned and adrift, the master of the Bellver would have been at liberty either to put a crew upon her who might navigate her into port, or to leave her to her fate. But in this extraordinary case his duty as a sea-faring man forbade either of these measures. He had no right to put any of his own men upon a vessel infected with one of the most deadly of diseases, and one peculiarly fatal at sea. He could not abandon to their fate three worn-out, helpless human beings, begging to be saved. Nor could he take these poor people on his own ship, crowded as it was with men, and bound within the tropics, where, if the germ of yellow fever were once planted upon his ship, it would surely fructify in disease, and destruction to his business. I think the master of the Bellver adopted precisely the course imposed upon him by all the circumstances of the situation. In answer to the entreaty of the people on the Marie Anne to be taken on board his own steamer, he did what the authorities of Norfolk did three days afterwards, in answer to their petition to be admitted into the city hospital,—he refused. The protection of many from pestilence is a higher duty than that of gratifying even the moderate desires of a few who are afflicted. His refusal was an act of duty, and not an act of cowardice. The master of the Bellver, taking great care to protect his own vessel from infection, and declining to subject any of his own crew to risk by putting them on board the infected ship, did the only thing he could do with safety to his own vessel,—he towed the Marie Anne into Hampton Roads.

I cannot concur with Judge CURTIS in his opinion intimated in the case of *The Alphonso*, hereafter cited, that a person may safely go upon the deck of a ship infected with yellow fever, if he take care not to go below into the hold. Experience has shown that remaining at night on deck of such a vessel subjects to the contagion as surely as going below decks either by day or night. An historical proof of this fact was given in the instance of *The Ben Franklin*, which was the ill-fated steamer that brought the yellow fever to Norfolk in 1855. This ship, after being, as was thought, thoroughly cleansed and disinfected, and after lying for a while down in the Roads, took on wood from a lighter. Owing to a rainstorm,

which came on late in the afternoon, two laborers from the lighter slept overnight on the deck of the Franklin. This was their only exposure to the epidemic; but they took the fever, and both died, from this single night on the deck of what had been supposed to be a disinfected ship.

By deviating from his course in the manner which has been stated, the master of the Bellver incurred serious risk and cost. His own steamer was very valuable, as was also his cargo. The loss of three days' time to an ocean steamer running on a fixed schedule is always an important matter. Coming into any sort of contact with a vessel infected with yellow fever is most seriously perilous to a steamer plying within the tropics. Bringing a vessel in tow into the capes of the Chesapeake, under a high wind blowing upon the land, is a hazardous adventure to one not regularly navigating these waters. When we consider all these things, we cannot avoid the conclusion that the steamer Bellver subjected herself to serious peril and cost in undertaking this salvage service. As to the Marie Anne, she was found practically derelict. She had reversed her course in mid-ocean, after making a great part of her voyage, and had floated back before the winds for hundreds of miles. She had no chart. No one upon her deck knew where she was, except that it is probable that Le Marchand had an approximate apprehension of the latitude he was in. Her crew were too feeble and too emaciated or despondent even to trim sails. Most of the sails were torn, and all were hanging on the rigging in a slovenly manner, when the brigantine was spoken by the Bellver. Consequently, in the gale which soon after came on, she was in condition to be lost. It is absurd to contend that her voyage, before she was spoken by the Bellver, had demonstrated the proficiency of her crew as navigators. If it proves anything, it shows only that a vessel may live many days at sea adrift without a navigator. Le Marchand, the only man among the crew with any spirit remaining in him, had nothing but an ordinary map to guide him; but he could not have made any nautical use of it, as he did not know, until he was informed after he had got into harbor, that this map had on it the lines of longitude. It is certainly true that one person may take the longitude of a ship unassisted; but it is equally certain that Le Marchand had not performed this office at all while on board the Marie Anne.

I think it unreasonable to insist now that Le Marchand was a navigator. When first spoken by the Bellver, and especially and particularly asked whether she had a navigator on board, which was a most material inquiry, it was replied from the Marie Anne, with iteration, that she had not. After arriving in Hampton Roads, and when the Bellver was about to leave the brigantine, and her master naturally desired to take with him to his owners, from the saved crew themselves, evidence of the service he had taken the responsibility of deviating from his course to render them, Le Marchand, after reading a paper written in his own language, which he signed and asked his companions to sign, (who did sign it,) stated in this writing that the Marie Anne had no navigator on board. It was clearly an afterthought when, some weeks or more afterwards, he began to claim to be a navigator.

vouching in proof a diploma from St. Malo, which has never been produced. Though I can readily conceive how the procurement of a certificate from a saved crew by salvors may, as a rule, deserve severe reprehension, yet I can see nothing in the tenor of the certificate which was obtained by the master of the Bellver from the crew of the Marie Anne, or in the circumstances under which it was obtained, to reprehend. It was but a brief record of what were, up to the day of its date, a few undisputed facts. Returning to the main subject in hand, I think the preponderance of chances were that the Marie Anne would have been lost and cast away on the dangerous coast above and below the Chesapeake capes, during the gale which prevailed on the day and night after she was taken in tow by the Bellver, if she had been left to herself. I think, therefore, this was a highly meritorious case of salvage; and I am restrained from allowing a maximum reward only by the circumstance of the comparatively small value of the subjects saved contrasted with that of the instruments which effected the salvage.

In respect to vessels found helpless at sea, there are two classes of cases of salvage,—one, in which the saving ship, usually a sail-vessel, puts one or more of her own crew on board, and leaves them to take the distressed vessel into port; and the other, in which the saving ship, being a steamer, herself takes the distressed vessel in tow, and carries her into port. Where the former expedient is adopted, the salvage allowed by the admiralty courts has not been as large, for obvious reasons, as in cases of the latter class. But when the latter method has been pursued, the salvage awarded has usually been large, sounding in thousands of dollars or pounds sterling. It may be remarked also, as to salvage cases which have been decided in the English high court of admiralty in later years, that the old rule of adjusting the amount of the award by proportions or percentages of the values saved has been more and more disregarded; and I think it may now be assumed that the rule is in England obsolete. I admit, however, that in the United States we are still bound to pay a sort of conventional deference to it. The tendency, nevertheless, here, as well as in England, is to cut loose from the old Procrustean rule, and to award as salvage—*First*, the amount due on the principles of *pro opere et labore* and *quantum meruit*; and, *second*, to add to this a reward graduated to the circumstances of each particular case; this reward or bounty being diminished from a generous amount only in cases where the value saved is exceptionally small compared with the values employed in the salvage, and the merit of the service rendered.

In the case of *The Janet Mitchell*, Swab. 111, the award was £1,200 (\$6,000) for furnishing a navigator to a distressed ship. In the case of *The Roe*, Swab. 84, the award was £200 (\$1,000) for supplying additional seamen to a ship disabled by being short of hands. In the case of *The Golondrina*, L. R. 1 Adm. & Ecc. 334, the award was £1,800 (\$9,000) for furnishing a navigator to go from Chili to Swansea. In the case of *The Alphonso*, 1 Curt. 376, where two vessels were off shore, and one of them supplied a seaman to the other to bring her a few miles into port,—yellow fever being on board the latter,—the award was \$750,

and would have been increased to \$1,050 if the master who furnished the seaman had been willing to receive the additional amount. In the case of *The Czarina*, 2 Spr. 48, \$5,500 were allowed for bringing a ship from the middle of the Atlantic into Boston, and furnishing her a navigator. In the case of *The Martin Luther*, Swab. 287, £1,500 (\$7,500) were allowed for rescuing a vessel from distress under circumstances of considerable risk, by a service of 24 hours. In the case of *The Andalusia*, 2 Mar. Law Cas. 215, £510 (\$2,550) were allowed for towing a disabled steamer for eight hours under circumstances of danger. In the case of *The J. L. Bowen*, 5 Ben. 296, \$3,000 were awarded for navigating a ship short of hands into port, in fair weather. In the case of *The Meg Merrilies*, 3 Hagg. Adm. 346, £750 (\$3,750) were allowed for towing a dismasted vessel 105 miles for 17 hours. In the case of *The Traveller*, 3 Hagg. Adm. 370, £1,000 (\$5,000) were allowed for a meritorious case of towing a helpless vessel. In the case of *The Akbar*, 5 Fed. Rep. 456, \$3,600 were allowed for navigating a brig with valuable cargo from Havana to New York. In the case of *The Cleopatra*, 3 Prob. Div. 145, £2,000 (\$10,000) were allowed for towing a derelict ship 90 miles into port, amid much danger. In the case of *The Skibladner*, Id. 24, £900 (\$4,500) were allowed for furnishing one navigator, who navigated a fever-stricken brig, with most of her crew prostrate, 3,000 miles, from the Gulf of Mexico to England. In the case of *The D. W. Vaughan*, 9 Ben. 27, \$1,140 were allowed for towing a disabled schooner from a few miles off Long Island shore to New York. In the case of *The Minnie Miller*, 6 Ben. 117, the steam-ship Pacific was allowed \$2,250 for towing a disabled brig, found sailing with a jury-mast, 175 miles, into New York, in a salvage service. In the case of *The Wesford*, 6 Ben. 119, a pilot-boat was allowed \$1,500 for towing a dismasted and distressed brig for nine days into port. The award would have been larger, but the amount saved was only \$3,800. In the case of *The Albert*, 33 Law J. Adm. 191, £400 (\$2,000) were awarded by Dr. LUSHINGTON, on appeal, for standing by and towing for nine days a schooner that had been damaged in a storm off the Dutch coast. Respondents denied that it was a salvage service, and the value saved was only £1,680.

Most of these cases, it will have been observed, were cases in which the services of mere individuals, as seamen or navigators, were thus liberally rewarded, but seldom with reference to the values saved, except where the amount was so inconsiderable as to make a stinted allowance necessary. Among those cited there are but few cases of ocean steamers, running upon fixed schedules, turning from their course, under the behests of humanity, for the generous purpose of conducting distressed vessels into port. This latter was the service rendered by the *Bellver*, under the appeal of humanity, and at the imperative dictate of duty. Her conduct deserves the most emphatic commendation of the court; and, sitting here in an admiralty court, at this central port between the great marts of American commerce on one hand, and the tropical portions of the continent on the other, which are no less fruitful in pestilence than in all the elements of wealth, I dare not, I have not the

courage to, decree, in view of its influence in future cases, a reward of less than \$2,750, over and above costs and expenses, to a costly steamer, laden with a valuable cargo, and having full 50 persons on board, for picking up and bringing safely into port an infected vessel, found far out at sea, with a crew cut down by fever to three worn-out, emaciated men, demoralized by misfortune and fright, and drifting they knew not where, at the mercy of the elements. I am sorry that a just award bears so large a proportion, as the one due in this case, does to the value saved, which is only \$7,700. It is to be considered that this is the cash auction value at Norfolk, and much below the mercantile value both of the ship and cargo. The ship is foreign-built, and cannot obtain an American registry, and so her valuation here at only \$4,000 is only half her insurable value in France. It is true that in salvage cases we are bound to decree upon values in the port of the forum; but, if a large proportion be awarded, the hardship in this case is only apparent. I repeat, therefore, that I am restrained in the present case, in fixing the amount to be allowed for this meritorious service, by the inconsiderable value of the property saved. The expenses of the *Bellver* incurred by deviating some three days from her course, and as incidental to the service, were about \$1,000. I think the reward due for performing this service ought to be at least \$2,750, besides expenses. And therefore I will award the round sum of \$3,750, and the costs of this suit. As the counsel for the libelants represent all the persons claiming to participate in this award, I will leave to them the apportionment of the amount awarded among the several claimants as they may think just, subject to revisal and correction by the court after conference with them.

THE EXCELSIOR.

FRENCH v. THE EXCELSIOR.

(District Court, E. D. Virginia. August 5, 1882.)

1. SALVAGE—SUBJECTS OF SALVAGE—STEAMER ON BAR.

The large flat-bottomed steamer *Excelsior* grounded broadside on near high tide, on the eastern shoal of Hampton bar at Hampton Roads. Shortly afterwards another steamer tried in vain to pull her off, and at the next high tide the most powerful tug in those waters, aided by the steamer's own engines, was unable to move her. Thereupon a wrecking schooner in charge of a professional wrecker, and with powerful apparatus, was employed, and, with the aid of a tug, tried during one high tide to move the steamer without success, but at the next succeeded in drawing her off. The tide there runs in strongly, and the evidence showed that a tide sufficient to float her would probably have carried her further upon the bar. *Held*, that she was a subject of salvage, and the services rendered were salvage services.

2. SAME—COMPENSATION.

The *Excelsior* was worth \$150,000. No danger was incurred by the wrecking schooner or the tug. There was no agreement as to compensation, but the captain of the wrecker presented a bill for \$300, which was refused. *Held*, that the wrecking company was entitled to \$700 as salvage.

3. SAME—EVIDENCE.

On a hearing to determine the amount of salvage to be awarded for pulling a steamer off a bar, evidence as to the sums paid in particular instances for drawing off other vessels which had gone aground is inadmissible.

In Admiralty. Libel by W. H. French for salvage services in drawing the steamer *Excelsior* off from Hampton bar. Decree for libellant.

Sharp & Hughes, for libellant.

White & Garnett, for respondent.

HUGHES, J. On the 1st day of December, 1881, about 2 o'clock A. M., the large passenger and freight steamer *Excelsior*, on her way from Norfolk to Washington city, while aiming for Old Point wharf in a thick fog, and endeavoring to avoid the shipping then lying in Hampton Roads, and feeling her way cautiously, drifted with the strong tide then coming in, and grounded on the eastern shoal of Hampton bar, about 1,000 yards from the south end of Old Point wharf. She grounded broadside on, heading to the east. She tried for some time to get off by putting her engines hard at work, but these efforts only served to plant her higher and more firmly upon the bar. She finally desisted, and lay solid aground on the edge of the bar, some 20 feet from the channel. She remained in that position about 28 hours; that is to say, until about 6 A. M. on the 2d of December, when she was finally got off. She was a vessel of 1,350 tons, 240 feet long, and 40 feet wide. She was a steamer of peculiar structure, having been designed as a ferry-boat for transporting trains of cars from landing to landing. Her bottom was exceptionally broad and flat; and she laid flat upon the bar, in such a manner as to require an extraordinary propelling power to pull her off. During her stranding, the weather was good, and there was no heavy wind or sea. The time being December, she was liable to the perils of both wind and sea, and to bilge, and to being strained and damaged, even in good weather, in the position in which she lay. Capt. Parrish, an aged pilot, and one of the commissioners to examine pilots, says the bar is a hard, sandy bar, but not a shifting or quicksand. It is about three miles long. The bar near that point is sometimes bare at low tide, and drops off very steep towards the channel; sinking from a few feet to five fathoms depth. It is a point at which vessels are liable to be stranded. Soon after the *Excelsior* got aground, the steamer *Westover* ran upon the bar, bows on; but got off, and then tried to pull the *Excelsior* off, but failed. Before the late war, an experienced seaman, now agent of the underwriters in Norfolk, Capt. Crellin, got off two or three vessels that had stranded on the bar; and during the war he got off steamers which proved to be much bilged and damaged. Capt. Parrish, who is rather exuberant in his statements, says he has been on the bar "often enough," and seen hundreds of ships on it. Capt. French has assisted three vessels off that bar in late years. During the 1st of December the wind was from the westward, which diminishes the tide on the bar; but on the night of her stranding, before the tug *Sampson* took hold of the *Excelsior*, it had been S. E. At about 12 on the night of the 1st the

wind changed to the eastward, which increases the tide there. The tide on the morning of the 2d was fuller than it had been the day before at corresponding stages. The tide in these waters varies ordinarily only about three feet, and does so at this point, when not reached by south-westerly winds. Capt. Parrish has seen the bar bare just where the Excelsior lay. There seems to be a considerable difference between the time of the tide in the channel and on the top of the bar, say somewhere from an hour to an hour and a half; but Capt. Parrish says there is no difference of this sort near the edge of the bar, (though he seems to contradict this statement in answer to subsequent questions in his cross-examination.) Capt. Crellin says, in certain winds the place is a bad one for vessels going ashore on the Roads side of the bar; and that a heavy vessel going ashore there on a rising tide, without using an anchor to hold her off, would be driven up on the bar by the tide coming flood; and that if the current was strong enough to cut out the sand from under its bottom, a heavy vessel would work down and become more or less imbedded in the sand; though a flat-bottom vessel would not work down so much as one with a sharp bottom. It is strong currents that make a bottom of sand quick or shifting. In the absence of currents, a sandy bottom, like that under the Excelsior, may be very firm.

It has been already said that, soon after the Excelsior stranded, the steamer Westover went head on upon the same bar, near by, but backed off, and then, having pulled at the Excelsior without success, gave up the undertaking. The Excelsior was next taken hold of by the steam-tug Sampson, of Baltimore, a new boat, stated to be the most powerful tug belonging to Baltimore. The Sampson came to the Excelsior about day-break, or a little before 6 o'clock A. M. on the 1st. She got hold of the steamer's hawser without delay, and went to pulling on her. The hawser was an 8-inch one, and "was a pretty good rope," in the opinion of Capt. Starke of the Sampson. He pulled and swayed on the hawser for some hours. At 6 o'clock, when he began, the tide was at high water. He broke the hawser twice. After pulling one hour and a half, the steamer, which had given aid with her own engines, blew the water out of one of her boilers in order to lighten herself, but kept steam in the other and kept it at work, until within a few minutes before they told the tug to stop. Capt. Starke says it was the power of the tug that broke the rope. The rope had been bought new in the preceding July. Capt. Starke says that, in his judgment, it was impossible for any tug to have pulled the steamer off the bar as she lay when he got to her and when he left her; and that he told her master, Capt. Beacham, so; and that she was too high out of the water to admit of it, and was hard aground forward and aft. The like testimony is given by several witnesses of experience in such cases. Capt. Starke of the tug Sampson says that he returned to the steamer on the morning of the 2d, before day-break, and that the tide then was worse than it had been on the previous morning. The testimony is that tugs, in pulling at a vessel in the condition in which the Excelsior was, if she is large and hard aground, are without sufficient purchase to draw it off, having none other than

the resistance of water upon the propeller. Where an extraordinary power has to be applied to the stranded vessel, tugs are incapable of exerting it; and the usual course is to obtain the requisite power by planting one or more anchors out in the water, and attaching between them and the grounded vessel the usual mechanical apparatus for heaving her afloat. The tide having considerably subsided by the time the Sampson ceased to pull at the Excelsior, on the morning of the 1st, nothing could be done until the ensuing afternoon, and the approach of another high tide.

On the morning of the 1st December, the agent of the Excelsior in Norfolk, Mr. Keeling, had an interview in that city with the libellant, W. H. French, a professional wrecker, on the subject of getting the steamer off. Capt. French was the owner of the wrecking schooner Joseph Allen, and was a mariner and professional diver and wrecker of several years' experience, and was known to Mr. Keeling as such. After telegrams had passed between Mr. Keeling and the agent of the Excelsior at Old Point, and her master, Capt. Beacham, a telegram came from Old Point, directing Capt. French to come with schooner, anchor, cables, and a good strong tug-boat, at once, before 3 o'clock P. M. Capt. French accordingly made preparations to proceed, with no stipulation as to the compensation he should receive, but giving his own assurance that the charges should be "reasonable." At no time before the service, whether in conversation with Mr. Keeling in Norfolk, or Capt. Beacham on board the Excelsior, did Capt. French mention any specific sum as his charge, but said invariably it should be reasonable; and refused to mention any sum. He did say on one occasion on the steamer, to Capt. Beacham, that he would consult Capt. Joseph Baker (who is the oldest wrecker in Norfolk) as to what it should be. After the ship was got off, and all the parties were in Norfolk, Capt. French presented a bill for \$800 for his services. Capt. French undertook the job at the instance of Mr. Keeling, some time after 11 A. M., on the 1st December, and at once made ready the schooner Joseph Allen, which he provided with tackle, wrecking apparatus, two anchors, one a very heavy anchor of 3,500 lbs., a strong 12-inch hawser, a chain cable, and a hoisting engine, the largest used by the Baker Wrecking Company, and set out for Hampton bar in tow of the steam-tug Olive Baker, Capt. Chase, master, stated to be the strongest and best pulling tug in the harbor of Norfolk. Capt. French took along with him his mate, C. H. Godfrey, a professional wrecker; Charles Izon, a professional diver and wrecker; and four or five other men, besides the crew of the Olive Baker. He arrived at the Excelsior with these vessels, wreckers, and wrecking appliances about 3 P. M., having left Berkley about 1 P. M. On being asked by Capt. Beacham, Capt. French at once replied that he thought it would be impossible to pull the vessel off without laying anchor and cable. The anchor was laid S. E. of the steamer by the aid of the tug, and the cable from it was passed through the side chock of the ship, to the schooner on the starboard quarter of the Excelsior. The cable was made taut in time for the tide. There was some delay in getting up steam in the

hoisting engine, from having to fill the boiler with water; and there was some interruption of work afterwards from leakage in the boiler. Capt. French says that they got up steam in the hoisting engine about half past 4, and that they first hauled on the cable to make it taut about that time. He says:

"Between 5 and 6 P. M. of December the 1st we were laying with steam on the hoister, cable taut, waiting for the tide to rise, so as to heave on the cable; and about 6 o'clock we judged it to be high water, or a little after. At that time we were pulling as hard as we could on our cable, and about half past 6 the captain of the Excelsior thought, if the tug would take hold and help, we might start her. I didn't think there was any use. We called her along-side. We gave Capt. Chase a line, and he took hold about 7 o'clock, and we were heaving on the cable all the time. He pulled steadily at first; but the captain thought, by backing up and 'snatching her,' he might move her. He tried that several times, and in the last pull parted the hawser, and did not start her."

Capt. Chase made no further effort that night, after parting the hawser. Mate Godfrey, of the Joseph Allen, says:

"We began heaving on the cable and pulling on the tug at high water, and did not succeed in moving her with cable and tug."

He says the six-foot mark of the Excelsior was out of water at the time,—about 6 o'clock,—that is to say, at high tide. The witnesses of the steamer say that one end of the Excelsior was pulled around on the occasion about 11 feet on the evening of the 1st. I think this statement is improbable. There was thus a failure on this evening to get the ship off by heaving upon the anchor and cable, pulling by the Olive Baker, and, from Capt. Beacham's testimony, heaving on a 1,250 pound anchor which the ship had out. So the effort was given over for the night, after the tide had begun to subside.

I do not think it worth while here to enter into any consideration of the difference of time between the tides on the bar and in the channel. I am sure that when the witnesses spoke of the tide in connection with their efforts to get this vessel off they meant to speak of them as they were at the particular place where the Excelsior lay, and where they were making their exertions to get her off. I cannot believe that they meant to speak of the tides anywhere else; and I feel it to be useless in this examination to consider the variation of the tides in different places. I cannot believe that the tide in the channel would be at high water many moments earlier or later than on the edge of the bar shelving steeply and abruptly down into the channel. Capt. French, with his schooner Joseph Allen, lay by the Excelsior all night, and ordered the Olive Baker, which went off to an inner anchorage, to return before day-break the next morning. The Allen changed her position from the star-board quarter to the port quarter of the Excelsior, and grounded in the night. Her draught was four feet and a half. Mate Godfrey says:

"On the next morning, at 3 o'clock, we commenced pulling on the cable after getting up steam; we commenced first to pull on a triple purchase, and, when we found that we could not move her, we put an extra tackle and com-

menced pulling on that. As soon as we commenced pulling on that, she commenced coming off, about quarter past 5 that morning. We pulled her 20 feet, as near as I can guess at, by cable, which I looked at when it was pulled in. The Olive Baker had come at 5 o'clock that morning. Between 5 and 6 the Excelsior gave her a hawser by Capt. French's orders. She went ahead, and pulled the Excelsior's head around."

Charles Izon, the wrecker, confirms the foregoing, and, on being asked whether, "during the time the Excelsior was moving that twenty feet under the strain on the cable and anchor, the ship's engines and the tug were co-operating to get her off, or whether it was solely by heaving on the cable," answered: "Altogether by the cable. The tug was not pulling on her, nor were the engines of the Excelsior moving," at the time she was so moving. Capt. French says:

"I called Charles Izon to get steam about 2 or 2½ in the morning. I turned out shortly afterwards, called all hands, went aboard the Excelsior, and got ready to go to work. Pulled on our fall that led to the cable, led our main purchase on the hoister, pulled all we could pull well, and then put on a buff tackle and pulled awhile. Then stopped to wait for the tide. Did not move her before we stopped. In a few minutes we worked on the hoister again, and found she was coming. This was about half-past 5 A. M. We pulled her off about twenty feet. Got about twenty feet on our cable, and found she was coming a little too easy for a buff tackle. We took that off, and led the main purchase aboard of the schooner again, then called the Olive Baker to take a line to the Excelsior, and told the captain of the Excelsior to work the port wheel, that was on the inshore side. We went ahead on our hoister as fast as we could, and the Excelsior went right off. She was afloat about 6 o'clock, I judge. Olive Baker took hold of her, and just about had time to tighten her line when she went right off. The hour of high water that morning, as near as I can judge, was from half-past 6 to 7, with that easterly wind. If we had had no anchor or cable there, the effect of a strong northeasterly wind and swelling sea that day upon a steamer stranded broadside on the outer ledge of the bar would have been, not to take the vessel off, but to put her higher up."

Capt. Beacham says:

"At 3 A. M. next morning the second officer awoke me, and said the tug-boat Sampson was there, and wanted to know if I wanted him to pull at me at high water. I said 'No,' we would easily get off with the tug we had. I got up at half-past 4, and went down on the main deck. The first man I saw was French. I asked him to take coffee. He said he had had coffee. I asked him if he had steam. He said, 'Yes.' I told him he had better pull on her a little, which he did, to get the slack of his hawser up. I then measured the water on our starboard side, (which was the channel side,) and found 8 feet 6 inches of water. Then the tug-boat Baker came, gave us his line by request of one of my mates, I think, put it in our check on the starboard side. He gave us the line on his own accord, and I then told my engineers to work my engines one ahead and one back to shake her. I wanted to see if she was afloat. I found she was afloat. French was then standing on our starboard side with an oar overboard. After the tug got steam on us I told my engineers to go ahead on both engines. The hoisting engine was not at work at this time. When the Excelsior's engines went ahead, she shot right ahead, and the tug-boat pulled our bow around, and went ahead so fast that the Joseph Allen broke away from us. We came off the bar and swung around to the hawser of the Allen, and we then came to Norfolk under our own steam."

I do not know that this evidence of Capt. Beacham necessarily conflicts with that of Capt. French, Izon, and Godfrey. They would seem to have got the vessel to moving, and to have brought her to the extreme edge of the channel, in 8 feet 6 inches of water, unconsciously to Capt. Beacham. She seemed to have moved so insensibly that Capt. French could not verify the fact except by putting an oar overboard to mark the movement. It was after the Excelsior had been thus brought to deeper water that Capt. Beacham ordered both his engines to work, and that the ship "shot off." Capt. Beacham makes statements in his evidence, doubtless in perfect good faith, which I find it hard to credit. He says that the hawser of his ship, upon which he depended for the Sampson to pull him off on the first morning, and which he allowed the Olive Baker to use the first evening and second morning, was "very rotten anyhow." He says that he would have been lying with his fine ship on Hampton bar till now, before he would have consented to pay \$800 to Capt. French to get her off. He says that the Excelsior could have lain where she was a year without receiving any injury, and this, whatever might be the changes of weather or sea. After sending for a wrecking schooner, with anchor, cable, and other things, and bringing professional wreckers and their appliances to his vessel's side and aid, he represents that he did not wish to use them; speaks of Capt. French's movements in planting his anchor and rigging his hoisting engine and cable as "fooling around" his ship; and implies finally, if not stating in terms, that the assistance rendered by the wreckers on the morning of the 2d was of no avail or efficiency, and that his vessel went off the bar easily when the tide came, for which he had been waiting; went off by force of her own engines. I can't help feeling that such statements, made in excess of zeal, and no doubt made in good faith, impair the value of Capt. Beacham's testimony. Though he testifies, if not expressly, at least by implication, that Capt. French did nothing on the second morning for the ship, yet Mr. Plant, one of his ship's stockholders, who was on board, and who was up and awake all night, says that he timed by his watch, and that Capt. French was at work an hour and fifty minutes before the vessel moved. If she moved at half-past 5, then Capt. French had been at work since 40 minutes after 3 A. M. If Engineer McDonnell testifies rightly, when he says that his order to his fireman was to have steam at 5 that morning, his engines could have had very little to do with getting the ship in motion; and this inference is the stronger from the fact that Capt. Beacham seemed unconscious of what Capt. French was doing.

My conclusion, founded on a heavy preponderance of testimony in this case, is that the Excelsior was stranded beyond the power of her own engines and anchor and cable to pull her off; that the use of her own engines in such an effort could only aggravate her predicament; that she was planted on the edge of that bar so firmly that it was beyond the capacity of the most powerful tug to get her off; that the use of the heaviest anchor and most powerful hoisting engine, cables, and

tackle accessible in Norfolk was necessary to her relief; that application was made to a professional wrecker at Norfolk for wrecking appliances; and that they were furnished by the libellant, and the wrecking service was rendered—successfully rendered—by him without previous stipulation fixing the amount of compensation for the service.

Evidence was taken by the respondent, before the commissioner in this case, of Capt. Howes, master of the ocean steamer W. H. Crane, designed to show what Capt. Howes had paid for tug service and other assistance he employed when his ship was on one occasion aground in the upper part of Chesapeake bay. Evidence was also taken, by the respondent, of Mr. Plant, as to what he had paid for getting some other vessel off that was once grounded near the mouth of the Potomac river. It would have been competent to ask either of these witnesses, as experienced steam-boat men, what price per day or hour was usually paid to powerful tugs employed in getting off large vessels stranded on bars, and what was the usual cost of labor, and what the hire of wrecking apparatus in such work; but evidence (taken without previous notice to the opposite party) of some of the particulars of such a service, and of but one witness as to that service, there being no pretense that the whole truth or facts are given, especially where most of the service seems to have been performed by contract, is not competent testimony in any case under judicial examination; and I do not feel at liberty to consider the testimony given by Capt. Howes, or that given by Mr. Plant, respecting the vessel or vessels which they respectively alluded to as stranded in the waters of the Chesapeake.

In the sketch of the evidence which I have thus given, I have had reference almost exclusively to the question whether this was or not a case of salvage. It is useless for me, after the elaborate manner in which the question of salvage was treated in the recent cases of *The Sandringham*, 10 Fed. Rep. 556, and *The Mary E. Dana*, 17 Fed. Rep. 353, to discuss here at length the law of salvage. That this was a case of salvage is clear. The ship was hard aground broadside on, upon a ledge of sand, where every exertion of her own engines would only tend to plant her more firmly upon the bar. She repeatedly tried these, with the assistance of a cable heaved upon her own large anchor of 1,250 pounds, and of the propeller Sampson and Olive Baker successively, the most powerful steam-tugs in these waters; but tried in vain. Even the use of the large anchor and cable of Capt. French, aided by her own heavy anchor and cable, and her own engines, and by the Olive Baker, was unavailing to the Excelsior on the evening of the 1st December. I cannot entertain a doubt that it was by the agency of the libellant's anchor and cable on the morning of the 2d December that she was finally drawn off. That she could not have got off with her own engines on that morning, against a higher tide than that which carried her on the bar on the morning of the 1st, reinforced by a strong easterly wind, but would have been driven further on the bar, seems to me to be almost as certain as a mathematical truth. It is clear, therefore, that the vessel was beyond the reach of self-help and self-rescue. She was also in a situation be-

yond the capacity of the most powerful steam-tugs to rescue her. Two of these and the steamer Westover had tried in vain to pull her off. She was therefore a subject for salvage. She employed wreckers to perform a salvage service. She was actually rescued by the wreckers, and the service performed in rescuing her was a salvage service. Being a salvage service, this is a case for a greater reward than that of mere compensation for work and labor done. The libelant is entitled not only to such compensation, but also to a reasonable reward as bounty for his enterprise, and for the use of expensive wrecking apparatus always liable to loss, wear and tear, and deterioration.

As to the compensation, the respondent concedes that this may be \$300, by the deposit of that amount in court. I think that on this score a fair allowance would be \$350. As to reward or bounty, the case is not one to justify a large amount. A vessel ashore on Hampton bar is probably less at risk than on any other ground on the Atlantic seaboard; and wreckers, wrecking vessels, and wrecking apparatus are probably as little at risk in hauling ships off that bar as from any other shallow place in this part of the world. There is no element in this salvage service which calls for more than a moderate award, except the extraordinary value of the vessel saved, (her value being proved to be \$180,000,) and the success of the libelant in getting her off speedily and unharmed. I think, therefore, that in such a case as this the idea of percentage must be discarded, and that a lump sum should be given as bounty, having no direct reference to the extraordinary value of the Excelsior. This may be the same as the compensation which has been named. I will give a decree for \$700 and costs. This amount is within the sum advised by Capt. Joseph Baker before the libelant rendered his bill for \$800, expressing his own estimate of the value of his services, and but little within that estimate. I do not think I would be justified in this case in giving a higher award than the libelant's own original demand.

THE GLENFINLAS.

DAVIS v. CARGO OF CHALK *et al.*

(Circuit Court of Appeals, Second Circuit. December Term, 1891.)

1. DEMURRAGE—CHARTER—RATE OF DISCHARGE OF CARGO—CUSTOM OF PORT.

The charter of a ship for a cargo of 3,000 tons of chalk provided that cargo should be discharged "as fast as she can deliver." She was capable of discharging more than 150 tons per day. While the cargo was being discharged, the consignee notified the ship "that the customary delivery of chalk at this port is not over 150 tons per day," that he could not take care of more, and that he would hold the ship responsible for any over that amount put on the dock. *Held*, that the ship, under her charter, was entitled to deliver as fast as she could, without reference to the custom of the port, and that the consignee, having provided inadequate facilities for such rapid discharge, was liable for demurrage on account of the ship's delay thereby caused.

2. SAME—DISCHARGE FROM SINGLE HATCH.

The ship had two hatches, from which cargo could have been discharged into two lighters of proper size on one side, but the consignee did not provide lighters capable of taking cargo from both hatches at the same time. *Held*, that the ship did not lose her right to demurrage by not breasting out, so as to admit of discharge from both sides of the vessel.

42 Fed. Rep. 282, modified.

Appeal from the Circuit Court of the United States for the Southern District of New York,

In Admiralty. Libel by Ebenezer H. Davis against a cargo of chalk, lately on board of the ship *Glenfinlas*, and Howard Fleming, consignee, for demurrage. Decree for libellant. Respondents appeal. Modified.

STATEMENT BY THE COURT.

The ship *Glenfinlas* arrived at the port of New York on July 5, 1889, with a cargo of 3,000 tons of chalk consigned to Howard Fleming. She is a large vessel, 2,148 tons register, 280 feet long, and with four hatches. The cargo was brought under a charter which provided that she was "to discharge at two safe wharves, as ordered; any expense incurred * * * in shifting from first to second wharf to be paid by charterers, or so near thereunto as she may safely get, and there, always afloat, deliver the same." It also contained this provision: "Cargo to be supplied as fast as vessel can load, and to be discharged as fast as she can deliver. * * * If required, ten days on demurrage, over and above the said laying days, at four pence per registered ton per day." This would be \$175 per day. The *Glenfinlas* promptly notified her arrival to the consignee of the chalk, and asked for a berth, repeating the request on July 6th (Saturday) and July 8th. On the latter day the consignee asked the ship to select a dock where lighters could go along-side and receive cargo, promising to place lighters along-side as soon as she gave notice that she was berthed. The ship secured a berth at Atlantic dock that same day, gave notice, was in her berth ready to discharge at 6 A. M. Tuesday, July 9th, and rigged two hatches with tackle. No lighter came till 5:30 P. M. of the 10th, too late to commence discharging. Work commenced on Thursday, the 11th, and continued the rest

of that week, into two canal-boats, the *Mary Ann* and *Home Rule*, which were too long to admit of both being worked at the same time on one side, and not strong enough to take cargo from more than one hatch. During these three days 600 tons were discharged from the one hatch. On the 11th the consignee notified the ship that "the customary delivery of chalk at this port is not over 150 tons per day," that he would not take care of more, and would hold the ship responsible for any more put on the dock. The ship replied, at once, insisting that, under her charter, the chalk was to be received as fast as she could deliver. Work was resumed on Monday, July 15th, and continued until 9:30 A. M. of Friday, the 19th. Two lighters received cargo, the *Hope* and the *Baltic*. They were of appropriate size and sufficient strength to have worked at the same time on one side of the vessel, thus admitting of discharge from two hatches, had they come together; but the *Baltic* did not appear till 1:30 P. M. of the day on which the *Hope* finished, the latter being fully loaded by 9:30 A. M. These two lighters took 800 tons. On Friday, the 19th, the vessel was ordered to Taintor's dock, on Newtown creek, too late to avail of the tide that day. She moved to her second wharf on Saturday, the 20th, and work began there on the afternoon of the 22d, 60 tons being discharged that day. Taintor's dock is one of the principal docks in the city for the delivery of chalk. It is fitted with a railway, so arranged that discharge is possible from only one hatch at a time. On the next four days, including Friday, July 26th, 344 tons were discharged. Up to this time the weather had been uniformly fine, there being no rain to interfere with the discharge. Afterwards there were occasions when the work was prevented by rain, there were slight delays from accidents to the cars on the railway, and more than half a day was lost in consequence of insufficient water in the creek, which prevented shifting the *Glenfinlas*, so as to bring another hatch into position. The discharge was completed on Friday, August 2d. On July 19th the ship protested against the slow rate of discharge, and on the 22d wrote twice, complaining of the unsuitable character of Taintor's dock, as not permitting rapid discharge. The decree below allowed demurrage for seven days.

Robert D. Benedict, for appellant.

Wilhelmus Mynderse, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. We are of the opinion that the learned district judge was entirely correct in holding that the charter provided for the rate of delivery, at such places and during such days and times as the ship might be properly worked, under the usage of the port; and that the evidence introduced by the claimants—that according to the usual practice of the port, as respects the delivery of ordinary cargoes of chalk, a hundred and fifty tons per day is as much as is expected to be received or delivered—does not control the plain intent of the charter to provide for a rapid discharge during working hours; especially as the vessel was a much larger one, and the cargo much larger, than were

usual in the ordinary transportation of chalk cargoes. In the discharge of ordinary cargoes, vessels of her size use at least two hatches, and under the charter the Glenfinlas was entitled to do so despite the evidence of a contrary practice having reference to smaller vessels and smaller cargoes.

We do not think, however, that the Glenfinlas lost that right, at her first wharf, by not breasting out, in view of the evidence that she was attended by lighters which could easily have taken cargo from two hatches at the same time had they come together. The rate of discharge from one hatch during the fair weather, both at the first wharf and at Taintor's dock, was 200 tons or a little over per day. It must be inferred that she could have discharged at least 400 tons from two hatches, which would give eight lay-days, and a day may be allowed for removal to the second wharf. The lay-days began Tuesday, July 9th, and expired (including the day for removal) on Thursday, July 18th. She was detained 15 days more, for which she should be allowed the demurrage at the rate fixed by the charter. The cause is remanded for further proceedings, in accordance with views herein expressed. Costs of the district court and of this court to the libellant.

THE R. R. KIRKLAND.

MALTBY v. THE R. R. KIRKLAND

(District Court, E. D. Virginia. January 7, 1880.)

1. COLLISION—TUG AND SAIL—DUTY OF TUG.

On a night of moderate darkness, and in the open sea, a tug struck a schooner on her starboard side forward, probably at an acute angle. The tug's lookout and pilot, who saw the schooner from a minute and a half to two minutes before the collision, and at a distance of over 500 yards, testified that she showed no lights, and they supposed she was going the same direction with themselves; but the helm was not ported or the engineer signaled until an instant before the contact. The schooner's crew testified that her lights were up. *Held* that, under the rules requiring steam-vessels to keep out of the way of sailing vessels, and to stop and reverse if necessary when approaching another vessel, and requiring an overtaking vessel to keep out of the way of the vessel preceding her, the tug was in fault, in respective of the question of the lights.

2. SAME—EVIDENCE—ADMISSIONS OF LOOKOUT.

Unsworn admissions made by the lookout of a vessel the day after a collision are inadmissible as evidence to charge the vessel with fault.

3. SAME—DUTY OF LOOKOUT.

When the lookout of a steamer resorts to the pilot-house, he subjects himself to the suspicion that he is there largely for his own comfort.

In Admiralty. Libel by O. E. Maltby against the steam-tug R. R. Kirkland for damages for a collision. Decree for libellant.

Sharp & Hughes, for libellant.

Ellis & Thom, for respondent.

HUGHES, J. The schooner J. J. Housman set sail from Norfolk on the morning of the 8th September, 1879, at or about half-past 1 o'clock,

on a fishing expedition to the Chesapeake bay. Her crew was a captain, a mate, a man before the mast, and a cook; and she also had on board three fishermen, a book-keeper, and one passenger. One of the fishermen, Roy Thomas, acted as lookout in the forward part of the vessel throughout the trip. This night was moonlight, but not bright; the moon had entered her last quarter at 10h. 33m. p. m. on that night. There were frequent fleeting clouds. The vessel proceeded through Hampton Roads into the Bay, and at about 4 A. M. was moving in a northerly course, heading a little to the westward of York Spit light, making eight miles an hour, with a fresh breeze from about south-west, when she came in collision with the steam-tug R. R. Kirkland, which struck her on her starboard side, forward of amidships, probably at an acute angle of about 30 deg., by which her hull was broken into, and she was sunk at the place of collision. The testimony of her lookout, Thomas, is positive, and particular that her lights were both up and burning brightly. The testimony of her master, Garrison, corroborates Thomas in so far as it asserts that the red light, which was the only one visible from her wheel where he was standing, was up and burning. The testimony of several persons on board of her is that they saw the lights put up in good order and in proper position as the vessel was leaving Norfolk harbor at half past 1 A. M. On the other hand, the testimony of the pilot, the engineer, and the fireman on the tug is equally positive that when they came in sight of the schooner, one and one-half to two minutes before the collision, they saw no light, especially on that side of the vessel not hidden from them by her sails.

Just before the collision the tug was moving nearly due south at the speed of nine knots an hour, and shortly before the moment of collision the pilot, Dougherty, had ported his helm. The master of the tug, Lowell, had, about 25 minutes before, laid down in the rear part of the pilot-house to sleep. He was aroused when the vessels were nearly in contact, and gave four bells to the engineer just at the time of the collision. The mate, Daniels, who was the tug's lookout, had been in the pilot-house during the captain's nap, and would seem, from the pilot's testimony, to have seen the schooner before the pilot saw her, one and one-half to two minutes before the collision, and had given no signal to the engineer. The evidence of the men on the schooner is that the night was light, but not bright; that of the men on the tug is that it was dark, but not very dark.

I am to consider and decide the case on the statement I have thus drawn up from the testimony, variant as to the character of the night, and directly contradictory as to the question whether the red and green lights of the schooner were properly placed and burning. I will add that the lights of the tug were as they should have been under the rules of navigation. I will premise that I have rejected the evidence of Sharrett as to what he saw as an expert when he went on board the Housman in the harbor at Norfolk on the night before his testimony was taken, (28th November, 1879,) on the point whether the lamps could be seen from the helm when up in their proper places. I will not say

that under all circumstances I would reject such testimony, but it is of the character of hearsay, cannot be subjected to proper restrictions, and ought generally to be discarded. Though I consented at the hearing of the argument to treat as evidence the mere fact that Daniels, the lookout, who was not sworn as a witness in the case, made statements the day after the collision prejudicial to the respondent, declaring at the time that it would have little weight with the court, I have changed that opinion, and think all testimony as to Daniels' admissions after the collision should be stricken out, and disregarded. I have given them no consideration whatsoever in considering the other evidence. In regard to the question of the proper place for a lookout on a tug-boat of the size and build of the *Kirkland*, I hold here, as I did in *The Kallisto Case*, 2 Hughes, 142, that he ought to be at such moment just where he can best make proper observations as a lookout at that moment, whether it be in or out of the pilot-house. I am inclined to think, from the evidence in this case, that the pilot-house is as good a place for observation as any in a steam-tug; and shall not rule that Daniels, the lookout here, was at fault from the mere fact of being there in this instance. But in general, when the lookout of a steamer resorts to the pilot-house, he subjects himself to the suspicion that he is there largely for his own comfort, and I do not think the courts will or ought to encourage the proposition that the pilot-house, even of a tug, is the right place for a lookout.

I come now to consider the case on that scant part of the testimony which is undeniable, and which I have embodied in the statement of the case which I have made above. The case turns upon the following laws of navigation. Before 1864, these were not laws imperative and binding upon navigators and courts, but were rules of prudence, recommended by the experience of navigators, and enforced in cases of breach more or less gross by the courts. They are now statutory laws of navigation enacted by congress, and by the legislatures of all commercial countries, which navigators are commanded to observe, and which courts have no option but to enforce, unless in cases coming clearly under rule 24, which allows a departure from them only where it is necessary to avoid immediate danger. These rules of law governing the case at bar are as follows:

"Rule 20. If two vessels, one of which is a sail-vessel and the other a steam-vessel, are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel.

"Rule 21. Every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse," etc.

"Rule 22. Every vessel overtaking any other vessel shall keep out of the way of the last-mentioned vessel.

"Rule 23. Where by rules 20 and 22, one of the two vessels shall keep out of her way, the other shall keep her course," etc.

The fact whether the schooner's sailing lights were up or not, being unascertainable from the direct evidence respecting the lights, the case turns upon other points affected by the rules of law just quoted.

The defense of respondent is that, when the schooner was seen, the crew of the tug saw no lights, and concluded that the schooner was moving in the same direction as themselves; that is to say, that the tug was "overtaking" the schooner. The tug's duty, therefore, was, under rule 22, to keep out of the way of the schooner; to do everything necessary to that end; and the question arises, did the tug do everything or do anything to insure her keeping out of the way of the schooner? The testimony is that she did not port her helm until just before, or strike her four bells until just at the time of, the collision; although, as the testimony also shows, she saw the schooner one and a half to two minutes before the collision. At a minute and a half before, the vessels, one of them moving eight miles and the other nine miles per hour, were 547 yards apart; yet during the interval, according to the account given by Dougherty, the tug's pilot, the following is what occurred:

"Mr. Daniels [the lookout and mate] was sitting on the starboard side of the wheel-house. I put my hand on the window to look out for Back River light. Daniels asked me if I saw the light plain. I said, 'Yes.' Daniels asked me if I saw that vessel. I told him that I saw something like a vessel,—a loom of a vessel. He then asked me if I saw a light, and I told him, 'No.' He then said, 'I can't see any light;' and he had night glasses in his hands. He asked me if I thought which way she was going; and he said she must be going to the southward, the same as we are, because I see no lights. So he stated to me to keep off inshore, to go inside of him, and give the right of way. I done so, and before we had time to get one move [of the wheel] the vessel was coming right across our bows. Mr. Daniels then called Captain Lowell from the lounge where he was lying or sitting,—I don't know which,—and Captain Lowell pulled the bell to back the boat immediately. As soon as the bells were struck we were into the vessel."

This same witness (the pilot, Dougherty) says, in another place, that the helm was ported about one minute—not exceeding two minutes—before the bells were struck. It is evident from this statement that Daniels had seen "that vessel" before Dougherty did, and called his attention to it; and that some conversation—apparently leisurely conversation—had occurred between them before the helm was ported; and, further, that they were so slow in porting the helm that the schooner "was right up across our bows before they had time to get one move of the wheel in porting."

Now, it seems to me, from the foregoing, that, on the supposition that the tug was "overtaking" the schooner, the men in charge of the tug, Daniels and Dougherty, did not do what they were bound to do in order to keep out of the schooner's way. The law requires that its commands shall be effectively obeyed. It does not tolerate a listless or tardy, imbecile obedience. And it is a cardinal canon of the admiralty law that the rules of navigation which it prescribes must be effectively, promptly, energetically, and faithfully executed. There ought not to have been a collision in this case. The two vessels were in an open sea. Even if the vessel had not her sailing lights up, (which is the question in dispute,) the tug was bound to keep out of the way, if she saw the

schooner in sufficient time to do so. The absence of sailing lights could only have misled the tug as to the direction in which the schooner was moving; and, on the hypothesis that the lookout and pilot of the tug were thus mistaken, the tug's own testimony shows that she failed to do what was necessary effectually to keep out of the way.

I take the case as it actually was,—that of a steamer and sail-vessel proceeding in such directions as to involve risk or collision. In that case the law requires the sail-vessel to keep her course, (rule 23,) and the steamer to keep out of the way of the sail-vessel, (rule 20.) It is not denied—it is proved—that the schooner complied with rule 23. She did keep her course. The steamer, on the other hand, did not keep out of the way, but, on the contrary, ran into and sank the schooner; and that in open sea, after the schooner had been seen for from one and a half to two minutes,—seen when at a distance of from 500 to 900 yards. The testimony of the tug's pilot is that he could turn his boat around in the space of 100 yards; that in this case he could have cleared the schooner in about a hundred yards; indeed, that he could have cleared the schooner in three points of the compass,—that is to say, in 3-32 of a complete circuit of 100 yards diameter. If, then, they saw the schooner one and a half to two minutes, or from 500 to 900 yards off, and yet ran into her, how can I be expected to hold otherwise than that the tug was in fault, and must be held for the damages resulting from this collision? I will so decree.

THE THINGVALLA.

In re DAMPSKIBSELSKABET THINGVALLA.

(*Circuit Court of Appeals, Second Circuit. December 14, 1891.*)

1. COLLISION—LIGHTS—EVIDENCE.

On an issue as to whether a steam-ship, before a collision, showed a white light at her mast-head, the positive testimony of witnesses that the light was properly burning there immediately before and after the collision is not outweighed by testimony of witnesses on the other vessel that they did not see the light, nor by the suggestion that the light was so hung as to render it liable to be obscured by the foretop-mast stay-sail.

2. SAME—HEIGHT OF MAST-HEAD LIGHT—EVIDENCE.

On the question as to the proper placing of the mast-head light of a steam-ship, her first officer, when asked, "How far off can your lights be seen at night?" answered, "You can see about 8 miles off,—the head-light; that mast is 20 feet high." Held, that the part of the answer relating to the height of the mast was not responsive, and, being the only evidence relied on for the purpose, was insufficient to show that the light was not placed at a height above the deck of 46 feet, the width of the beam.

3. SAME—STEAM-SHIPS MEETING.

The steam-ship Thingvalla, when in mid-ocean, discovered the white light and both side lights of an approaching steam-ship, the Geiser, so situated as to indicate to the navigator of the Thingvalla that the two vessels would meet end on, or

nearly so. The Thingvalla altered her course to starboard in order to keep out of the way, and continued to swing to starboard, although the red light of the Geiser disappeared, indicating that she was swinging in the same direction, until, although the engines of both were reversed, they came into collision. *Held*, whether the two vessels were meeting end on, or on crossing courses, in either case the change of course of the Geiser was in violation of rules 16 and 23, requiring her to port, if meeting end on, and to hold her course if on crossing courses; and that, as the navigator of the Thingvalla did not know but that the Geiser would change her course so as to conform to the rules, she was not in fault for not changing her course to port as soon as he saw the mistaken maneuver of the Geiser.

42 Fed. Rep. 331, affirmed.

Appeal from the District Court of the United States for the Eastern District of New York.

Petition by the Dampskibsselskabet Thingvalla (Thingvalla Steam-Ship Company) for limitation of liability for loss caused by collision of the steam-ship Thingvalla with the steam-ship Geiser. Certain insurance companies and others interested in the cargoes lost, caused themselves to be entered as respondents to the petition, and, from a decree in favor of the petitioner, appeal. Affirmed.

Sidney Chubb, for appellants.

E. B. Convers and *J. Parker Kirlin*, for appellant Hilda Lind.

Harrington Putnam, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The petitioner, a Danish corporation, was the owner of two steam-ships, the Geiser and Thingvalla, which collided on the high seas, not far from Sable island, on August 14, 1888. The Geiser sank almost immediately in deep water, the steamer and her cargo being totally lost. The Thingvalla's bow was smashed in, but, by careful management, she was navigated, stern first, into Halifax, N. S. The petitioner's interest in the Thingvalla and her pending freight, which was duly appraised at \$64,680.66, has been deposited in the district court for the eastern district of New York. The petitioner, claiming that the collision occurred through no negligence of those in charge of the Thingvalla, prayed to be decreed free from responsibility for the loss or damage occasioned by the collision. Several insurance companies, and others interested in the cargoes laden on the steamer, appeared and joined issue with the allegations of the petition, contending that the collision was caused by the fault of the Thingvalla. The district court held the Thingvalla free from fault, and that the petitioner was entitled to the benefit of the limitation of liability, provided for in the act of March 3, 1851, and its amendments. Appeal was taken to the circuit court, which affirmed the decree of the district court, and certain of the respondents appealed to this court. 42 Fed. Rep. 331.

The collision happened about 4:30 A. M. It was dark, the weather being cloudy, with a little rain, but there was no fog, nor such degree of haziness as would prevent vessels from seeing each other's lights at a sufficient distance easily to maneuver so as to avoid one another. As to the navigation of both steamers there is no particular dispute. The Geiser was outward bound, on a course of E. $\frac{1}{2}$ S. magnetic; the Thing-

valla inward bound, on a course of "W. $\frac{1}{2}$ S., a little more west," magnetic. The Thingvalla carried some of her sails, including the jib and the foretop-mast stay-sail. Her regulation lights were set and burning. The navigating officer of the Thingvalla,—her first officer, Jens Petersen,—seeing the Geiser's head-light, and, immediately after, her two side lights, bearing a half point on his port bow, ported, and telegraphed to the engine-room to "stand by." As the navigating officer of the Geiser—her first officer, Brown—went down with his ship, we are without positive information as to what lights he saw and navigated to. Her lookout, who was also drowned, reported a light on her port bow. Her third officer, J. Duus Petersen, who was on the bridge with Brown, the navigator, says it bore about a quarter of a point on the port bow. His glance at it was but momentary, as he at once stooped down to open the valve to let more steam into the steering gear. He took the light to be a vessel's side light, but could not be certain whether it was green or red. When he rose, after manipulating the valve, he saw it was a steamer, and saw both side lights about right ahead. As soon as the lookout reported the lights, Brown and the third officer walked to the port side of the bridge, looked at the light, and the former immediately gave the order, "hard a-starboard." The Thingvalla soon lost the red light of the other steamer, and, realizing that there was risk of collision, her navigator signaled to the engines, "stop, full speed astern," and ordered the helm hard a-port. Realizing the risk of collision, the navigator of the Geiser also ordered her engines, "full speed astern." The wheels of both steamers were kept at port and starboard, respectively, without change, both vessels swinging to the northward and coming into collision, the Thingvalla striking the Geiser on her starboard side, just abaft the mainmast.

The respondents insist that a primary cause of the collision was the improper position of the Thingvalla's white light; that it did not show properly. Two of the Geiser's watch on deck at sighting survived the disaster. One of them, a boy, was not in the employ of the petitioner at the time of the trial, and was not called. The other was her third officer, who, as stated above, looked at the reported light so hastily that he was unable to say whether it was red or green, and "does not remember to have seen her top light." A passenger who first saw the Thingvalla after the collision, when she, having backed out, was about 1,500 feet aft, saw only her red and green lights. It was then day-break. It is argued that, because the lookout of the Geiser reported "a light," and not "a steamer," he could not have seen the white light. And the same is urged as to her first officer, who was a competent navigator, and whose orders can be accounted for only on the theory that he did not know it was a steamer to which he was maneuvering. But the master of the Geiser saw the Thingvalla's mast-head light when he was called on deck, just before the collision, saw it again when she was backing away, and again when he was swimming. The second officer of the Geiser also saw it, as he climbed aboard the Thingvalla,

after the collision. And the evidence from the Thingvalla shows that the white light was there and properly burning. It hung on the foretop-mast stay. The captain saw the reflection on the foretop-gallant stay, and her first officer testified to the same effect. There is no evidence to show that the light was so hung relatively to the foretop-mast stay-sail that it was liable to be obscured thereby, and a mere suggestion that such might possibly be the fact is not sufficient foundation for a judgment that there was a failure to show a mast-head light, through fault of the Thingvalla. As the learned district judge remarks: "It might also be suggested that some sudden dash of rain obscured the light." Positive testimony as to the presence of the light is not to be outweighed by mere inferences, where the single witness, who testifies to a failure to see the white light before the collision, is unable to say whether the light he did see was green or red, and the extent of whose evidence is that "he does not remember to have seen the white light," that he "had no occasion to look for it," when he stood up after opening the valve, as he then saw the steamer itself.

It is contended that the white light was improperly placed, in that it was not more than 20 feet above the deck, when it should have been upwards of 46, which is her beam. The first officer of the Thingvalla was asked: "*Question.* How far off can your lights be seen at night? *Answer.* You can see about eight miles off,—the head-light; that mast is twenty feet high." Other than this there is no evidence in the case as to elevation above the hull. The latter part of the answer was irresponsible to the question, and only by inference applies to the light. It was not fastened to the foremast, nor even to the jib stay, which leads to the foremast-head, but to the foretop-mast stay, and how high up on that stay it was fastened nowhere appears. We do not think there is sufficient evidence to warrant a finding that the light was set lower than the rules required.

Nor can the Thingvalla be held in fault for porting. Her navigator saw a white light and both side lights, indicating an approaching steamer, so situated as to have her (the Thingvalla) ahead. He saw those lights, as he judged, about half a point on the port bow, a position from which (as the side lights overlap a half point) the three lights of the Thingvalla would be visible to the approaching steamer, indicating to her that the Thingvalla had her (the Geiser) ahead. As the situation appeared to him, the steamers were meeting end on, or nearly so, and article 15 required him to alter his course to starboard. The respondent's counsel has argued most elaborately and ingeniously that the navigator of the Thingvalla was mistaken as to the situation; that the vessels were in fact on crossing courses, the Thingvalla having the Geiser on her starboard bow. If that were so, article 16 required the Thingvalla to keep out of the way, and allowed her to do so by altering her course to starboard, if that would accomplish the object, the Geiser holding her course. If the situation was as respondents claim, the Thingvalla was not in fault for porting. But it is further contended

that the Thingvalla should have stopped her swing to starboard, and swung to port, as soon as she saw, by the disappearance of the Geiser's red light, that she was swinging to starboard, and that there was risk of collision. There is little to add to the comments of the learned district judge on this contention. Looking at the situation after the event, it may be apparent that such a change of course would have avoided the collision; but the Thingvalla's navigation must be judged by the knowledge she had, or ought to have had, at the time. Whether they were meeting, as her navigator believes, or crossing, as the respondents contend, the disappearance of her red light showed that the Geiser was changing her course in violation of the rules, which in the one case required her to port, and in the other to hold her course. Whether or not she would realize that fact, and alter her helm accordingly, the navigator of the Thingvalla could not know. An attempt on his own part to abandon the course, which the rules enjoined upon him in the one case, and permitted him in the other, might, so far as he knew, tend to produce the very mishap it was intended to avoid, by co-operating with a belated effort on the part of the Geiser to return to her true course, and he cannot, therefore, be held in fault for not taking the chance. He did what the rules required of him, when, seeing the mistaken maneuver of the Geiser, he stopped and reversed.

There is nothing in the suggestion of improper speed or insufficient lookout. The vessels sighted each other at sufficient distance to avoid collision without any difficulty, had there not been improper navigation of the Geiser after sighting. The decree is affirmed, with costs of this appeal to the petitioner against the appellants.

(SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. ROBINSON.)

(Circuit Court of Appeals, Fifth Circuit. November 27, 1891.)

1. APPEAL—JURISDICTION OF COURT BELOW—RECORD—REMOVAL OF CAUSES.

When a cause has been removed from a state to a federal circuit court, and thence carried to the circuit court of appeals, the jurisdiction of the circuit court must appear affirmatively upon the record, otherwise the judgment will be reversed, with directions to remand to the state court.

2. SAME—REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—"RESIDENCE."

An averment of residence is not equivalent to an averment of citizenship under the removal of causes acts; and, where the cause is of a character which is only removable because of diversity of citizenship, an averment showing diversity of residence only is insufficient to sustain the jurisdiction of the federal circuit court.

3. SAME—REVERSAL—JURISDICTION—COSTS.

When a cause is brought from the circuit court to the circuit court of appeals by the defendant, who removed it from a state court, and is there reversed, because the record fails to show jurisdiction in the circuit court, the defendant should be taxed with the costs.

Error to the Circuit Court for the Northern District of Texas. Reversed.

John W. Wray, for plaintiff in error.

M. L. Crawford, for defendant in error.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, J. The record shows a suit brought in the district court of Cooke county, state of Texas, against the Southwestern Telegraph & Telephone Company to recover damages suffered by the plaintiff through the negligence of the defendant. The suit was afterwards removed by order of the state court to the United States circuit court for the northern district of Texas. Upon what grounds the removal was made does not appear. The suit is one, however, in which the jurisdiction of the circuit court must depend upon the citizenship of the parties. The petition filed in the state court commences as follows:

"Your petitioner, J. B. Robinson, a resident of Cooke county, Tex., complaining of the Southwestern Telegraph & Telephone Company, a private corporation, incorporated under the laws of the state of New York, but doing business in the state of Texas, having a legal office at Gainesville, Cooke county, Tex., respectfully represents," etc.

Beyond this in the record there is no averment or showing as to citizenship of the parties. The jurisdiction of the circuit courts must appear affirmatively in the record. *Insurance Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. Rep. 193; *Timmons v. Land Co.*, 139 U. S. 378, 11 Sup. Ct. Rep. 585. "Where the jurisdiction of the circuit court does not appear in the record, the appellate court will, on its own motion, notice the defect, and make disposition of the case accordingly." *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. Rep. 510; *Everhart v. Huntsville College*, 120 U. S. 223, 7 Sup. Ct. Rep. 555. "It is well settled that an averment of residence is not the equivalent of an averment of citizenship in the courts of the United States." See *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. Rep. 873, and cases there cited. "When a suit

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which has been removed from a state court is brought up by appeal or writ of error, and it does not appear on the face of the record that the citizenship of the parties was such as to give the circuit court jurisdiction upon removal, the judgment or decree of the circuit court will be reversed, and the cause sent back with instructions to remand it to the state court from which it was improperly removed." *Railway Co. v. Swan*, *supra*; *Hancock v. Holbrook*, 112 U. S. 229, 5 Sup. Ct. Rep. 115. In the present case it does not appear on the face of the record that the citizenship of the parties was such as to give the circuit court jurisdiction upon the removal. It follows that the judgment of the circuit court should be reversed, and the cause sent back, with instructions to remand it to the state court from which it was removed.

As the plaintiff in error brought the case into the circuit court as well as to this court, he should not be allowed to recover costs, but should be condemned to pay them. See *Hancock v. Holbrook*, *supra*; *Timmons v. Land Co.*, *supra*. The decree of the circuit court is reversed, and the cause is ordered returned to that court, with instructions to remand it to the state court from which it was removed. All costs of this and the circuit court are to be adjudged against the plaintiff in error.

VANZANDT v. ARGENTINE MIN. Co.

(Circuit Court, D. Colorado. November, 1880.)

INJUNCTION—VIOLATION—PROSECUTION FOR CONTEMPT.

Upon the filing of a bill alleging plaintiff's ownership of a silver mine then in defendant's possession, a preliminary injunction was granted, restraining defendant from taking ore therefrom pending the suit. Plaintiff thereupon ejected defendant, and himself took possession. On application to the court, plaintiff was ordered to restore the possession, and abstain from further interference therewith pending the suit. *Held*, that plaintiff was not also punishable for contempt as for a violation of his own injunction, as it did not in terms forbid him to take possession.

In Equity. Prosecution for contempt in violating an injunction.

The bill alleged plaintiff's ownership of a certain silver mine in Colorado, then in the possession of the defendant; and upon his application a preliminary injunction was granted, restraining defendant from mining or disposing of any ore pending the suit. Afterwards plaintiff ejected the defendant, and himself took possession of the mine. Upon application by defendant, and proof of this fact, an order was made, requiring plaintiff to restore possession, and to abstain from further interference therewith pending the suit. Thereupon defendant also moved for an order requiring plaintiff to show cause why he should not be punished for contempt in violating his own injunction.

Dixon & Reed, for the motion.

Thomas & Campbell, *contra*.

Before McCraby and HALLETT, JJ.

McCrary, J. 1. A proceeding for contempt is in the nature of a criminal proceeding, and to be governed by the strict rules of construction which prevail in criminal cases. Its purpose is not to afford a remedy to the party complaining, and who may have been injured by the acts complained of. That remedy must be sought in another way. Its purpose is to vindicate the authority and dignity of the court. *Haight v. Lucia*, 36 Wis. 355.

2. We cannot hold that the complainant has subjected himself to this summary criminal proceeding by taking ore from the mine in dispute. Strictly speaking, the writ of injunction did not restrain the complainant from so doing. Its only effect was to restrain the defendant, and to subject its agents to punishment in case of a violation of the order. The injunction did not by its terms, or of its own force, forbid the complainant to interfere with the possession of the mine pending the suit, and therefore he cannot be held to answer in this proceeding. It does not follow, however, that a complainant, in such a case as the present, can with impunity do the acts which, at his instance, the defendant has been restrained from doing. Where, as in this case, the evident purpose of the writ is to preserve the existing *status* of property in litigation until a final adjudication can be had, it is a gross abuse of the process of the court for the complainant to disregard his own injunction, after having by means thereof tied the hands of his adversary; and no doubt the court has ample power to prevent or redress such abuse. In this case the court did redress it, by ordering the complainant to restore the property to defendant, and to abstain from any further interference with the possession thereof pending the suit. If defendant had desired and asked a dissolution of the injunction, the court might have granted it, on the ground that complainant was no longer entitled to the exercise of the discretionary power of the court for his protection. See remarks of LYON, J., on the point, in *Haight v. Lucia*, *supra*. Motion denied.

HALLETT, J., concurs.

CALIFORNIA & O. LAND CO. v. GOWEN, Sheriff.

(Circuit Court, D. Oregon. January 4, 1892.)

1. ILLEGAL ASSESSMENT, WHEN TAX LEVIED ON MAY BE ENJOINED.

Where an assessor assessed a large body of lands belonging to the plaintiff, of various values, at a uniform value, without reference to the local advantages of the various parts of the tract or tracts, and beyond the cash value of the whole, and relatively at a much greater value than the lands of resident tax-payers, for the purpose of favoring the latter at the expense of the former, equity will restrain the collection of a tax levied upon such an assessment, when it further appears that the collection of the tax will cast a cloud upon the title of the plaintiff, and involve the party in a multiplicity of suits.

2. BOARD OF EQUALIZATION.

The board of equalization is a part of the machinery for the assessment of property for taxation, and a person, by asking it to reduce an alleged overvaluation of his property, does not thereby elect to pursue a remedy at law for such overvaluation, or an illegal or fraudulent assessment, if it be such.

3. THE WRIT OF REVIEW.

A writ of review directed to the board of equalization is the commencement of proceedings at law to correct such assessment, on which the circuit court examines the record of the board, including the facts found, if any, and determines, without reference to the evidence, whether, as a matter of law, the board has exceeded its jurisdiction, or exercised its functions erroneously, to the injury of the substantial rights of the plaintiff therein.

(Syllabus by the Court.)

In Equity. Suit for an injunction.

Mr. Charles B. Bellinger, for plaintiff.

Mr. N. B. Knight, for defendant.

DEADY, J. This suit is brought by the California & Oregon Land Company, a corporation formed under the laws of California, to have E. W. Gowen, the sheriff of Klamath county, Or., enjoined from selling certain lands of the plaintiffs for alleged delinquent taxes.

It is alleged in the bill that the plaintiff is the owner of 185,902 acres of land, situate in said county, and particularly described therein; that in the year 1890 the assessor of the county made an assessment of said lands at the valuation of \$1 per acre, although the same were of widely different values, and some of them only nominal value; that said assessment exceeds the aggregate cash value of said lands, while all other assessments of land in said county were made at not to exceed one-half their cash value; that thereafter the plaintiff appeared before the board of equalization of said county, and asked to have said assessment reduced, but said board refused so to do; that said arbitrary classification and assessment of said lands at relatively much beyond the assessment of other property in said county, and much beyond their actual value, is for the purpose, as plaintiff believes, of relieving resident tax-payers from their proportion of the taxes; that plaintiff has been at all times ready and willing to pay its just proportion of taxes upon said lands, which comprise all its taxable property in said county, and on March 25, 1891, did tender and pay to the defendant the sum of \$1,487.21, which sum he credited as part payment of said taxes.

That in April, 1891, the defendant made a return of delinquent taxes, which did not contain any description of real property upon which taxes remained unpaid, as required by section 2809 of Hill's Laws of Oregon, or at all, nor was there any delinquent assessment roll annexed thereto, as stated in said return, but said return simply contained a statement in gross of the amount of taxes collected and uncollected, without the name of a delinquent or the mention of a tract of land on which the tax was not paid; that thereupon, on April 16, 1891, the county court of said county, without any other or further return being made by said sheriff, issued a pretended warrant commanding him to collect the taxes mentioned in the foregoing delinquent tax-list, which, so far as appears, did

not exist, and on August 8, 1891, the defendant by virtue of such warrant pretended to levy upon certain of the lands so assessed as aforesaid, and has advertised the same for sale to satisfy a delinquent tax of \$2,275.30, with costs; that the tax actually levied upon said advertised lands amounts to the sum of \$99, and said lands are worth more than \$2,000, and the tax claimed to be delinquent in the sum of \$2,230.83; and that unless restrained by the order of this court the defendant will proceed to sell the lands levied on, and make deeds to the purchasers thereof, which will constitute a cloud on plaintiff's title, and involve it in a multiplicity of suits in respect thereto.

The defendant interposed a demurrer to the bill, and after argument the court, on November 16th, overruled the same, and allowed a provisional injunction. On motion of the defendant the case was reheard on December 28th.

By section 2815 of the Compilation of 1887, a warrant for the collection of taxes is made an execution against property, and "shall be executed and returned in like manner." The following section authorizes such warrant to be levied on any real property, or sufficient thereof, of the person against whom the tax is charged. This explains the action of the sheriff in levying upon only a portion of the premises to satisfy the tax against the whole.

On the argument it was admitted by counsel for the defendant that upon the statements of the bill as to the manner and purpose of making the assessment, coupled with the allegation as to the multiplicity of suits and clouds on title, the plaintiff is entitled to an injunction to restrain the collection of the tax as illegal and fraudulent; and of this there can be no doubt.

Section 2752 of the Compilation of 1887 provides that lands and town lots shall be valued by the assessor "at their true cash value, taking into consideration the improvements on the land and the surrounding country, the quality of soil, the convenience of transportation lines, public roads, mills, and other local advantages." An assessment willfully made in disregard of these requirements, and for the purpose of imposing upon the owner of the property more than his just proportion of the public burden, is fraudulent and illegal. *Hersey v. Board*, 37 Wis. 75; *Merrill v. Humphrey*, 24 Mich. 170; *Railway Co. v. Cole*, 75 Ill. 591; *Dundee v. Parrish*, 11 Sawy. 92, 24 Fed. Rep. 197; *Balfour v. Portland*, 12 Sawy. 122, 28 Fed. Rep. 738. The Michigan case was one very like this. It was alleged in the bill and admitted by demurrer that the supervisors had assessed the lands of the plaintiff "above their value, and relatively very much beyond the assessment of other property, for the purpose of relieving resident tax-payers from their proportion of the taxes."

The plaintiff professed to be willing to pay his just proportion of taxes, but had not paid or tendered any proportion of them; and for this reason the injunction was denied, but the bill dismissed without prejudice. But on the main question Mr. Justice COOLEY, in delivering the opinion of the court, laid down the law in such cases as follows:

After stating that the courts cannot sit in judgment upon the supposed errors of the assessor, and substitute their opinions for his, he says:

"But it remains to be seen whether what is sought here is a review of the assessor's judgment. The charge is that the several supervisors have purposely assessed the property of the complainant beyond its value, and above the assessment of other persons, with a fraudulent intent to compel the payment by him of an undue proportion of the public taxes. * * * It is admitted that the supervisors have not brought their judgment to bear upon the question of values, but have set aside and disregarded their duty for the express purpose of perpetrating a wrong upon an individual.

"The question, then, is this: A public officer being empowered by law to apportion certain burdens among the citizens, as in his judgment shall be just, being actuated by a fraudulent purpose, instead of obeying the law, disregards its mandate, declines to bring his judgment to bear upon the question submitted to him, and arbitrarily, and with express reference to defeating the ends at which the law aims, determines to impose an excessive burden upon a particular citizen. Has this citizen any remedy against the threatened wrong?"

"We think this question can admit of but one answer. A discretionary power cannot excuse an officer for refusal to exercise his discretion. His judgment is appealed to; not his resentments, his cupidity, or his malice. He is the instrument of law to accomplish a particular end through specified means; and when he purposely steps aside from his duty to inflict a wanton injury, the confidence reposed in him has not disarmed the law of the means of prevention. His judgment may, indeed, be final, if he shall exercise it; but an arbitrary and capricious exertion of official authority, being without law, and done to defeat the purpose of the law, must, like all other wrongs, be subject to the law's correction."

It is also admitted that equity will not enjoin the collection of a tax merely because it is illegal. In addition to this, it must appear that the case falls within some recognized head of equity jurisdiction, as that the enforcement of the tax would lead to a multiplicity of suits, or cast a cloud upon the title of the plaintiff. *Dows v. Chicago*, 11 Wall. 110; *State Railway Tax Cases*, 92 U. S. 614.

Here it is admitted on the showing in the bill that the tax is illegal by reason of the manner and purpose of the assessment, and if enforced it will cast a cloud upon the title of the plaintiff, and involve it in a multiplicity of suits. Therefore he ought to have relief by injunction from this court.

But the defendant contends, and this was the burden of his counsel's argument on the rehearing, that the plaintiff, by going before the board of equalization, and asking it to correct the assessment, has elected to pursue his remedy at law, and is thereby precluded from resorting to a court of equity, and is driven to a writ of review to correct the action of the board of equalization.

In support of this position he cites *Railway Co. v. Hodges*, 113 Ill. 323; *Bank v. Board*, 25 N. Y. 312; *Railway Co. v. Board*, 48 N. Y. 513. I have examined these cases carefully, and find them not in point.

By section 2778 of the Compilation of 1887, the county judge, county clerk, and assessor are made a board of equalization to correct assessments, and increase or reduce the valuation of property assessed.

In my judgment, this board is merely a part of the machinery of assessment. No relief can be had against a mere overvaluation of property incident to the infirmity of human judgment, except by an appeal to it.

In the case of an illegal assessment, relief may be had in equity without resorting to the board. *Balfour v. Portland*, 12 Sawy. 124, 28 Fed. Rep. 738. But the party aggrieved in such case may present his case to the board, without forfeiting his right to go into equity. An appeal to this board is in no sense an election to pursue a remedy at law. It is merely the last act in the matter of the assessment.

Whoever is dissatisfied with the action of this board in the matter of his assessment may consider whether he will have his action reviewed on a writ of review from the circuit court, or seek relief in equity; but, whichever course he elects to pursue, that he is bound by. If the judgment of the court of law is adverse, he cannot fall back on equity.

A writ of review, under the Code, is the equivalent of the common-law writ of *certiorari*. The latter is defined as "a writ issuing from a superior court to an inferior court, tribunal, or officer exercising judicial powers, whose proceedings are summary or in a course different from the common law, commanding the latter to return the records of a cause depending before it to the superior court." 3 Amer. & Eng. Enc. Law, 60.

The writ of review issues from the circuit court to an inferior court, officer, or tribunal in the exercise of judicial functions, where the same appears to have exercised such functions "erroneously, or to have exceeded its jurisdiction, to the injury of some substantial right of the plaintiff." Comp. Laws 1887, § 585.

The supreme court of the state has decided that the board of equalization was a tribunal to whom this writ might issue. *Poppleton v. Yamhill Co.*, 8 Or. 337. The return to the writ must not include the evidence, and if it does the court will not consider it. The facts found by the inferior tribunal constitute the return upon which the court acts in determining whether such tribunal exceeded its jurisdiction, or exercised its functions erroneously, to the injury of the plaintiff in the writ. *Road Co. v. Douglas Co.*, 6 Or. 308; *Poppleton v. Yamhill Co.*, 8 Or. 337.

In this case the writ of review would not furnish the plaintiff any remedy for this illegal assessment. The board undoubtedly had jurisdiction to examine the assessment, and, regardless of the alleged motives which prompted it, to increase, diminish, or affirm it, as it thought proper. By refusing to reduce the assessment, it practically affirmed it. Its finding of fact, if any, would be that the assessment was according to the true valuation of the property; and with such a return the circuit court would be bound to affirm its action. There would be nothing else to do. The circuit court cannot substitute its judgment for that of the assessor, or the board of equalization, as to what is the assessable value of property. Its power is confined to questions of law that arise on the face of the return.

It is absurd to suppose that, because the plaintiff asked the board of equalization to reduce its assessment, it was thereby irrevocably committed to such a fruitless remedy at law as the writ of review.

The plaintiff is entitled to have this injunction maintained to protect his property from the imposition of a tax levied upon an illegal and fraudulent assessment, and attempted to be collected on a void process.

ROLLINS INVESTMENT Co. v. GEORGE *et al.*

(Circuit Court, D. Oregon. December 28, 1891.)

1. THE BRIDGE COMMITTEE.

The bridge committee of the city of Portland is a mere agency of the city, for whose acts, done within the sphere of their authority, the city is liable; and therefore the city is a necessary and proper party to a suit for the specific performance of a contract, alleged to have been made with said committee for the sale and delivery of certain city bonds.

2. SPECIFIC PERFORMANCE.

A contract for the sale and delivery of certain bonds of the city of Portland is not such a contract as a court of equity will specifically enforce, for the damages which may be recovered in an action at law for the non-delivery will compensate for the same.

3. CONTRACT, WHAT CONSTITUTES.

A statute authorized the bridge committee of the city of Portland to sell and deliver its bonds for the purpose of building bridges across the Willamette, and the act required that the chairman of the committee should execute all written contracts on behalf thereof. *Held*, that a proposal in writing to purchase said bonds, and a resolution by the committee, entered in its minutes, accepting the same, constitute a written contract within the meaning of the statute, and is incomplete and invalid unless executed by the chairman.

(Syllabus by the Court.)

In Equity. Suit for the specific performance of a contract of sale of bonds, brought by the Rollins Investment Company against M. C. George, E. A. King, J. L. Sperry, C. H. Meusdorffer, William M. Ladd, John Parker, C. C. Redman, and T. W. Pittenger, constituting the bridge committee of the city of Portland, Or. Heard on demurrer to the bill. Demurrer sustained.

Mr. O. F. Paxton, for plaintiff.

Mr. William T. Muir, for defendants.

DEADY, J. This suit is brought by the Rollins Investment Company, a corporation formed under the laws of Colorado, to specifically enforce an alleged contract by which it claims to have purchased from the defendants \$500,000 worth of bridge bonds of the city of Portland, and for a temporary injunction to restrain the defendants, in the mean time, from otherwise disposing of said bonds.

On the filing of the bill an order was made requiring the defendants to show cause why such an injunction should not issue, and in the mean time restraining them as prayed for in the bill.

The defendants are a committee of eight persons, created by the act of February 18, 1891, commonly called "The Meusdorffer Act." The act authorizes the cities of Portland, East Portland, and Albina to provide one or more suitable bridges across the Willamette, through the agency of these eight persons appointed from the tax-payers of Multno-

nah county by the two circuit judges thereof, and styled "The Bridge Committee." For this purpose the committee is authorized to issue and dispose of bonds of these cities of the par value of \$500,000.

On February 19, 1891, the legislature framed an act "to incorporate the city of Portland," with boundaries including the territorial limits of East Portland and Albina, to take effect upon a favorable vote of the three localities. The election took place on the first Monday in June, 1891, and resulted in a vote for consolidation of the three towns into one, by the name of the "City of Portland."

The relation of these two acts, and the effect of the latter upon the former, were lately considered by the supreme court of the state, (*Winters v. George*, 27 Pac. Rep. 1041,) wherein it was held that the acts are *in pari materia*, and both in force, except so far as the elder act provides for the bonds of the three cities, which is superseded by the latter, and the vote for consolidation thereunder, so as to abolish the corporations of East Portland and Albina, and make the bonds issued those of the city of Portland, as thus constituted.

The defendants show cause by demurring to the bill, and objecting, first, that there is a defect of parties thereto, in that the city of Portland is not made a defendant.

In my judgment the objection is well taken. The committee is not a corporation, but a mere aggregation of persons authorized to do a certain thing for and on behalf of and in the name of the city. The city is responsible for its acts, done within the sphere of its authority. It is a mere agency of the corporation,—the city of Portland,—like the water committee, the police commissioners, or the common council. The committee is not capable of suing or being sued, as such. True, their powers and duties are defined by law, and the city cannot control them in the exercise or performance of the same; but, nevertheless, the committee exists only to do a certain thing on behalf of and in the name of the city, and this constitutes an agency. The city, as principal, is entitled to be heard on the question whether its agent—the bridge committee—has lawfully disposed of its bonds, and pledged its faith and resources for the payment of the same, and should be made defendant. *Barnes v. District of Columbia*, 91 U. S. 540; *Brown v. District of Columbia*, 127 U. S. 586, 8 Sup. Ct. Rep. 1314. But, as this objection can be overcome by an amendment to the bill, it is necessary to consider the matter further.

It is also objected that the plaintiff is not entitled to have this alleged contract specifically enforced, because, if it is injured by the non-performance thereof, it has an adequate remedy at law, in an action thereon for damages.

The tendency of courts in modern times is to enlarge, rather than restrict, the jurisdiction whereby courts of equity undertake to compel the specific performance of contracts concerning personalty; and with this tendency I sympathize. But no court has gone so far as to exercise this jurisdiction in a case where the remedy at law is adequate and the party is solvent.

These are the bonds of a solvent city. Indeed, it is alleged in the bill "that the city of Portland is a wealthy and well-known city, of high financial standing and good reputation; that its bonds are of greater value and more easily sold than bonds of ordinary cities and towns." Under these circumstances, it is difficult to see why an action at law for damages does not furnish the plaintiff a complete remedy for the non-delivery of the bonds. The difference, if any, between the price bid and the market price will be the measure of damages.

Mr. Justice Story states the case for specific performance, (2 Eq. Jur. § 716,) where he says:

"Whenever, therefore, the party wants the thing *in specie*, and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance."

Here the party wants the thing (the bonds) *in specie*, but he can be otherwise (by an action for damages) fully compensated for its non-delivery.

And again the author says, (2 Story, Eq. Jur. § 717:)

"So courts of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because the damages at law, calculated on the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as with the damages he may ordinarily purchase the same quantity of the like stock or goods."

Besides, these are the bonds of a municipality,—a part of and an agency of the state. They are, then, what are known as government or public bonds. Professor Pomeroy, in his work on Contracts, (section 17,) says:

"It is a settled rule that agreements to purchase and sell or deliver shares of government or other public stocks will not be specifically performed in equity, because such securities are always for sale, their price is known, and the damages awarded at law will enable the injured party to make himself whole by purchasing in the market."

There is an attempt in the bill by sundry allegations to make it appear that the plaintiff will sustain special and peculiar damages from the non-delivery of these bonds which cannot be recovered at law. But in my judgment they fail to show anything of the kind. For instance, it may be, according to these allegations, that the plaintiff may be put to more than ordinary inconvenience, in an action at law, in showing the value of these bonds in the principal markets of the world. But mere inconvenience is no reason why the remedy at law is inadequate; and the extra expense of making such proof may be recovered as costs.

My conclusion is that this is not a case for specific performance, and that this objection is well taken.

Objection is also taken by the demurrer that there is no valid and binding contract to sell and deliver these bonds to the plaintiff.

The act of February 18, 1891, provides that the bridge committee shall organize by the election of a chairman and clerk. Section 7 provides that "the chairman of the committee shall execute all written con-

tracts on behalf thereof, and sign all orders for the payment of money authorized thereby;" and it is elsewhere provided that the clerk shall attest all such contracts signed by the chairman.

It is alleged in the bill that on June the 10th the committee met, and adopted a resolution to the effect that it issue \$500,000 of bonds, as provided by the act constituting the same, and advertise the bonds for sale in amounts to be determined by the committee. That on June 27th the committee resolved that \$500,000 of the bonds be sold, and afterwards advertised the sale of said bonds in the Daily Oregonian, to the effect that proposals would be received for the purchase of the same until 12 noon of August 17, 1891, dated January 1, 1892, payable in 30 years from date, with 5 per cent. interest, payable on January and July 1st of each year, in gold coin of the United States, at certain points, as the purchaser may desire. That on August 17th the plaintiff made a bid in writing to purchase said bonds at 92.69 of their par value, to be delivered in three lots, on January 1, 1892, February 15, 1892, and April 1, 1892; that on August 18, 1891, the committee met and passed the following resolution: "Resolved, that the bid of the Rollins Investment Company for the bridge bonds be accepted;" and thereupon the defendants duly made and delivered to the plaintiff a copy of the offer to purchase, with the resolution accepting the same indorsed thereon, and signed by the clerk. That afterwards, and before the commencement of this suit, the plaintiffs gave notice to the defendants of the place where the bonds might be made payable; but on November 24th the committee met and rescinded the resolution accepting the bid of the Rollins Investment Company, and rejected it. The proceedings of the committee were all entered in their minutes.

It may be admitted that under ordinary circumstances this proposal and the acceptance of the same constituted a binding contract for the sale and delivery of the bonds, but just here the statute comes in and requires all written contracts to be executed—signed—by the chairman. This is a written contract, if anything, not executed by the chairman, and is therefore incomplete and ineffectual. The parties negotiated for the sale and delivery of these bonds, and came to an agreement or understanding in writing, but stopped short of the execution of the same by the chairman of the committee, which the statute requires to make a complete and binding contract.

The injunction is denied, and, unless amended, the bill is dismissed.

PEELER v. LATHROP.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1891.)

1. CIRCUIT COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

The amount in dispute or the matter in controversy, which determines the jurisdiction of the circuit court in suits for the recovery of money only, is the amount demanded by plaintiff in good faith, and not the amount of recovery.

2. PRINCIPAL AND AGENT—RECOVERY OF MONEY COLLECTED—EVIDENCE.

In an action to recover rents alleged to have been collected by defendant as agent, testimony of plaintiff's solicitor that he fixed the amount of the claim by questioning the tenants who had paid the rents, where there is no showing to the contrary, is sufficient to show good faith.

3. SAME—LIABILITY OF AGENT FOR NEGLECT—ERROR NOT PREJUDICIAL.

In an action against an agent to recover for rents collected by him, and for damages for failure to collect rents, an allegation that defendant has "neglected said business, and hence has failed to collect rents that with diligence he might have collected," is insufficient, and demurrable; but, where such charge is disregarded on the trial, the overruling of a demurrer thereto is not prejudicial.

4. TRUSTS—AGREEMENT TO CONVEY PROPERTY PURCHASED ON FORECLOSURE.

B., a member of a firm, transferred to P., a creditor thereof, as collateral security for payment of the debt, two acceptances, secured by a deed of trust, on agreement by P. that on foreclosure of the trust-deed, if P. should purchase the property, he would, on payment of his debt, reconvey the same to B. *Held*, that the transaction constituted a trust in favor of B. for the two acceptances, which extended to the property in case of its purchase by P. on foreclosure.

5. EQUITY—ACCOUNTING—REQUISITES OF BILL.

A bill in equity for an accounting of rents collected by defendant as agent for plaintiff, and to avoid a settlement with defendant for misrepresentations made by him, cannot be sustained alone on the ground that defendant, when making the settlement, falsely represented that he had not collected any rents from certain property. It must appear that all the rents collected were more than sufficient to offset defendant's just claims against plaintiff.

6. SAME—WEIGHT OF EVIDENCE.

To a bill in equity to avoid a settlement for rents collected by defendant as agent, on the ground of false representations by defendant that he had not collected any rents from certain property, defendant answered under oath, as required by the bill, denying fully and specifically any false representations. *Held*, that such answer was not overcome by the testimony of plaintiff's solicitor, corroborated only by a letter by him sent to defendant, which defendant did not answer, it apparently requiring no answer.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Mississippi.

Bill in equity by Fannie E. B. Lathrop against Richard Peeler for an accounting of rents collected by defendant, and to set aside a settlement between the parties for false representations of defendant. On the death of defendant the suit was revived in the name of Clementine G. Péeler as administratrix. Decree for plaintiff. Defendant appeals. Reversed.

STATEMENT OF CASE.

On December 31, 1889, appellee filed in the circuit court the following bill:

"Mrs. Fannie E. B. Lathrop, a citizen of the state of Louisiana, residing in New Orleans, exhibits this, her bill of complaint, against Richmond Peeler, a citizen of the state of Mississippi, residing in the western division aforesaid. Complainant shows that on the 25th day of February, 1888, and for many years prior thereto, the said Peeler was a mortgagee in possession of complainant's two tracts of land in Warren county, Miss., known as the

Upper' and 'Lower Butler Places on Old River,' which are particularly described in Exhibit A hereto, to which reference is hereby made for a more particular description thereof; holding the same under an agreement that the rents of said land should be credited on the debt and on the taxes on the lands, which he, said Peeler, was to pay. That on that day they had a settlement of said matters, and said Peeler represented that the rents of the Lower place, which he had actually received, net, after payment of all the taxes on the lands, which he said he had paid, amounted to about enough to pay said debt, and that he had not received any rents from the Upper place at all. Relying on the truth of said representations, complainant accepted a deed from said Peeler for said lands, a copy whereof is herewith filed as Exhibit A, and prayed to be taken as part hereof, and gave him a receipt in full. Now complainant shows that said Peeler had, in fact, as he then well knew, and as she has since discovered, collected rents from said Upper place to a large amount,—the exact amount, however, she is unable to state,—and that he had negligently suffered large portions of said land, to-wit, lots 7 and 8, sec. 8, and lots 3 and 4, sec. 15, all in township 17, range 3 east, in Warren county, Miss., to be sold for the very taxes he had undertaken and was in duty bound to pay, and which he claimed he had paid; so that complainant has lost such portions entirely, and is damaged to the full extent of their value, for which he should compensate her. Complainant states that said Peeler was a trustee in the matter, intrusted with the lands for the purpose aforesaid, and bound to exercise the utmost diligence and good faith; that he was a man of good reputation, and she had no reason to suspect any misrepresentation, bad faith, or deception; that she did not live in this community, and knew nothing about the facts. Complainant further showed that said Peeler had neglected said business, and hence had not collected as much rent as said lands were reasonably worth, or as they, by the exercise of even ordinary diligence, would really have brought, although he charged for his pretended attention to the business. That, if he had attended to it, he would have realized a very large sum of money in excess of his debt years before the date of said settlement, and she claims that he should be held accountable for the rents so lost by his fault. Complainant is informed and believes that there is due her from said defendant forty-nine hundred dollars, for which she asks a decree. The premises considered, complainant prays that said Richmond Peeler may be required to answer this bill on oath, and to answer showing the amount of his debt, with interest; the amount of taxes paid by him, and when, and on which parcels; the amount of rents actually collected by him from both places, and what rents he failed to collect as aforesaid; that an account be stated of such matters and of the value of the lands which by his failure to pay the taxes thereon has been lost to complainant; and that he may be decreed to pay the balance of the rents over and above his debt and interest and taxes, and also the amount of damages she has sustained by the loss of said land as aforesaid. Or, if mistaken in the relief prayed for, complainant prays for such other further or general relief as may be equitable in the premises."

No further proceeding seems to have been had in the case until July following, when an agreement of counsel was filed to the effect that filing an answer should not prejudice defendant's right to file a demurrer and have judgment thereon; and at the same time the death of defendant was suggested, and an order of revivor was entered against Mrs. Clementine G. Peeler as administratrix. On January 3, 1891, the defendant filed a sworn answer, in substance as follows:

She admits on the 25th day of February, 1888, the said Richmond Peeler was in possession of the lands mentioned in said bill; but re-

spondent denies that the said R. Peeler was in possession of said lands as mortgagee, and denies that they were the lands of said complainant; but, as she is informed and believes and states the fact to be, that some time in 1867 or thereabout one B. J. Butler, who was the father of complainant, as a member of the firm of Butler, Terry & Co., doing business in the city of New Orleans as cotton factors, became indebted to the said Peeler, for proceeds of cotton consigned to him, in a large sum, to-wit, \$3,260, which, becoming bankrupt, he was unable to pay. That on the 21st of April, 1866, one E. S. Butler executed a deed of trust conveying said lands to trustees, to secure to B. J. Butler four bills of exchange for \$1,000 each, accepted by Butler, Ferrell & Co. That for the non-payment of said bills said deed of trust was, on the 14th day of January, 1871, foreclosed, and at the sale thereof the said Peeler became the purchaser for the sum of \$1,800. That before said sale, to-wit, on the 19th day of February, 1870, said B. J. Butler assigned two of said bills of exchange to the said Peeler, and agreed in writing that they should have priority over the other two as collateral for the payment of said debt; and it was also then agreed on the part of said Peeler as follows:

"And I agree that I will, whenever the said account and interest shall be fully paid to me, transfer and assign said two bills of exchange and deed of trust to said Baxter J. Butler, or to whom he may direct; or, if said land mentioned in said deed of trust shall be sold and bought by me, or in my name, that I will, upon payment of said account and interest, convey the same to the said Baxter J. Butler, or to whomever he may direct."

—That, after the said lands were bought by the said Peeler as aforesaid, the said Peeler, on the 22d of September, 1873, made an agreement with C. W. Butler, wife of B. J. Butler, wherein he promised to carry out the agreement made before then with B. J. Butler; and, upon the payment of said debt, to convey the lands to C. W. Butler, or to whom she might direct. It was further agreed that the said Peeler should be repaid any taxes he might pay, and any rents received by him should be credited upon said debt.

Respondent avers that said agreements were the only agreements in writing made by the said Peeler in reference to said lands; that at the time they were made neither the said B. J. Butler nor C. W. Butler were the owners of said lands, or of the equity of redemption therein. Respondent admits that on the 25th day of February, 1888, the said Peeler had a settlement and accounting with the complainant as stated in her bill, who then claimed a right to a conveyance of the lands; that he then conveyed the same to her, and she gave him thereupon a receipt and acquittance in full discharge of all demands against him; but respondent denies that said Peeler then made any false statements whatever as to the rents, or any other matters in reference to said business. Respondent denies that complainant was at the time of said settlement the owner of said land, and avers that said conveyance to her was without any consideration, and is void. But, further answering in reference to said settlement, this respondent denies, as hereinbefore stated, that any

false representation was made by said Peeler to said complainant; and, on the other hand, avers that at said settlement the said Peeler informed complainant of the fact that nearly or quite all of his accounts had been destroyed by fire,—once in 1886, and once a few years before then. That from his recollection of the average amounts of rents collected and taxes and improvements paid, and the amounts paid to Mrs. C. W. Butler, he was unwilling to claim that a balance was still due him. That the settlement was avowedly made upon his statements, based upon his memory, and thereupon he executed to the said complainant a deed to said land, and in consideration of such settlement and acquittance received from her, in writing, a full discharge of all liability in the premises.

Respondent denies that the said Peeler received in his life-time, and while in possession of said lands, an amount for rent of the same, which, after deducting therefrom taxes and other lawful charges, exceeded the said debt and interest due him. Respondent says that she is unable to make a statement of what rents were received, because some time in 18—, and again in 18—, nearly all the books and accounts of the said Peeler were destroyed by fire. She states, however, that on the 1st of January, 1876, a statement was made by which it appears for the years 1871 and 1872 he received for rent \$1,400, and for the years 1873 and 1874 he received \$510, and paid out for taxes, etc., some \$500, leaving a balance then due him in the sum of \$2,751.72; that he expended at different times since said settlement large sums of money in making necessary repairs, and in building fences, which in one year amounted to some \$600, being the cost of putting a wire fence around said place; that the maintenance of a fence was costly, owing to the said overflows washing the same away. For the reason that all of said accounts were burned, respondent is unable to state definitely the exact amount of said repairs. She avers, however, that the said complainant, and, after the death of her father, her mother, was constantly advised of the extent of the income from said place. That in 1888 the said Peeler, not having his accounts, they having been burned, came to a settlement as aforesaid, based upon his recollection that in point of fact said place had not averaged, after paying all necessary expenses, annually, a net income exceeding \$225 or \$250. That for four or five years before the death of the said Mrs. C. W. Butler, the mother of complainant, and after the death of B. J. Butler, the said Mrs. Butler was without means and dependent, and during said years, at her request, a large portion of the rents were paid to her by the said Peeler, and was permitted by the said Peeler to receive and collect said rents. The amount so collected, for the reasons above stated, respondent cannot definitely state, but believes and avers said sum was perhaps as much as \$1,000. That during several years little or no rent was collected, in consequence of overflow,—said lands being low, or subject, more or less, to inundation nearly every year; and, if an accurate account could be stated, a balance would be found still due upon said debt. Nevertheless he consented to the settlement as aforesaid, and in consideration therefor, as before stated, con-

veyed said lands to said complainant. And afterwards, to-wit, on the 3d day of January, 1891, the defendant filed her demurrer to complainant's bill herein, as follows:

"The said defendant, not confessing any of the matters in said bill contained to be true in the manner and form as therein set forth, demurs thereto, and for cause of demurrer says that said bill does not show that the amount or value of the property in controversy is within the jurisdiction of this court. (2) And as to so much of said bill as seeks to charge the estate of the intestate for value of rents lost through the failure and negligence on the part of Richmond Peeler in his life-time to collect the same, she demurs thereto, and for cause of demurrer says that the allegations of said bill in that regard are insufficient, and do not constitute any liability upon said estate, and are vague, indefinite, and uncertain. (3) And to so much of said bill as seeks to charge a liability for the value of certain lands alleged to be lost by reason of the non-payment of the taxes thereon, she also demurs thereto, because: *First*, said lands are not described; and, *second*, because such failure to pay said taxes does not raise any liability beyond the amount of the taxes, and the acquisition of any tax-title to the same by any stranger is too remote and consequential; *third*, because in this regard said bill is indefinite in not stating how said lands were lost. And to so much of said bill as seeks to charge for rent collected on the Upper Butler place, because said bill in that regard does not show complainant entitled upon the statute to any relief in relation thereto. Wherefore defendant prays judgment whether she should make further answer."

On July 6, 1891, the complainant dismissed her bill, "in so far as it claimed damages of defendant by reason of the said Richmond Peeler having permitted certain lands mentioned in the bill to be sold for taxes;" and on the 16th day of July, 1891, the defendant filed a motion to dismiss complainant's bill, because it appears that the matter in dispute is less than \$2,000, and this court is therefore without jurisdiction; and on the same day the cause, by agreement, was submitted for final hearing upon the pleadings, motion to dismiss for want of jurisdiction, and upon the depositions of certain witnesses. It was further agreed that B. J. Butler died in 1872, leaving surviving him C. W. Butler, his wife, and one daughter, the complainant.

The testimony was to the effect that Peeler collected rents from the Upper Butler place, prior to the settlement in 1888, to the amount of \$1,200; and, in addition, Mr. Marshall, a member of the bar, who represented complainant in the settlement, and who filed complainant's bill in this case, testified as follows:

"Mrs. Lathrop demanded a settlement of accounts, claiming that there was a considerable amount due her from the Lower place. She claimed that she had the right to charge him with reasonable rents. He refused to settle on those terms, but was willing to settle for what he actually received; but when he came to state that, he said that these papers had been burned in the loss of some house, I do not remember what, and that he was not able to furnish any itemized account at all, but that he knew that the rents that had been received would be about equal to paying the debt. Mrs. Lathrop wanted him to account for the rents of the Upper place, asking him, as she did not live here, what was its condition, and what rents he had received from it. Mr. Peeler assured her that the Upper place was originally wild, or in the woods, which we knew to be true, and that he had never received any

rents from it at all; that the negroes whom he had up there were on clearing lands,—that is, clearing the land on leases for a number of years, the improvement to be in lieu of rent. I had every confidence in Mr. Peeler. I thought that, except on this question as to what rents he was chargeable for, it was open to discussion. He had acted straightforwardly about the whole thing, and I assured Mrs. Lathrop that his word was worthy of credit; and, on the distinct understanding that he had received no rents from the Upper place at all, she settled with him. To the best of my recollection she gave him her receipt in full. * * * *Question.* I understand you to say that when the settlement was made and the deed executed by Mr. Peeler to Mrs. Lathrop it was upon his distinct representation that he had received no rents from the Upper place? *Answer.* Yes, sir; that is so. You see, I stated it to him in my letter, and he never denied it to me. *Q.* Do you know of any other fact of interest to either of the parties to this litigation, or material to the issues involved? If so, please state them. *A.* Yes, sir. After the discovery that there had been rents payable from the Upper place, I got all the tenants from that place, and some who had been tenants in previous years, down here, and questioned them as to the amount of rents that they collected; and the amount of rent as they represented it to be, collected by Richmond Peeler from the Upper place, amounted to over \$3,000,—I don't remember the exact amount,—and that was the reason I sued in the federal court."

The circuit court found in favor of complainant in the sum of \$900, and the defendant took an appeal to this court, assigning as errors:

"(1) That said United States court for the southern district of Mississippi, western division, erred in overruling the demurrer of the defendant to complainant's bill. (2) That said court erred in denying the motion of the defendant to dismiss said cause for the want of jurisdiction, the amount in controversy being less than two thousand dollars. (3) Said court erred in rendering a decree against said defendant for the sum of nine hundred dollars, because the testimony failed to establish a state of facts by reason of which there was any legal or equitable liability to, or on the part of defendant to plaintiff, and because, if any liability ever existed, it was barred. Wherefore the said C. G. Peeler, administratrix as aforesaid, prays that said decree of said circuit court be reversed, and the bill of complaint herein be dismissed."

And the record shows the following agreement of counsel, to-wit:

"It is agreed that the decree in the above case shall be held and deemed to overrule defendant's demurrer."

L. W. Magruder, for appellant.

R. V. Booth, for appellee.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, J. Complainant in the circuit court asked for a decree in her favor for the sum of \$4,900 on three accounts: (1) For rents collected in excess of the debts and demands due Richmond Peeler; (2) for the rents Peeler failed to collect through negligence; and (3) for the value of certain lands sold for taxes. Her bill did not allege how much was due or claimed to be due on each account. When she dismissed her bill "in so far as it claimed damages by reason of the said Richmond Peeler having permitted certain lands mentioned in the bill to be

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sold for taxes," there was left a bill claiming a decree for \$4,900 on account of rents collected and uncollected.

Counsel for appellant claims in his brief that the demand for the failure to collect rents was abandoned, but we find nothing in the record to show this, except that such demand does not appear to be supported by any testimony, and is not referred to by the circuit court in deciding the case.

The motion to dismiss for want of jurisdiction, made in the circuit court, was based on the ground that, after the dismissal of the bill in so far as it claimed damages for lands sold for taxes, "it appears that the matter in dispute is less than \$2,000." It certainly did not appear from the bill or any other pleading filed by complainant that the amount claimed was less than \$2,000. The only way it could have appeared, if at all, was in the testimony. That undoubtedly showed that the complainant had only been able to prove up about \$1,200. This appears by a stipulation found in the record in reference to omitting the testimony of certain witnesses from the transcript. Whether the testimony omitted from the record tended to prove more, we are not informed. It is not, however, the amount a plaintiff is able to prove he is entitled to that determines the amount in dispute for the purpose of jurisdiction, for otherwise the failure of a plaintiff to recover would oust the court of jurisdiction. The amount in dispute, or matter in controversy, which determines the jurisdiction of the circuit court in suits for the recovery of money only, is the amount demanded by the plaintiff in good faith. See *Hilton v. Dickinson*, 108 U. S. 165, 2 Sup. Ct. Rep. 424; *Barry v. Edmunds*, 116 U. S. 550-561, 6 Sup. Ct. Rep. 501. In determining in this case whether the complainant was claiming in good faith an amount exceeding the sum of \$2,000, exclusive of interest and costs, the evidence of the solicitor who drafted and filed the bill is of very great weight. He testifies as follows:

"After the discovery that there had been rents payable from the Upper place, I got all the tenants from that place, and some who had been tenants in previous years, down here, and questioned them as to the amount of rents that they collected; and the amount of rent as they represented it to be, collected by Richmond Peeler from the Upper place, amounted to over \$3,000.—I don't remember the exact amount,—and that was the reason I sued in the federal court."

—And the record shows nothing to the contrary.

Appellant also complains that the demurrer interposed to the bill in the court below was overruled. It does not appear that any action was had in the circuit court on the said demurrer. It was neither set down for argument nor confessed, and the court disregarded it in passing on the merits of the case. A stipulation in the record, made without date or filing, but apparently after appeal taken, is to the effect that it is agreed that the decree shall be held and deemed to overrule the defendant's demurrer. The demurrer was filed with or after the answer, and was a special one, and went to portions only of the bill, except on the ground that the bill did not show a controversy in amount within the

jurisdiction of the court; but a short consideration may be necessary. The objection to the jurisdiction was not well taken, as we have hereinbefore shown. The bill was subsequently dismissed in so far as it claimed damages for lands sold for taxes, so that the third ground of demurrer need not be considered.

There remains the second ground, charging that the allegations of the bill in regard to the demand for rents lost through the failure and negligence of Peeler in his life-time to collect, are insufficient, vague, indefinite, and uncertain. This ground of demurrer should have been sustained. The bill merely states in this regard "that said Peeler had neglected said business, and hence had failed to collect rents that, with diligence, he might have collected," and was clearly insufficient as the basis of a liability. As, however, no testimony appears to have been taken on account of failure to collect rents, and as such charge was totally disregarded in the court below by the judge deciding the case, it does not appear that the demurrer need cut much figure in the consideration of the appeal in this court.

This brings us to the main complaint of appellant, substantially that on the bill, answer, and proof as made in the circuit court the appellee is not entitled to a decree for any sum whatever, appellant contending that under the agreements made by Peeler no trust relation was created, so far as the lands and the rents thereof were concerned, and that the agreement with Mrs. Butler to credit rents in the contract of 1873 was without consideration, and that claims for rent under it are barred by the statute of limitations. The view we take of the case is this: The original transactions between B. J. Butler and Peeler created a trust in favor of Butler for the two acceptances transferred by Butler to Peeler as collateral security for the payment of Butler, Terry & Co.'s debt to Peeler, and by the express terms of the documents in writing passed between the parties the trust extended to and covered the mortgaged real estate when the mortgage securing the acceptances was foreclosed by Peeler, and he bought in the mortgaged property. From the date of purchase under the foreclosure the lands bought by Peeler thereunder took the place of the acceptances, and Peeler's title thereto was that of trustee for the security of his debt against Butler, Terry & Co. He fully acknowledged the trust in the agreement entered into in 1873 with Mrs. Butler, and again when he made the settlement in 1888 with the complainant. In the agreement of 1873 his rights as trustee were more clearly defined, and his liabilities enlarged, than in the original agreement. The settlement made in 1888 seems to have been on the basis of the agreement of 1873, and the settlement was to the effect that the rents Peeler had received were sufficient to extinguish the debt due him by Butler, Terry & Co., as well as the taxes paid by him, and his outlays, charges, and expenses, including compensation. No account was stated, nor vouchers exhibited; in fact, no account could have been stated, as Peeler's papers and accounts had been destroyed by fire. The case shows that Peeler represented that he had received rent about equal to paying the debt, and

then offered to and did convey the lands in question to the complainant, who accepted the same, giving full acquittance.

Under the pleadings and proof there are two serious difficulties in the way of a recovery by the appellee: (1) Although a full account of the trust is prayed for in the bill, on the theory that the settlement of 1888 should be avoided on account of Peeler's misrepresentations in making the said settlement, yet no account has been taken, or sufficient proof offered, to show that on a full account Peeler's estate would be indebted in any sum. The case, in this respect, at best, for appellee, only shows that Peeler said that he had not collected any rents at all from the Upper place, when in truth and in fact he had collected about \$1,200. It seems clear that appellee cannot recover solely on the ground that Peeler made false representations which appellee believed, and that he collected rents from the Upper place. Unless Peeler collected rents from all the lands, sufficient to more than pay the Butler, Terry & Co. debt, with interest, costs, outlays, and charges, appellee cannot recover. (2) The proof as to false representations by Peeler is not sufficient to overthrow the settlement of 1888. The bill alleged the false representation in terms, and called on the defendant to answer under oath. The defendant answered on oath, denying fully and specifically that Peeler made the representations alleged in the bill to be false and untrue. The appellee's proof on the point consists of the testimony of only one witness,—that of her attorney and solicitor, Mr. Marshall; and there are no corroborating circumstances shown sufficient to defeat the sworn answer. The only corroboration claimed is that Marshall also testified that he sent Peeler a letter, in which he said that Peeler had represented in the settlement that he had received no rents from the Upper place, and Peeler had not answered the letter. We notice, however, that the letter of Marshall referred to was one in answer to a previous letter of Peeler in regard to seizing some cotton from the Upper place, and apparently required no answer. In our opinion, no presumption arises against Peeler from neglecting to answer. When the answer to a bill is required to be made, and is made, under oath, and is responsive to the allegations of the bill, such allegations must, to entitle complainant to relief, be sustained by the testimony of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to the testimony of another witness. See 2 Story, Eq. Jur. § 1528; *Vigil v. Hopp*, 104 U. S. 441; *Railroad Co. v. Dull*, 124 U. S. 175, 8 Sup. Ct. Rep. 433; *Development Co. v. Silva*, 125 U. S. 249, 8 Sup. Ct. Rep. 881; *Beals v. Railroad Co.*, 133 U. S. 295, 10 Sup. Ct. Rep. 314. Our judgment is that the complainant in the court below failed to establish a case for equitable relief, and that the decree in her favor was erroneous, and should be reversed; and that, on the case as made, the defendant should have had a decree dismissing the bill. The decree appealed from is therefore reversed, with costs, and the cause remanded, with instructions to dismiss the bill.

FOWLE *et al.* v. PARK *et al.*

(Circuit Court, S. D. Ohio, W. D. January 23, 1892.)

1. BREACH OF CONTRACT—SALE OF PATENT MEDICINE—DAMAGES.

Where one advertises and sells a proprietary article in a specified territory in violation of a contract the other party cannot recover as damages any moneys spent by him in advertising for the purpose of counteracting the effect thereof, since he might, in the first instance, have resorted to the courts for the protection of his rights.

2. SAME—ACCOUNTING.

In a suit for injunction and an accounting for violation of a contract not to sell a proprietary article in a specified territory, belonging to complainant, equity cannot decree an accounting for losses suffered by complainant by reason of reducing the price to meet defendant's competition. The accounting is limited to defendant's profits.

3. SAME—REMOTE DAMAGES.

Even if such damages were allowable generally, losses incurred by continued sales at the reduced prices after defendant had withdrawn from the territory would be too remote to merit consideration.

4. SAME—CALCULATION OF PROFITS.

Each party having manufactured the article for himself according to the same formula, the profits for which an accounting can be allowed must be computed upon the basis of the actual cost to defendant, and not to plaintiff, of making and selling the article; since the selling of nostrums of this character depends less upon intrinsic merits than the expedients used to recommend them to the public, which fact renders the cost of selling by one party no criterion of the cost to another.

5. SAME—INTEREST.

In an accounting for profits made by selling a proprietary medicine in a specified territory contrary to a contract, interest should be allowed, for though the liability is *ex delicto*, it arises upon a contract.

6. LACHES—EXCUSE.

One who knows that another is selling a proprietary article in a certain territory in violation of a contract between them, cannot justify a prolonged sleeping upon his rights on the ground that he has not sufficient knowledge of the details to bring suit, since he could bring suit by stating the facts generally according to his knowledge, and by means of interrogatories have a discovery of the details from the other party.

7. SAME—STATUTE OF LIMITATIONS.

The delay in bringing suit should only operate to reduce the time for which an accounting could be had to the time fixed by the state statute of limitations for actions on written contracts.

8. JUDICIAL NOTICE—SELLING NOSTRUMS.

The fact that the selling of proprietary medicines and nostrums depends less upon the merits of the medicines themselves than upon the expedients used to recommend them to the public is so notorious that the court will take judicial notice thereof.

9. BANKRUPTCY—EFFECT OF DISCHARGE.

A discharge in bankruptcy releases the bankrupt from liability for breach of a contract with a creditor who assented to the composition, although the creditor had no knowledge of the breach at the time of giving his assent.

10. SAME—PLEADING DISCHARGE.

A debtor who fails to plead his discharge in bankruptcy waives the benefit thereof.

In Equity. Bill by Seth A. Fowle and Horace S. Fowle against John D. Park, Ambro R. Park, and Godfrey F. Park for an injunction and accounting. The defendants filed an answer and a cross-bill for an injunction. Both the bill and cross-bill were originally dismissed by the circuit court. On appeal by complainant the decree was reversed. 9 Sup. Ct. Rep. 658. Subsequently a perpetual injunction was allowed against defendants; and the cause was referred to a master for an ac-

counting. The hearing is now on exceptions to his report. Report modified.

McGuffey & Morrill, for complainants.

O'Hara & Bryan and *Paxton & Warrington*, for defendants.

SAGE, J. This cause is before the court upon exceptions to the report of the special master. The suit was to restrain the defendants from the violation of their agreement not to sell Wistar's Balsam of Wild Cherry within certain territory belonging to complainants, including that portion of the United States west of the Rocky Mountains. A decree was entered June 10, 1889, perpetually enjoining the defendants from selling said balsam or causing the same to be sold or manufactured within said territory, or within other territory embraced in the contract made by defendants with the complainants' assignors, and referring the case to a special master, to ascertain, take, state, and report to the court—

(1) An account of the sale of said balsam made, directly or indirectly, by the defendants, in violation of said contract or of the rights of the complainants in the premises.

(2) The gains, profits, and advantages which the defendants have received, or which have arisen or accrued to them, from the violation of the exclusive right of the complainants to sell said balsam in the territory prohibited to them.

(3) To assess the damages the complainants have suffered from such violation.

The complainants claimed before the master as the measure of their damages under paragraph 3, as stated above:

(1) The profits they could have made if they had enjoyed the monopoly of trade within the prohibited territory, guaranteed them in said contract by defendants.

(2) The reduction of price necessitated by said violation of contract.

(3) The actual cost of extra advertising rendered necessary to counteract the injury to their trade by said violation of contract.

(4) Interest on each of the above items.

The defendants' claim before the master was that the true measure of damages was the amount of their profit on the balsam sold within the prohibited territory. They also presented a transcript of the record in bankruptcy, by which it appears that they filed their petition in bankruptcy, in the United States district court for this district, January 2, 1878, and that a composition was made with their creditors, which operated as a discharge from said date, and that complainants appeared among the creditors, and assented to said settlement.

In respect of discharge in bankruptcy the complainants said that at the time of said composition they had no knowledge of the violation of the contract, which is the basis of this action, and they were creditors of defendants, and gave their assent to the composition upon another and entirely different account.

The master finds that the net profits of defendants on sales made or authorized by them, or made with their knowledge, within the prohib-

ited territory, prior to January 2, 1878, (the date of the filing of the petition in bankruptcy,) were \$1,154.84; and subsequent to January 2, 1878, \$1,023.32; total, \$2,178.16. The cost to complainants of the manufacture and sale of balsam was from \$1.32 to \$1.75 per dozen. The cost to the defendants was \$2.63 per dozen. The sales by defendants before January 2, 1878, were 23 gross 5 7-12 dozen; after January 2, 1878, 20 gross 6 1/2 doz.; which amounts, deducted from the gross proceeds of defendants' sales, as stated in the report, show that the complainants' profit, on the defendants' sales, at the defendants' prices, would have been, prior to January 2, 1878, \$1,439.58; subsequent to January 2, 1878, \$1,243.36; being in all, \$2,682.83.

The complainants further claimed before the master:

(1) Damages resulting from a reduction of price of the balsam in the prohibited territory made by them, and deemed necessary to counteract the injurious effects of the violation of the contract by the defendants. The master finds that said reduction of price upon sales actually made in the prohibited territory by the complainants from September 4, 1878, to October 23, 1889, amounts to \$6,668, with interest amounting to \$2,908.19.

(2) Extra advertising, considered necessary to protect their interest from the injurious effects of the violation of the contract, amounting to \$1,024.47, with interest amounting to \$238.

(3) Interest on the profits complainants would have made but for the violation of the contract, amounting to \$1,799, of which \$1,153.39 is upon sales prior to January 2, 1878, and \$645.61 on sales after that date.

The master sums up his findings as follows:

Complainants' profits	-	-	-	-	-	\$2,682 83	
Interest	-	-	-	-	-	1,799 00	
							\$ 4,481 83
Reduction of price	-	-	-	-	-	6,668 00	
Interest	-	-	-	-	-	2,908 19	
							9,576 19
							<u>\$14,058 02</u>

Both parties except to the master's report. The complainants' exception is to the refusal of the master to allow the actual cost of advertising by them, rendered necessary, it is claimed, to counteract the injury to their trade by defendants' violation of the contract. The master refused to make this allowance, for the reason that the advertisements were under the caption "Caution," and were warnings to the public that there were counterfeits, and advising to buy the genuine, which might be known by the signature "I. Butts" on the wrapper. The master reported that that advertisement had reference to a spurious balsam, and called attention to the fact that it was nowhere charged that the balsam put upon the market by the defendants was spurious or counterfeit, and to the further fact that one of the complainants testified that he knew of no counterfeits in the market. The master found furthermore that all the

testimony, and the whole theory of complainants' case, assumed that the balsam of both complainants and defendants was compounded from the same formula, so that the logical effect of the "caution" would be to warn the public, not against the balsam prepared by the defendants, the curative property of which was identical with that of the balsam prepared by the complainants, but against some other balsam, different in its composition, and therefore presumably different in its effects, but which, in fact, had no existence. So that, although it may have been the purpose of complainants to warn the public against defendants' balsam, the "caution" advertisement did not do so in terms, and the defendants should not be charged with the miscarriage of complainants' purpose.

But, apart from this statement of reasons by the master, which is, logically, sound, the claim for the cost of advertising is inadmissible. If the complainants saw fit to resort to advertisements to counteract the defendants' wrong, they undoubtedly had the right to do so. That was a remedy of their own selection. They might instead have applied to a court of equity for an injunction to restrain the defendants from violating the negative covenants contained in their agreement with the complainants. In the unreported case of *Britting v. Decker Bros.*, (decided by the district court of Hamilton county, Ohio, January 5, 1881,) Judge AVERY, in speaking of the claim made for advertising, which was allowed by the master on the ground that it was necessary to counteract the defendant's advertisements, said:

"It is said by counsel that Decker Brothers were not to sit idly by and suffer their reputation to be lost without an effort to regain it. This may be true, but courts were open for actions for damages, or, if multiplicity of suits would be involved, for injunction. If they resorted to counter-advertisements, they might do so. But it is a different question whether, in a court of law, rules of damages would allow them to recover the expenses. If a man's property is invaded by a trespasser he may recover for the loss, but not for the expenses of building a wall to keep out the trespasser. The plaintiffs could have recovered for injury to their business, but not for counter-advertising, in which they saw fit to engage as a means of protecting themselves.

"It is said where injury has been done it is for the party injured to take reasonable care to prevent more serious consequences. That is a principle of law which is merely the application of the doctrine of ordinary care. Damages must be the proximate loss from the injury, and not aggravated by the omission of reasonable care of the party injured. But reasonable care does not require the owner of a trade-mark, injured by an advertisement in the newspapers, to resort to the newspapers to lessen his loss. There can, therefore, be no recovery for the cost of advertisements."

This is a correct statement of the law, and the claim for the expense of advertising was properly rejected.

The defendants' first exception is that the complainants are not entitled to an accounting, by reason of their long-continued acquiescence in the alleged violation of the contract in question, and their unreasonable delay in seeking relief. The testimony shows that the complainants, in a letter written to defendants under date August 20, 1878, stated that they had then indisputable evidence that the defendants' manufacture

of Wistar's Balsam was being sold on the Pacific coast market with defendants' knowledge and sanction, and an explanation was demanded. The complainants, in answer, say that they were not then in possession of details sufficient to enable them to bring a suit, and that it was only shortly before the bill was filed that they obtained such details. I do not think that the answer is sufficient. It was not necessary that they should have the details before bringing suit. If they were advised of the fact that the defendants were selling, they could have filed their bill, stating the facts generally, and according to the knowledge they had, and have attached to the bill interrogatories which would have compelled the defendants to make full and complete discovery; and upon the decree for injunction and reference to a master the details would have been brought out. But, while ignorance of details was no excuse for not bringing the suit, the delay did not give to the complainants any right to continue their violation of a then subsisting and binding negative covenant.

My conclusion is that the delay operates only to limit the time embraced in the accounting, and that that should be fixed by the rule under the statute of limitations of Ohio, which, the liability arising by reason of the breach of a written contract, is 15 years. The bill was filed on the 28th day of March, 1884, which would carry the accounting back to the corresponding date of 1869. But this conclusion is subject to the next objection made by the defendants, to-wit, that on January 2, 1878, they filed their petition in bankruptcy in the United States district court for this district, and a composition was made with their creditors, which operated as a discharge from that date; and that complainants appeared among the creditors and assented to the composition. The complainants urge that the discharge is no bar, because they did not then know of the claim upon which this suit is based. I do not think that objection sound. If the debt was provable, it has been held that the action is barred, although it was not actually proved. *Hardy v. Carter*, 8 Humph. 153; *Rogers v. Insurance Co.*, 1 La. Ann. 161. But the defendants have not pleaded their discharge in bankruptcy, and that omission is fatal to the objection.

The defendants' exceptions to the master's assessment of damages present the following objections:

(1) To the finding that the complainants suffered damage resulting from their own reduction, in the invaded territory, of the price of the balsam, which reduction was forced upon them by the defendants' competition and cutting of prices, in the sum of \$6,668, on which he allows \$2,908.19 interest, making a total of \$9,576.19. Complainants cite, as authority for this finding, *Yale Lock Co. v. Sargent*, 117 U. S. 552, 6 Sup. Ct. Rep. 934, where the supreme court sustained an award of damages for the enforced reduction of price of the locks which the complainant sold, caused by the infringement of the complainants' patent by the defendants. But counsel do not take into account that in a patent case, upon a decree for infringement, the complainant is entitled to the benefit of the statutory rule contained in section 4921, Rev. St.

U. S., that he may recover, in addition to the profits to be accounted for by the defendant, the damages he has sustained thereby. This cause is based upon a contract, and, the jurisdiction having attached to enjoin the breach of the defendants' negative covenant, the court may hold the case for the purpose of giving compensation or damages if the breach is incidental to the main relief. This is the settled rule, both in this country and in England. 1 Story, Eq. § 71; Bisp. Eq. § 487. The rule of compensation must be according to the settled principles of equity. It is well stated in Adams' Equity, *218, as follows:

"The grant of an injunction necessarily presupposes that the plaintiff has sustained a loss by the defendant's act, and that the defendant has probably derived a profit, which may or may not, according to the circumstances, be co-extensive with the plaintiff's loss. The strict right of the plaintiff, so far as the past wrong is concerned, is to recompense in damages for his own loss, irrespectively of the defendant's profit.

"A claim, however, for such damages would involve the necessity of proceeding in two courts at once,—in equity for an injunction, and at law for damages; and therefore the court of chancery, having jurisdiction for the purpose of the injunction, will prevent that circuitry and expense; and, although it cannot decree damages for the plaintiff's loss, it will substitute an account of the defendant's profits."

Crosley v. Gas Co., 3 Mylne & C. 428; *Colburn v. Simms*, 2 Hare, 543-560.

There is another objection to this finding by the master. He allows for the reduction of price complained of from September 4, 1878, to October 23, 1889. The bill was filed March 28, 1884, and the testimony shows that the defendants made no sales in the prohibited territory after the filing of the bill. The master finds, however, that the reduction subsequent to the filing of the bill was due solely to the defendants' prior unauthorized competition. The finding was not warranted by the testimony. It is true that witnesses state that such was the fact, but these statements do not warrant the conclusion reached by the master. The damages claimed and allowed upon that basis are altogether too remote and uncertain. I know no rule which would authorize the court to allow the subsequent reduction, even if damages could be awarded in this suit. The exception to this portion of the master's report will be sustained.

(2) The defendants object to the computation of the profits by the master, arrived at by substituting the cost to the complainants of making and selling the balsam for the cost to the defendants of the same items. This objection is well taken. The computation must be of the profits actually made by the defendants, and not of the profits which they might have made. It cannot be concluded with the certainty required by the law that the complainants could have made and sold the balsam at the figures they state. The cost of manufacturing could be stated accurately, but not the cost of selling, because that must depend largely upon the skill and efficiency of salesmen, and upon advertising. It is a fact so general and notorious that the court may properly take notice of it that the business of selling nostrums of the class to which

the medicine in this case belongs depends more upon the expedients employed to recommend them to the public than upon the merits of the medicine. The cost to one of manufacturing and selling is therefore no criterion by which to determine the cost to another.

(3) The defendants object to the allowance of interest. This objection will be overruled. The liability, although *ex delicto*, arises upon contract, and interest should be included. The record shows a deliberate and inexcusable violation by the defendants of their contract, and the court is not disposed to release them from any part of the liability which they have incurred. The decree will be in accordance with the master's report, as modified by this opinion. If counsel cannot agree upon the modifications, there will be a recomittal to the master to restate the account.

McCAMPBELL *et al.* v. BROWN *et al.*

(Circuit Court, S. D. Ohio, W. D. January 26, 1892.)

1. EQUITY JURISDICTION—TRUSTS.

A bill brought by the assignee of a partnership alleged that the partnership held a mortgage upon the lands of a cattle company, and that, for the purpose of discharging the same, the company negotiated a sale thereof through one B., who agreed to take as his commission a mortgage upon the company's cattle; that by the terms of the sale the deed was placed in escrow, the depository also receiving a part of the price, under an agreement to apply the same to the discharge of the liens on the land, including complainants' mortgage; that, while in the midst of the transaction, B., fraudulently, and for the purpose of coercing the payment of his commission in cash, commenced a suit against the cattle company, and garnished the purchaser; and that thereupon complainants agreed with the depository, as agent of the purchaser, that the depository should retain a sum sufficient to cover B.'s claim, until an order could be obtained from a competent court for the payment of the same to complainants. The bill asked that B. should be decreed to have no claim upon the fund, and that the purchaser be decreed to pay the balance of the price to complainants. *Held* that, as the bill showed that the money was held in trust, it stated a case cognizable in equity, although B. was no party to the trust agreement.

2. SAME.

The fact that the money so held was subsequently retransferred by the depository to the purchaser did not discharge the trust.

3. SAME—REMEDY AT LAW.

In cases involving trusts the jurisdiction of equity is not dependent upon the absence of a remedy at law.

4. EQUITY—PARTIES.

The bill having alleged that the partnership was in fact solvent, but had been compelled to make an assignment because of the cattle company's failure to pay its mortgage, it was not a misjoinder of parties to make the individuals of the partnership parties plaintiff with their assignee, since these allegations showed that there might be a surplus for distribution to the partners after the discharge of the partnership liabilities.

In Equity. Suit by Edwin A. McCampbell, as assignee of Doddridge & Co., and others, against J. R. P. Brown and David Sinton. Heard on demurrer to the bill. Overruled.

STATEMENT BY SAGE, J.

The bill sets forth that the complainant is the assignee of the estate and effects of the copartnership of Doddridge & Co., of Corpus Christi,

Tex., and that on April 26, 1888, the Dimmitt County Pasture Company, a corporation under the laws of Texas, executed to Doddridge & Co. its mortgage upon about 180,000 acres of land in Texas, to secure the payment of \$64,000, and subsequent advances to be made. For the purpose of paying off this mortgage and other incumbrances the pasture company placed their property on the market for sale. The defendant J. R. P. Brown, on behalf of the pasture company, entered upon negotiations for the sale of the property to the defendant David Sinton. The pasture company proposed through Brown to sell said lands to Sinton for the price of \$2 per acre, and upon the execution and delivery of the deed to take a lease of the land from him for a term of 10 years, and to pay as rent therefor the sum of 10 cents per acre, the pasture company also agreeing to pay all taxes on the land, and to keep up fences and the ranch premises. One dollar and sixty-two and a third cents per acre was to be paid in cash, and the balance of the purchase money to be retained by Sinton to secure the payment of the lease money. On this balance he was to pay interest at the rate of 5 per centum per annum. Sinton accepted the proposition, with the exception that the amount reserved as above from the purchase money should be increased \$10,000, and the rent be paid quarter-yearly from said reserves; the lease to be for five years, with privilege of extension for an additional term of five years on the same terms and conditions, or with such other security for the rent as might be agreed upon. These modifications, which were under date May 30, 1891, were accepted by the pasture company. At the same time Brown agreed to take for his commission a mortgage on the cattle on the ranch or other security for \$10,000.

The bill sets forth that, in order to provide the means of completing the sale, the pasture company executed its deed of conveyance of said lands to Sinton, and placed the same in the hands of Charles P. Taft, in escrow, to be delivered to Sinton whenever the incumbrances should be fully removed. Sinton, to provide the means of completing the sale on his part, placed the necessary funds in the hands of Taft for the payment of the incumbrances upon the land, and Taft was authorized, whenever satisfied that the title was cleared, to deliver the deed to Sinton, and Sinton then was to complete payment to the complainant McCampbell as assignee.

The bill further sets forth that on the 19th of June, 1891, while the parties were in the midst of the transaction of purchase as above set forth, the defendant Brown, fraudulently, and for the purpose of coercing, in violation of his agreement, a payment of his commission in cash, brought his action in the court of common pleas of Hamilton county, Ohio, against the pasture company, for \$10,000, and caused a writ of attachment to issue, and the defendant Sinton to be garnished. The transaction had then proceeded so far that it could not be stopped, and the complainants, under the stress of circumstances, agreed with Taft, as the agent of Sinton in that behalf, that all the balance of the purchase money should be paid to them upon their mortgage, and receipted for as full payment of purchase price in the hands of Taft for Sinton, until an order could be obtained from a court of competent jurisdiction di-

recting the payment of that money to the complainants in a proceeding that would operate as a protection to Sinton, and that in the mean time "they should hold said fund in trust for your orators." Accordingly, all the balance of the purchase money excepting \$10,650 was paid over to the complainants, and that amount was left in the hands of Taft "in trust for the purpose aforesaid, and subsequently by him turned over to said Sinton, and still remains in the hands of said Sinton, in trust for the purposes aforesaid."

It further appears from the bill that as a part of the contract of sale, and as a mode of enabling it to be completed, it was agreed that the money should be applied directly to taking up and canceling the incumbrances upon said property, the mortgage to Doddridge & Co. held by the complainant McCampbell, as assignee, being the last, and the money payable thereon being insufficient to wholly discharge it; and that this was the only practicable way by which the parties could accomplish the sale. The complainants aver that the sum so held by Sinton "does not, and did not at any time, belong to said pasture company, and that, in pursuance of the agreement aforesaid between said Brown and Sinton and the said pasture company and the said Doddridge Company, it was to be paid to the said assignee of Doddridge & Co. upon their mortgage as aforesaid, with the express agreement with the said Brown that he should have no payment out of the said purchase money, but would take his compensation, and such as belonged to his associates, in the form of notes secured by mortgage of the said pasture company."

The complainants further aver that Sinton did not, when served as garnishee, hold any money belonging to the pasture company, and liable to attachment in suit against said company, nor has he since held any such money; and that the only claim made against Sinton is for an account of the said \$10,650.

The bill further avers the insolvency of Brown, and that, if the money shall be collected by him in said proceeding, it will be entirely lost to the complainants, and that they are without an adequate remedy at law; that Brown refuses to release the attachment, and is pressing said action with the view and intent of subjecting said money in the hands of Sinton to his own use upon his said claim, and that the complainants are not parties to that proceeding.

The prayer of the bill is that Brown may be adjudged to have no claim upon said fund, and that complainants' title thereto may be quieted as against him; that Sinton may be ordered and decreed to pay over to the complainants said sum of \$10,650, and for other and further relief.

The respondent Brown demurs to the bill—*First*, for insufficiency; *second*, because, if the complainants have any cause of complaint against respondent, they have a plain, adequate, and complete remedy at law; and, *third*, that there is a misjoinder of parties respondent.

Bateman & Harper, for complainants.

J. A. Warner, Job E. Stevenson, and J. J. Glidden, for respondents.

SAGE, J., (*after stating the facts as above.*) The demurrer is on behalf of the respondent Brown, upon the ground that the bill shows no cause for equitable relief against him. The contention of counsel is that he was no party to the trust agreement set up in the bill, whereby \$10,650 of the purchase price was transferred by Sinton to Taft, to be held by him until an order could be obtained from a court of competent jurisdiction directing the payment of that money to complainants in a proceeding that would operate as a protection to Sinton, and that in the mean time they should hold said fund in trust for the complainants. Counsel say that the rights of Brown could in no manner be affected by that arrangement, and that neither the pasture company nor the complainants, nor both combined, with or without the concurrence of Sinton, could create a trust controlling Brown's rights in the fund. Nothing of that sort is claimed or set up in the bill. It is perfectly clear that the rights of Brown could not be affected or in any way abridged by any agreement to which he was not a party. Nothing of the sort is claimed on behalf of the complainants. On the contrary, they expressly recognize that the trust agreement was subject to whatever rights Brown had in the premises. They do claim that Brown was bound by his agreement with the complainants to take a mortgage as specified in the bill for his claim, and all that was stipulated for in the trust arrangement was that the money should be left in the hands of Taft, for Sinton, until an order could be obtained from a court of competent jurisdiction directing its payment to complainants. The demurrer must be overruled. The averments of the bill are that the money was a trust fund in the hands of Charles P. Taft for the purposes stated in the bill. The subsequent transfer of the money by Taft to Sinton did not and could not destroy the trust. What effect shall be given to this trust agreement is not a question now before the court. It was made after the commencement of Brown's action in the state court, and while that was still pending. But this cause is not in conflict, nor in any sense an interference, with that action. This court cannot directly or indirectly enjoin proceedings in a state court. What has been done in the action there, if anything, does not yet appear. All that is now decided is that the bill states a case in favor of the complainants.

The objection that the complainants have a plain, adequate, and complete remedy at law is not well founded. The bill avers a trust. The jurisdiction in equity is undoubted. It was argued upon the hearing of the demurrer that the holding by Taft was as bailee, and not as trustee. How it may turn out to be upon the testimony remains to be ascertained. We are now dealing with the averments of the bill, and, as they set forth the transfer and delivery of the money by Sinton to Taft, in trust for the purposes specified, there is nothing upon which the argument that this is a case of bailment can be sustained.

The objection that there is a misjoinder of parties complainant must also be overruled. The bill sets forth that, although Doddridge & Co. were in fact solvent, their means were unavailable for the conduct of their business and immediate payment of their debts, by reason of the

failure of the pasture company to pay its liabilities to them, and that they therefore made an assignment of their property to their co-complainant McCampbell, for the use and benefit of their creditors. There was no objection, under these circumstances, to making the partners of Doddridge & Co. co-complainants with the assignee, because it appears from the face of the bill that there may be a surplus after discharging the liabilities of the partnership, which might, in that event, be decreed to the partners themselves.

FIRST NAT. BANK OF ALMA, KAN. v. MOORE *et al.*

(Circuit Court, S. D. Ohio, E. D. January 28, 1892.)

1. EQUITY PLEADING—MULTIFARIOUSNESS.

A bill by the receiver of a bank against two other banks, and against two persons, each of whom is a managing officer in both defendant banks, to cancel certain certificates of indebtedness, and obtain the return of certain notes held as collateral security therefor, on the ground that all these securities were obtained in pursuance of a single fraudulent scheme, is not multifarious by reason of the fact that the interest of each defendant bank in the part of the securities held by it is separate from that of the other.

2. EQUITY JURISDICTION—FRAUD—REMEDY AT LAW.

The existence of a remedy at law, in such a case, is no objection to the jurisdiction of equity, since equity jurisdiction in matters of fraud is concurrent with that at law, and in this case equity alone can give adequate relief by compelling the cancellation of the certificates and the return of the notes.

In Equity. Suit by the First National Bank of Alma, Kan., for the use of Frank I. Burt, receiver, against David H. Moore and Augustus Norton, the First National Bank of Athens, and the Pomeroy Bank, of Pomeroy, Ohio, for the cancellation of certain certificates, and the return of certain notes held as collateral security therefor. Heard on demurrer to the bill. Overruled.

The bill sets forth that the First National Bank of Alma was duly organized under the national banking act, and for more than two years last past has been doing a general national banking business at Alma, in the state of Kansas, under and by virtue of said organization; that, during the time said bank was engaged in business, John F. Limerick, of Alma, was its president, and had principal charge and control of its business, and his wife, Mary Limerick, was assistant cashier; that they two had the entire charge and management of the bank, except as the board of directors might otherwise direct, and that they were also directors; that the stockholders were largely residents of other states; that the defendants Moore and Norton are officers in said First National Bank of Athens and said Pomeroy National Bank, the said Moore being cashier of the First National Bank of Athens, and vice-president of the Pomeroy National Bank, and Norton president of the First National Bank of Athens, and an officer and director of the Pomeroy National Bank; that said defendants gave their personal and entire attention to the conduct-

ing of the affairs and business of said banks; that they are experienced bankers, and that the business transactions with the First National Bank of Alma were conducted by said defendant Moore, as were transactions of said banks with said John F. Limerick or said Mary Limerick, the officers of said Athens bank and said Pomeroy bank and their stockholders knowing and ratifying the actions and doings of Moore.

The bill further sets forth that on the 10th of November, 1890, the comptroller of the currency, being satisfied that the Alma bank was insolvent, placed a duly-authorized bank examiner in possession of its assets; and on the 21st of November, 1890, appointed Frank I. Burt receiver of said bank; and on the 28th of November, 1890, he took possession, and has since remained in possession and control, of the assets, property, and business of the bank.

The bill further avers that the defendants have filed with said receiver claims based upon certificates issued by the Alma bank, as follows: In favor of Norton, Moore, and the Athens bank, \$13,591.53; and in favor of the Pomeroy bank, \$2,500; each of said claims with 8 per cent. interest. The complainant sets forth that the entire claims so filed and asserted are fraudulent, and that said fraudulent dealings of said Moore for himself and defendants have largely contributed to the insolvency of the Alma bank. Complainant charges that said Moore, for himself and his co-defendants, who had full knowledge of Moore's proceedings in this business, induced said Limerick, president of the Alma bank, and said Mary Limerick, assistant cashier, to issue, over their signatures as officers of said bank, certificates of deposit in blank, so far as the name of the depositor was concerned, but for large amounts of money, and at a large rate of interest. These certificates were sent or given to Moore, and by him sold or otherwise disposed of, and the proceeds appropriated to his own use and the use of the other defendants herein, often without returning to the Alma bank any consideration whatever, and generally no money passed at the time when said certificates were issued.

The bill enters into details of the fraudulent devices and contrivances whereby Moore carried into effect his designs; and sets forth that in July, 1890, he went to Alma, taking with him an attorney from Kansas City, and having in his possession a large number of time certificates of deposits purporting to have been issued by the Alma bank, and also promissory notes which he had obtained from John F. Limerick; that he then demanded payment of said certificates and notes, and that at that time he also examined into the condition of the Alma bank, and that he and his co-defendants then knew that said bank was utterly insolvent, and unable to pay its indebtedness; that he then, for himself and his co-defendants, threatened Limerick, acting as president of the bank, that upon his refusal to issue time certificates, bearing interest, for the amount claimed to be due himself and his co-defendants on account of said certificates and promissory notes, with a quantity of the promissory notes belonging to said bank as collateral security, he would at once call for a bank examiner to be sent to said bank, and the result would be that it would be closed, and a receiver appointed; that by

these means he induced said John F. and Mary Limerick to issue to him a large number and amount of time certificates of said Alma bank bearing interest, and substitute them for other certificates previously issued. The bill avers that the claim made by said Moore and the defendants against the Alma bank is based upon certificates so obtained. The amount of the notes of the bank procured by Moore as collateral is, as set forth in the bill, which gives a list, with the name of the maker of each note and its amount, about \$23,244.57. The defendants refuse to return said notes to the Alma bank or to its receiver, and have placed them in the hands of their attorney at Kansas City, with directions to bring suit for their collection, and suits have already been brought upon some of said notes in Kansas. The said notes constituted nearly all the available promissory notes belonging to said Alma bank upon which said receiver could depend for money to pay its indebtedness. The real estate of said bank amounts to about \$5,000 in value; and the claims of creditors, other than the defendants herein, to about \$22,000. The assets of said bank, outside of said promissory notes so taken and claimed by said Moore for himself and co-defendants, are not sufficient to pay more than 50 per cent. of the indebtedness of the bank.

The prayer of the bill is that the certificates aforesaid, upon which defendants base their claims, be declared void, and that they be delivered up and canceled; that said several promissory notes be declared to be assets of said Alma bank, and defendants be ordered to at once deliver them up, together with any proceeds realized therefrom; that, if any judgments have been obtained by defendants upon any of said notes, the same be declared to be for the use and benefit of said Alma bank; and that by the decree of this court the entire dealings and business between said bank and said defendants may be fully settled and determined; and an injunction issue restraining the defendants from selling or disposing of any of said promissory notes, or from collecting or bringing suit upon the same.

The defendants demur for multifariousness, for insufficiency, and for want of equity.

Van Zile & Robson, for complainant.

Tom George and L. M. Jewett, for respondents.

SAGE, J., (*after stating the facts.*) Although it appears from the bill that the Athens National Bank and the Pomeroy National Bank are entirely distinct and independent of each other as national banks, it also appears that the defendant Moore is cashier of the Athens bank, and vice-president of the Pomeroy bank, and the defendant Norton president of the Athens bank, and an officer and director of the Pomeroy bank; and that they acted in concert in the prosecution of the fraudulent scheme set forth in the bill. It is true that the proceeds of the fraud were divided among the defendants. The claims filed with the receiver in favor of Norton, Moore, and the Athens bank aggregate \$13,591.53, with interest, and the claim in favor of the Pomeroy bank is \$2,500, with interest. The rule stated by Sir JOHN LEACH in *Salvidge v. Hyde*,

5 Madd. 146, applies,—that the test is not whether each defendant is connected with every branch of the case, but whether the bill seeks relief in respect of matters which are, in their nature separate and distinct. "If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole object." The relief sought in this case is the cancellation and delivery of all the fraudulent certificates, and the surrender of the securities obtained. The testimony relative to the fraud set forth in the bill will bear alike upon the claims of each of the defendants, and the circumstance that, if the decision be in favor of the complainant, it may be necessary to so shape the decree as to require the surrender by the defendants of the certificates or securities held by them respectively, is not material, as affecting the question of multifariousness. In *Turner v. Robinson*, 1 Sim. & S. 313, the bill was filed against the personal representatives of two decedents, and a demurrer for multifariousness was interposed. Vice-Chancellor LEACH said that, as the complainants' title to their shares of the two estates was derived under the same instrument, they were entitled to unite the accounts of both estates in the same suit; and that, therefore, the bill was not multifarious. In *Grant v. Insurance Co.*, 121 U. S. 105, 7 Sup. Ct. Rep. 841, a *cestui que trust* under 26 trust-deeds of land, executed to 5 different sets of trustees, to secure the payment of money, filed a bill for the sale of the land. Some of the deeds covered only a part of the land, and but one of them covered the whole. The bill alleged that the trustees named in 22 of the deeds declined to execute the trusts. The holders of judgments and mechanics' liens and purchasers of portions of the land were made defendants. Some of the trust-deeds did not specify any length of notice of the time and place of sale by advertisement. It was held that the bill was not multifarious. Counsel for the defendants urge that the test is whether one defense can be made to the entire bill, citing *Attorney General v. St. John's College*, 7 Sim. 241; and insist that none of the certificates mentioned in the bill of complaint are owned by the defendants jointly. Applying their own test thus suggested, the bill is not multifarious. There is but one defense, and that goes to the entire case. It is to answer the charges of fraud made by the complainant. If they are not sustained, the complainant has no equity, and the decree will be in favor of the defendants. If, therefore, the defendants will apply themselves to meeting and refuting those charges, they will have no occasion for any other or further or separate defense. The objection that the bill is multifarious is not well taken.

The demurrer for insufficiency and for want of equity must also be overruled. The bill sets forth a clear and flagrant case of fraud, which may be also criminal under the provisions of section 5209, Rev. St. U. S. The principles upon which the jurisdiction in equity in such a case is maintained are elementary. Equity alone can afford adequate and complete relief by a decree for the cancellation and delivery of the

fraudulent certificates and the surrender of the securities fraudulently obtained. These propositions are so plain and familiar as to need no verification by the citation of authorities. It is true that there is a remedy at law, as there is in every case of fraud; but, the jurisdiction in equity and at law in relation to fraud being concurrent, a defendant has no right to complain if the complainant selects that tribunal where he can obtain the most ample and satisfactory relief.

The demurrer will be overruled, and the defendants allowed 20 days within which to prepare answers, and present them to the court, with application for leave to file.

HAZLEHURST COMPRESS & MANUF'G CO. v. BOOMER & BOSCHERT COMPRESS CO.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1891.)

1. SALE—WARRANTY—EVIDENCE OF BREACH.

A cotton-press was sold with certain warranties, and with the proviso that, "when it has performed its work in a successful manner, half cash is to be paid." The press was set up in November, 1887, and over 700 bales were pressed that season; and in the following January the cash payment was made, the purchaser giving a certificate recommending the press as a "practical machine in every respect." In November, 1888, the purchaser wrote that two nuts on the screw had broken, and that until that break the press had been doing good work, and asked an extension of time on the deferred payments, because of the small business done that year. Subsequently the request was repeated on the same ground, and an extension was granted. Over 1,100 bales were pressed in 1887-88, and over 4,000 in 1888-89. A further payment was made in 1889. No complaint of breach of warranty was made until January, 1890. *Held*, that this was almost conclusive against a claim of such breach as a defense to a suit for the balance of the purchase money, and its effect was not overcome by the testimony of unskilled workmen and unscientific persons that the press would not work to the guaranteed pressure of 800 tons, such testimony being based mainly on the fact that the bands often broke from the expansion of the bales; especially as it appeared that the bands were tied by unskilled workmen, and that the press had been strained by careless management.

2. SAME.

Evidence that two other presses of the same pattern failed to work satisfactorily was competent, but the weight thereof was much impaired by the fact that one of them was the first made of that pattern, and was inferior to the one in question, and that the weight of the bales compressed by the other was above the average weight of cotton bales.

3. SAME—CONSTRUCTION OF WARRANTY.

A warranty that a cotton-press will press "at the rate of 60 bales per hour," is not a warranty that it will press at that rate for a day of 10 hours, but only for a limited time.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Suit by the Boomer & Boschert Compress Company against the Hazlehurst Compress & Manufacturing Company to foreclose a mortgage to secure the balance of the purchase price of a cotton-press. Decree for complainant. Defendant appeals. Affirmed.

R. N. Miller and *J. S. Sexton*, for appellant.

S. S. Calhoun, for appellee.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

BRUCE, J. This suit is for the foreclosure of a chattel mortgage executed January 4, 1888, by the Hazlehurst Compress & Manufacturing Company to the Boomer & Boschert Compress Company to secure the sum of \$6,000, evidenced by two promissory notes, one for \$1,000, and the other for \$5,000, due at 6 and 12 months from date. The first note was paid; the other is unpaid, except \$600, paid January 4, 1889.

The answer of the respondent company admits the allegations of fact in the bill, but says the note and mortgage in the suit were given for the purchase of a cotton compress and machinery, which was bought from appellee under a guaranty, which respondent charges has been broken, and—

"That said press will not work to a power of 800 tons without overstraining; * * * that by reason of the insufficiency of the power of said press the bands are constantly breaking on the cotton compressed in said press, and that a large proportion of it has to be run through the press at least twice to get the bands to remain on it; that the said press cannot bear the necessary power to compress a bale of cotton so as to kill the spring in the cotton; * * * and the defendant is compelled to recompress fully one-third of all the cotton handled in order to make it meet the requirements for domestic and export shipments."

Respondent charges—

"That said press will not press domestic cotton, hand-tied, at the rate of sixty bales per hour, and that it will not press export cotton, seven or eight bands, lever-tied, at the rate of fifty bales per hour to a density of twenty-two and one-half pounds per cubic foot, shipping bulk."

Respondent charges—

"That said outfit of said press and machinery is not a complete and practical machine for compressing cotton; * * * that the guaranty of said press and machinery by complainant to this respondent has wholly failed, * * * and by reason of such failure they have been damaged much more than complainants claim to be due them in the bill of complaint; and at least in the sum of seven thousand dollars, (\$7,000;) and these respondents would have insisted upon a cancellation of this contract, and upon their rights, on the failure of such guaranty, and would not have paid complainant anything on said press,—for these failures of guaranty were apparent upon the outset of its operation,—but respondents, being anxious to retain said press and machinery, and to avoid doing complainants any injustice, supposed they were due to the fact that it was operated by inexperienced hands, and thus paid their money, and continued its operation, believing and hoping that the outfit would, in the hands of experienced operators, meet the full requirements of complainant's guaranty. But after the most full and satisfactory tests respondent finds that said guaranty has wholly failed as aforesaid, and prays to be dismissed with costs."

To this answer there was filed a general replication. The guaranty which the appellant claims has not been complied with is in these words:

"GUARANTY.

"Power. That the press will work to a power of 800 tons without overstraining or deterioration of any of its parts, except as to ordinary wear.

"Capacity. That it will press domestic cotton, hand-tied, 7 bands, at the rate of 60 bales per hour; and that it will press export cotton, seven to eight bands, lever-tied, at the rate of 50 bales per hour, to a density of 22 1-2 pounds or over per cubic foot, shipping bulk.

"*Range*. That the press will be perfectly adjustable to any sized bale within the ordinary limits of the business.

"*Safety*. That the power applied will be accurately shown by the pressure indicator, thus providing in the hands of the operator absolute security against breakage; that, when properly tied and packed, the cotton compressed by this machine will meet the requirements for export and domestic shipments; that the outfit is a complete and practical machine for compressing cotton."

The rule of law seems well settled as stated in 2 Benj. Sales, (1st Amer. Ed.) § 894, on the subject of remedies of the buyer on breach of warranty, where it is said:

"(1) He may refuse to accept the goods, and return them. * * * (2) He may accept the goods and bring a cross-action for the breach of warranty. (3) If he has not paid the price, he may plead a breach of warranty in reduction of damages in the action brought by the vendor for the price."

The compress in question was sold with express warranty by the appellee to the appellant; and the latter, after the machinery was received, set up, and operated, did not elect to rescind the contract on account of any breach of the warranty, and return the property, but retained it, and operated it; and, when sued for the unpaid purchase money, seeks now, in this suit, to recoup on an alleged breach of the warranty in the contract of sale of the press. This he may do; but he may not claim special or consequential damages. At section 898, Benjamin on Sales, says:

"Buyer may set up defective quality of warranted article in diminution of price, but not to claim special or consequential damages."

The same author states the general rule that an action for damages lies in every case of a breach of promise made by one man to another for a good and valuable consideration.

Before going into an examination of the testimony of the witnesses as to whether the alleged breach of warranty is established by the proof, we may look briefly at the case upon the acknowledged facts as they appear in the record. The sale of the compress and machinery was made on the 1st day of August, 1887, for the price of \$12,000. In November of that year the press and machinery was put up under the direction of appellee, and operated by appellant; and 733 bales of cotton were compressed on it the fall of that year. On the 4th day of January, 1888, one-half the purchase money was paid in cash, and notes and mortgage given for the other half of the purchase money,—one note for \$1,000 and one for \$5,000,—due, respectively, in six months and one year, with interest at 7 per cent.; and on the same day the appellant company, through its president, gave the following certificate:

"HAZLEHURST, MISS., January 4th, 1888.

"This is to certify that we purchased a press from the Boomer & Boschert Compress Co., of Syracuse, N. Y., and we cheerfully recommend the same as being a practical machine for compressing cotton in every respect. We can also say that Mr. G. B. Boomer, president of said company, is a gentleman with whom it is a pleasure to do business.

"HAZLEHURST COMPRESS & MANUFACTURING CO.

"I. N. ELLIS, President."

And again, in letter of November 27, 1888, Ellis, president of appellant company, says:

"Two nuts on the screw of the press have broken. Our press, up to this break, has been doing good work, but, owing to yellow fever in the early part of the season, and short cotton crops, we have not done the business we expected. * * * Owing to these causes, we will not be able to pay you more than \$2,500 on the notes we owe, and ask that you favor us and extend balance to January, 1890. I hope you will be able to accommodate us in this matter, as I feel sure you will get your money at the end of another year."

The request for extension was repeated in letter of December 24th, upon same grounds, and granted in letter of appellee of December 28th. The note for \$1,000 was paid; the other remains unpaid, except as to \$600 paid on January 4, 1889. It was not until January 28, 1890, in letter of that date, addressed to appellee, that the appellant gave any notice or made any claim that the guaranty in the contract of the sale of the property had not been made good, and that it claimed any thing as damages for breach of the guaranty. Now, in the face of such facts, can a court of equity do otherwise than look with some distrust upon such a defense, coming under such circumstances, and at such a time? The appellant had full opportunity to make any test of the compress it desired, and there is no suggestion of deceit or fraud on the part of appellee to prevent a test. During the season of 1887-88, 1,156 bales of cotton were compressed on the press; during the season of 1888-89, 4,031 bales were compressed on it; and, as we have already seen, in the fall of that year, and before any part of the purchase money was paid and the notes and mortgage given, there were compressed upon it 733 bales of cotton. The contract of sale between the parties seems to contemplate a test and trial, for it provides: "When the press has performed its work in a successful manner, half cash is to be paid, and the balance in two equal payments." Making the payment of half the purchase money and giving notes and mortgage for the other half is, in effect, saying that the press had performed its work in a successful manner; and, to say the least, raised a presumption, more or less weighty, that there was no counter-claim for breach of warranty. This presumption is made stronger when an extension of the time of payment of the balance due was afterwards asked by the appellant, and granted, with no notice or suggestion of any claim that the warranty of the press had not been complied with, or that the appellant had a claim for breach of warranty. This would seem little short of conclusive against the claim of the appellant here in this case; and yet the courts have not held it to be conclusive, but have allowed parties to explain and show why it is that they kept back their claim, and performed acts which, without explanation, are inconsistent with the existence of such claim. *Aultman v. Wheeler*, 49 Iowa, 647. The burden is upon appellant, not only to show by proof the alleged breach of the warranty, but also to explain its conduct in the particulars named, and show why it should not be taken to be conclusive against it.

Passing now to the terms of the guaranty, and the evidence relied on to establish its alleged breach, the first is that the press is deficient in power, and will not work to a power of 800 tons, as guaranteed. There were a number of witnesses who testified for appellant upon this subject. None of them seemed to be men of scientific knowledge and experienced in mechanics; and the mere opinion of such witnesses is not entitled to great weight. It is put rather by way of argument that the power is not sufficient, and would not kill the spring in the cotton, as it is called, and the rebound would break the ties on the bale, and therefore the alleged want of power. It is not shown that this breaking of the ties was not the result of unskillfulness in the persons employed as tiers, and in the want of skill and care in the handling of the press by the manager. The evidence shows that Trotter, in charge for appellant at the beginning of the operation of the press, did not handle it carefully and skillfully, but that he ran it together with great force, and "locked the nuts," as it is called; and Cook, who operated the press as engineer and manager in 1888, speaking of the marks on the indicator, says:

"Mr. Boomer impressed upon me that the upper mark, which indicated 900 tons of pressure, was the limit of absolute safety; that you could go there a thousand times with absolute safety, but not beyond that."

Then to the question, "Did you ever run it beyond the point that he indicates as the point of safety?" he answered, "Sometimes I did, though to a very slight extent." So that this compress of 800 tons' pressure was operated at its maximum, 900 tons, and above, which must have resulted in overstrain and injury to the press. It must be borne in mind that this was a light, and comparatively a cheap, press; that it required careful and skillful handling; and it is not established by the proof that it had a fair and just trial in the hands of those whom the appellant put in charge to operate it.

The same may be said as to the adjustability of the press, and as to its capacity to compress cotton at the rate of 60 bales an hour. Appellant's proposition is that the press, to meet the guaranty, should compress cotton at the rate of 60 bales an hour for a day of 10 hours. But such is not the guaranty in terms; and, considering the circumstances in proof,—the contemplation of the parties when it was agreed to put up this compress at Hazlehurst,—it is but a reasonable construction of this part of the guaranty that, under favorable conditions, it would compress cotton at the stipulated rate for a limited period of time. And it is not established by the proof that it has not and will not do so; in fact, there has been no test of the press in this respect to this day. Much of the testimony is in relation to other presses,—one put up in Demopolis, Ala., and one in Greenville, Miss.,—and this testimony is not incompetent when it is shown that these presses were of the same make and pattern, and were operated under similar circumstances and conditions. Boomer, however, testifies that the press put up for Webb at Demopolis, and about which he (Webb) testifies, was the first press made by his company of that pattern; and was an inferior press to those put up and operated in Hazlehurst and Greenville, Miss. A number of witnesses testify about

the Greenville press, as to its want of power and capacity to compress cotton at the rate guarantied; but it is shown also that the demand at that point was for a compress that would compress cotton bales much above the average weight,—some of them running over 750 pounds in weight. Manifestly the press was not adapted to cotton bales of such size and weight, and the parties took that view of it themselves, and procured from the appellee a heavier press of 1,500 tons' pressure, better adapted to the size of the bales and the volume of business at that place. It is clear from the testimony that the parties contemplated a comparatively light-made press, and it is vain and unreasonable to expect from such a compress the service obtained from heavy presses of great power, costing two and a half times as much money. The evidence does not satisfactorily establish the alleged breach of warranty, nor does it establish the *bona fides* of the claim for breach of warranty, but leaves it to the imputation that it was an after-thought. It follows that the judgment and decree of the court below is affirmed, with costs; and it is so ordered.

PARLIN *et al.* v. STONE *et al.*

(Circuit Court, W. D. Missouri, W. D. June, 1880.)

1. ESTOPPEL IN PAIS—FALSE REPRESENTATIONS—MORTGAGES.

An owner of lands who induces his creditor to accept as security a mortgage thereon from a third person, by representing that the third person is the owner, is estopped to claim the lands as against the lien of the mortgage.

2. EQUITY—REFORMATION OF INSTRUMENTS.

When a mortgage shows on its face that the consideration moved from a certain person, and it appears that his name as mortgagee was omitted by mistake, equity will reform the instrument by inserting his name.

In Equity. Bill to reform and foreclose a mortgage.

Waters & Winslow, for plaintiffs.

Botsford & Williams, for defendants.

MCCRARY, J. This cause has been argued and submitted for final decree upon the merits. The plaintiffs bring their suit in equity to reform and foreclose a mortgage. The following are the material facts established by the proof: (1) Defendant John L. Stone was indebted to plaintiffs in the sum of about \$1,600, part of which was his individual debt, and the balance was the debt of John L. Stone & Co. (2) This indebtedness was partially secured by collateral notes turned out by defendants. (3) Plaintiffs called upon said John L. Stone for additional security, and after some negotiation it was agreed that they were to have a mortgage on two tracts of land. (4) The defendant John L. Stone represented to the plaintiffs that one of the said tracts of land was defendants' property, and that the other tract was the property of his son Jeremiah Stone, and of record in his name. (5) Relying upon these

representations, the plaintiffs accepted two mortgages, one of which was executed by defendant John L. Stone, and the other by defendant Jeremiah Stone; the latter being the mortgage sued on in this case. (6) The representation of said John L. Stone, that the title to one of said tracts was in his son Jeremiah Stone, was not true in fact. The title to said tract was at the time in said John L. Stone, who had executed a deed to his son Jeremiah, which had never been delivered, and has never since been delivered, but has probably been destroyed. (7) In executing the mortgage sued on, the names of the plaintiffs, as mortgagees, were omitted by mistake.

Upon consideration of these facts, and the law applicable thereto, I have reached the following conclusions:

1. That plaintiffs are entitled to decree reforming the mortgage sued on, by inserting the names of plaintiffs as mortgagees, in accordance with the intention of the parties to the instrument. It is insisted by counsel for defendants that, inasmuch as no grantee is named in the mortgage, the instrument is void, and the defect cannot be cured by parol evidence. This point is not well taken, since it appears upon the face of the mortgage itself that the consideration for the mortgage moved from the plaintiffs; that it was given to secure a debt due to them; and that the omission to fill the blank left for the insertion of the names of the grantees, with the names of plaintiffs, was a mere oversight.

2. Inasmuch as the defendant John L. Stone, by his acts and representations, induced plaintiffs to believe that the land in controversy had been conveyed to Jeremiah Stone, and inasmuch as, acting upon that belief, the plaintiffs extended the time for the payment of their debt, and took a mortgage upon said land executed by said Jeremiah Stone, to secure the same, John L. Stone is estopped to claim the land as against the lien of said mortgage. This, upon the doctrine of estoppel *in pais*. It would be a fraud upon the plaintiffs to permit said John L. Stone now to deny what by previous declarations and conduct he asserted, when on the faith of his representations the plaintiffs have acted. A person having title to real estate, who represents another as the owner, and thereby induces a third party to accept from that other a conveyance by deed or mortgage for a valuable consideration, is in equity bound by such conveyance, and is not permitted to set up his own title against it. *Rice v. Bunce*, 49 Mo. 231; *Story, Eq. Jur. § 385*; *Sweeney v. Mallory*, 62 Mo. 485; *Hart v. Giles*, 67 Mo. 175.

3. Inasmuch as the plaintiffs have received and collected certain collateral notes assigned to them as security for this debt, an account should be taken before a master or otherwise, as the court may direct, to ascertain the sum due the plaintiffs, and decree should be rendered reforming the defective mortgage, and foreclosing the same as against all the defendants, including the said John L. Stone. The other defendants named, who are subsequent purchasers, are clearly shown to have purchased with notice of plaintiffs' equities.

BALDWIN v. ROSIER et al.

(Circuit Court, D. Iowa. May, 1880.)

INFANCY—AVOIDANCE OF MORTGAGE—RIGHTS OF THIRD PERSONS.

In a suit to foreclose a mortgage given by an infant the defense of infancy is personal to the mortgagor, and cannot be set up by a subsequent lienholder.

In Equity. Bill to foreclose a mortgage.

Brown & Dudley, for plaintiff.

J. W. Rogers & Son, for defendants.

MCCRARY, J., (*orally*.) This is a bill to foreclose a mortgage executed by the defendant Rosier to the plaintiff to secure a promissory note. The defendant Rosier seeks to avoid the contract sued on by pleading his infancy at the time of its execution. The defendant Davis holds a subsequent lien on the premises mortgaged, and he joins with Rosier in his answer, and pleads the infancy of his co-defendant, Rosier, as a defense. To this answer, so far as Davis is concerned, the complainant excepts. The contract of an infant is not necessarily void, but only voidable, since the infant has an election to avoid it during his minority, and affirm it after reaching his majority. The privilege of avoiding his acts or contracts, when they are voidable only, and not absolutely void, is personal to the infant, and one which no one can exercise for him, except his heirs or legal representatives. A person, not a party to the contract, cannot take advantage of the infancy of the parties to it. It is a personal privilege. Schouler, Dom. Rel. (2d Ed.) 534, 535. I am of the opinion that the defendant Davis cannot set up as a defense the infancy of the defendant Rosier. The exceptions to his answer are therefore sustained.

CAHN v. WESTERN UNION TEL. Co.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1891.)

TELEGRAPH COMPANIES—NON-DELIVERY OF MESSAGE—MEASURE OF DAMAGES.

Plaintiff, anticipating a heavy decline in the market price of certain corporate stock, and desiring to speculate in the same by selling on the exchange before the decline began, and thereafter purchasing at a lower figure, delivered to defendant telegraph company, in Columbus, Miss., a message to his brokers in New York city to sell a certain number of shares. The message was not delivered to the brokers until eight days later, during which time the stock had dropped from \$73 to \$55 per share. Plaintiff in fact had no stock to sell, but kept with his brokers securities, on the strength of which they would have sold the stock on exchange, and bought again on plaintiff's order. Held, in an action against the telegraph company to recover the difference in price between the stock at the time the message should have been delivered, and the time it actually was delivered, that the damages were too remote, uncertain, and speculative, and there could be no recovery therefor. 46 Fed. Rep. 40, affirmed.

Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi.

Action by E. Cahn against the Western Union Telegraph Company to recover damages caused by delay in delivering a telegraph message. Judgment directed for plaintiff for nominal damages. Plaintiff brings error. Affirmed.

E. H. Bristow, for plaintiff in error.

T. L. Bayne, Geo. Denegre, and Y. L. Bayne, Jr., for defendant in error.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

BRUCE, J. This is a suit brought in the court below by the plaintiff, who is appellant here, against the defendant telegraph company, appellee, for damages for an alleged breach of contract and duty on the part of defendant in failing to deliver in due time a telegraphic message from plaintiff to his brokers, Latham, Alexander & Co., in New York city. The message was in these words:

"COLUMBUS, Miss., Feb. 20th, 1890.

"To Messrs. Latham, Alexander & Co., New York, N. Y.: Sell 200 Tennessee Coal and Iron.

[Signed] E. CAHN."

Plaintiff avers in his complaint—

"That said message was delivered to and received by the agent or operator of the defendant at its office in Columbus, Miss., on or about 7 o'clock P. M., on Thursday, the 20th day of February, 1890; * * * that, anticipating an early, rapid, and heavy decline in the value and price of the stock of the Tennessee Coal & Iron Company, and desiring to sell 200 shares of said stock before the decline began, with a view of purchasing later on the same number of shares when the price and value thereof had reached a much lower figure, thereby realizing the difference in the market value thereof at the time of sale and repurchase, and knowing that Latham, Alexander & Co. held said stock, and would sell the same on his account, repaying themselves out of the money of plaintiff in their hands, and would, at the option of the receiver or purchaser, deliver, before a quarter past two o'clock on same day, said stock certificate and power irrevocable in the name of witness, or guarantied by a member of the New York Stock Exchange, or a friend represented at the exchange, residing or doing business in New York, or by transfer of said stock as provided by the constitution and rules of the New York Stock Exchange, plaintiff delivered said message to the defendant, to be transmitted to New York, to be delivered to the said Latham, Alexander & Co.; that, if said message had been transmitted and delivered in due time, the said brokers would have made the sale on the 21st day of February, at \$73 per share."

But plaintiff avers—

"That said message was not promptly transmitted and delivered as agreed, but by the gross negligence of defendant's servants and operatives in charge of the same it was delayed, and not delivered until the 28th day of February, 1890, when said stock had fallen in price to, and was selling in the market at, \$55 per share, thus taking several times longer for its transmission and delivery than it required in due course of mail from Columbus, Miss., to New York city; and that the cause of the delay and non-delivery of said message, plaintiff avers, was negligence of the defendant's operators and servants. * * * Wherefore plaintiff sues and demands judgment for \$3,451.66, and costs."

To this declaration there are several pleas: (1) The general issue, not guilty. (2) That the message mentioned in the declaration was a night message; and that plaintiff failed to present claim for damages to defendant company within 30 days, as required by the regulations of the company. (3) Defendant sets up contract with plaintiff that no claim for damages should be valid unless made within 30 days after the message was sent, and that the plaintiff failed to present his said claim. (4) Defendant sets up contract that sender of message should not claim damages beyond a sum equal to ten times the amount paid for the transmission of the message, and pays into court the sum of five dollars,—amount of its alleged liability. (5) That said defendant denies that said plaintiff had in the possession of said Latham, Alexander & Co., or in the possession of any one else, subject to their control, 200 shares of the stock of the Tennessee Coal & Iron Company, at the time of the sending of said message; and avers the fact to be that it was the intention of the plaintiff that said brokers, Messrs. Latham, Alexander & Co., should pretend to sell the amount of stock so named in telegram to be delivered or subject to delivery on the 21st day of February, 1890; but the real intent of all the parties to said transaction was to speculate on the rise or fall of said stock, without any intention of selling or delivering the same, but, when called for, to settle the difference between the contract price and the market price on the day when called for,—that is to say, a settlement on margins. Wherefore said defendant says that said transaction was illegal and void, and this it is ready to verify. Replications are filed to second and third pleas; issue joined in fifth plea; issue, in short, by consent to replication to the third plea. The case came on for trial before a jury on the issues presented on the pleadings, and, after hearing the testimony, plaintiff filed his motion for a peremptory instruction to the jury charging them that they shall find a verdict for the plaintiff for the sum to which he is entitled on the facts in testimony, which motion, after argument by counsel *pro* and *con*, was by the court overruled and refused, to which plaintiff then and there excepted; whereupon the defendant filed its motion for a peremptory instruction to the jury charging them that they shall find a verdict only for the amount of the telegram on the facts in testimony, and, after argument, the court gave the instruction found in the record. The charge is, in effect, "that the plaintiff cannot recover; the claim for damages is too remote, uncertain, and speculative, and will not be allowed by you in your verdict." To the giving of the charge the plaintiff excepted. The verdict of the jury was for 32 cents and three-fourths of a mill, to which the plaintiff excepted, and tenders his bill of exceptions, embodying all the testimony and the rulings and order of the court.

The assignment of errors, as far as necessary to be here stated, are: The court erred in giving the instruction to the jury as to the measure of damages in the cause. The circuit court erred in refusing to give the special instruction asked by plaintiff. The question, then, is, did the court err in instructing the jury on the trial of the cause that the claim made by the plaintiff for damages is too remote and speculative to be

allowed by the jury in its verdict? A number of cases are cited by the counsel for appellee to sustain the ruling of the court, among which is the case of *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577. In that case the message was to buy, and not to sell, as in the case at bar. It was dated December 9, 1882, and should have reached the sendee at Oil City, Pa., at 11:30 A. M. that day, but the message was not delivered until the exchange had closed for the day, so that Hall could not purchase the petroleum ordered by the plaintiff; and that at the opening of the board the next day the price had advanced from \$1.70 per barrel, the price on the previous day, to \$2.25 per barrel, at which price Hall did not deem it advisable to make the purchase, and did not do so. The message was, "Buy ten thousand, if you think it safe." The court held there could be no recovery, because, in point of fact, the plaintiff had suffered no actual loss, and the court say at page 454, 124 U. S., and page 580, 8 Sup. Ct. Rep.:

"It is clear that, in point of fact, the plaintiff had not suffered any actual loss. No transaction was in fact made, and, there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th and of making a profit by selling on the 10th; the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would have certainly taken place."

The case at bar is the counterpart of the case cited. The order was to sell 200 shares of stock, but by the fault of the telegraph company this order was not delivered to appellant's brokers in New York, as it should have been, on the morning of the 21st, and not until the 28th; and there was no sale of the stock on the 21st, or on any subsequent day. And it may be said here, as it was there, "all that can be said to have been lost was the opportunity to sell" at a higher price on the 21st and buy at a lower price afterwards. The claim in the case at bar goes much beyond any rule of damages in any of the cases cited. It is not for the difference in the price of the stock between what it was on the 21st, when the order to sell should have been received by the brokers in New York, and what plaintiff actually sold for on a repeated order and no sale on any subsequent day, not even on the 28th, when the order was received, but not acted upon, by plaintiff's brokers. In the case cited, which seems to be quite elaborate, the court, at page 455, 124 U. S., and page 580, 8 Sup. Ct. Rep., goes on to say:

"It is well settled, since the decision of *Masterson v. Mayor, etc.*, 7 Hill, 61, that a plaintiff may rightfully recover the loss of profits as a part of the damages for breach of a special contract, but in such a case the profits to be recovered must be such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfillment. In the language of the supreme judicial court of Massachusetts, in *Fox v. Harding*, 7 Cush. 516: 'These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into; but, if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence

and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in the suit."

Counsel make a somewhat vigorous attack on the soundness of the decision in the case of *Telegraph Co. v. Hall*, and say it will never be applied beyond the facts in that particular case. However that may be, we find it cited by the supreme court of the United States approvingly in the case of *Howard v. Manufacturing Co.*, 139 U. S. 205, 11 Sup. Ct. Rep. 500, where it was held—

"That in an action to recover the contract price for putting up mill machinery anticipated profits of the defendant, resulting from grinding wheat into flour and selling same had the mill been completed at the date specified in the contract, cannot be recovered by way of damages for delay in putting it up."

And in that case Justice LAMAR, speaking for the court, at page 206, 139 U. S., and page 503, 11 Sup. Ct. Rep., says:

"The grounds upon which the general rule of excluding profits in estimating damages rests are (1) that in the greater number of cases of such expected profits are too dependent upon numerous uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such line of profits is ordinarily remote, and not, as a matter of course, a direct and immediate result of the non-fulfillment of the contract; (3) and because most frequently the engagement to pay such line of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms." Citing *Telegraph Co. v. Hall*, and other authorities.

We think the case at bar falls within the principle of the case of *Telegraph Co. v. Hall*, and much authority is cited in line with that decision, so that we do not see why that should not be taken as settled law; at least the case is binding upon us.

Again, the plaintiff ordered the sale of 200 shares of Tennessee Coal & Iron stock,—not his stock, which he held or owned, for he does not claim to have held or owned any such stock at the time of this transaction; but it is said his brokers, Latham, Alexander & Co., had the stock,—not even that they had it and owned it, but, as the witnesses Latham and Alexander both say, in answer to interrogatory 15, (and it may be noticed in passing that the answers of these two witnesses to this interrogatory, and to most of the other interrogatories, are in the same identical words, and notable for the statement of conclusions rather than facts:)

"If Latham, Alexander & Co. had received the said telegram of E. Cahn when it should have been delivered, they would have executed the order within contained, and sold for him 200 shares of stock of the Tennessee Coal & Iron Co., and would have supplied stock in their possession for delivery on account of the sale, according to the custom of the New York Stock Exchange, if said Cahn did not own the stock."

There is at least some obscurity in the meaning of this answer, and the constitution and rules of the New York Stock Exchange are not in the record, and we have not the opportunity of referring to them. The fact is, however, conceded that Cahn did not hold or own the stock in

question at the time of the order to sell on February 21st, nor did he have money in the hands of his brokers at the time to purchase the stock. Latham and Alexander again both testified, in answer to the same question, in the same words:

"Latham, Alexander & Co., on the 21st of February, 1890, did not hold for E. Cahn any stock of the Tennessee Coal & Iron Co. Latham, Alexander & Co. did not hold for E. Cahn any money on deposit with which to buy or sell stock, but they did hold for him securities sufficient to warrant them in making the sale of said stock as directed had the message been received on the morning of February 21, 1890."

Appellant could doubtless have gone into the market and bought the stock for present or future delivery, could have authorized his brokers to do it for him, or they could supply it themselves, as they testify they would have done had they received the order; and, if so, and Cahn had paid or become liable for the market price of the stock that day, there would have been no profit to him in the transaction, and therefore no damage. If, by supplying the stock, Latham and Alexander mean that their firm would have loaned it to him, then his case is that, by the alleged negligence of the defendant company, he was prevented from borrowing 200 shares of Tennessee Coal & Iron stock, and selling it on the 21st of February at its market price on that day, and buying the same number of like shares of stock on the 28th, or on a subsequent day, when the market price had fallen; and so suffered a loss of the profits he would have made if he had borrowed, sold, bought back, and returned, the stock to his brokers. Manifestly, in such a transaction—or, rather, want of transaction—the alleged damages are too uncertain, remote, and contingent to constitute a proper basis for a recovery.

It is insisted that an order, and delivery to an agent of a telegraphic company for transmission, to sell shares of stock, under the circumstances of the transaction in question, implies and means an order to buy to "cover," as it is called; and that such will be held to have been within the knowledge and contemplation of the parties, the plaintiff (appellant) and the appellee, (telegraph company.) Telegraphic companies transmit and deliver messages, for hire, touching business or other relations of the persons who employ them. It is not like contracts between persons for the building of structures, erecting machinery, or even for the delivery of goods, in all of which classes of cases much depends upon what may be considered to have been fairly and justly within the contemplation of the parties when the contract was made; and it may be questioned whether an order to sell 200 shares of a given stock delivered to a telegraph operator for transmission over his line would imply knowledge on his part that an order to purchase the same number of shares of same stock would surely follow. It is said that Scott, the telegraph operator at Columbus, Miss., was informed and well knew the purpose and object of the message, but he says in his deposition:

"I understood it was an order to Mess. Latham, Alexander & Co. to sell 200 shares of Tennessee Coal & Iron,—just what appears on the face of the message."

But, even if he (Scott) was familiar with transactions of this character made in the stock exchange in New York, his company could hardly be held responsible on account of such knowledge possessed by one of its employes. But, even if it could be conceded that an order to sell implied an order to buy, the question remains uncertain as to when such an order to buy would be given for execution. That would, in the nature of things, depend upon the market, and upon the buyer's judgment of the market. Again, the legal, if not the only, presumption would be that Cahn was ordering the sale of his own stock, and not that he contemplated the sale of something he neither had nor proposed to acquire, with no intention that in the sale ordered an actual delivery of the stock was to be made, for such presumption would involve a violation of the law as it has been held in some of the highest courts in the country. In any view of the case, we perceive no error in the charge to the jury in the court below and the judgment is affirmed; and it is so ordered.

GAUSS v. SCHRADER.

(Circuit Court, S. D. Illinois. May, 1881.)

BANKRUPTCY—PARTNERSHIP AND INDIVIDUAL DEBTS.

A partnership being unable to pay a note upon which it became liable by a partnership indorsement, its members signed, as individuals, an agreement with the creditor for an extension of time, agreeing to convey to him before the expiration thereof certain lands, which were to be sold, and any excess after payment of the debt turned over to the partners. *Held*, that the agreement merely provided a security for the original partnership debt, and on the subsequent bankruptcy of the firm and its members the debt was provable against the partnership, and not against the individuals.

In Bankruptcy. On appeal from the decision of the district court that the plaintiff's claim was provable against the partnership, and not against the estate of a partner.

W. C. Kueffner, for creditor.

F. A. McConaughy, for assignee.

DRUMMOND, J. Moritz J. Dobschutz and Joseph Abend were partners in business, and became indebted to the plaintiff on their own note, as makers, for \$4,500, upon which some payments were made, leaving about \$3,000 due, and on two notes given by Jackson & Browson of \$3,000 each, and indorsed by Dobschutz & Abend. The latter became bankrupts as partners and as individuals, a decree in bankruptcy was rendered against them, and an assignee appointed; and the plaintiff claims the indebtedness on the two notes which the bankrupts had indorsed was provable against the separate estate of Dobschutz. The district court decided that it was a partnership debt, and was provable, not against the separate, but against the partnership, estate. From this de-

cision Gauss has appealed to this court, and in conformity with the statute has filed a statement of the case in the nature of a declaration, to which a demurrer has been interposed by the assignee; and the question in the case is whether the decision of the district court is right, or whether it is competent for the plaintiff to prove his claim against the individual estate of Dobschutz. The controversy mainly grows out of a contract which was made between Dobschutz and Abend and the plaintiff on the 13th of August, 1875. It seems that the bankrupts at that time were not able to pay the amount that was due to the plaintiff, either on the note of which they were the makers or on those on which they were the indorsers; and the plaintiff was willing to extend the time of payment for two years, provided security were given him. There seems to be no controversy that the indebtedness on all these notes of the bankrupts to the plaintiff was a partnership indebtedness; that is inferable from the statements contained in the declaration. The contract between the parties referred to was under seal, and signed by each of them individually. It set forth that the plaintiff held these notes against the bankrupts, and it admitted that the bankrupts were responsible as well on the notes which they had indorsed as on that of which they were the makers, and it then proceeded to state that in consideration of this, and to secure the plaintiff against loss, the bankrupts agreed to convey to the plaintiff, on or before two years from the date of the agreement, certain real estate which was described. By the contract the plaintiff agreed to wait for two years on the bankrupts, and to give them that time to find a purchaser for the property, and when the property was sold he was to receive enough to pay whatever was due to him, and turn over the balance to the bankrupts. The declaration alleges that this conveyance was never made to the plaintiff. It makes no claim for any debt due on the note of \$4,500, but only for the amount due on the other two notes; and it alleges that by this contract Dobschutz and Abend bound themselves individually as well as jointly, and not as partners or in their partnership name, for payment of the two \$3,000 notes.

It will be seen that the agreement to convey the land was not for the purpose of payment, and if conveyed it would not have operated as such, but only as security for the payment of the indebtedness, so that the effect of the failure of the bankrupts was simply that they did not give the security which they agreed to give. The result was that the plaintiff thus gave time to the bankrupts, and the character of the debt remained unchanged. It was still a partnership debt due from the bankrupts to him. It becomes, therefore, a question of importance in this case, in view of the partnership and separate assets of the bankrupts and of the rights of their creditors, to determine whether it is equitable for the plaintiff, as against other individual creditors of Dobschutz, to prove his claim against him. We have to look at the case upon general principles of equity, and not as to the mere technical right of the plaintiff. It is true that this agreement between the parties was signed by Dobschutz and Abend individually, and there might be a

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technical liability against them for not giving the security which they had agreed to give; but, as has been already said, that did not change the character of the principal indebtedness, and did not make it an individual debt instead of a partnership debt. The theory of the declaration is in accordance with this view. It does not proceed upon a possible technical liability against the bankrupts individually, but upon the original indebtedness on the two indorsed notes. The declaration alleges that, while the bankrupts did not make the conveyance which they had agreed, it would have been useless if they had, because the property which was the subject of the agreement was incumbered to its full value; and therefore would not in any event have been available as a security to the plaintiff.

Looking at this case in its general scope and bearing, as it appears by the facts set forth in the declaration, and considering the various equities of the individual creditors of Dobschutz, and the character of the debt due to the plaintiff, I think that the decision of the district court was right, and that the plaintiff ought not to be permitted to prove the claim set forth in the declaration against the individual estate of Dobschutz, and therefore that the demurrer to the declaration must be sustained.

TARSNEY v. TURNER.

(Circuit Court, E. D. Michigan. October 11, 1880.)

1. FRAUDULENT CONVEYANCES.—CONSIDERATION.—HUSBAND AND WIFE.

When, by direction of a wife, the rents of her separate estate are paid to her husband with the understanding that he will invest them for her benefit, this creates a debt sufficient to constitute a valid consideration for a subsequent deed from him to her, as against the claims of other creditors.

2. SAME.—READING DEPOSITIONS.—ARGUMENT.—ATTACKING CREDIBILITY OF WITNESS.

When a party who assails a conveyance from husband to wife, as made in fraud of creditors, calls the husband and wife as witnesses, and afterwards reads their depositions in court, he thereby vouches for their credibility, and cannot be heard, in argument, to question their veracity.

In Bankruptcy. Bill to set aside fraudulent conveyances.

Wisner & Draper, for complainant.

Camp & Brooks and Griffin & Dickinson, for defendant.

BAXTER, J. In 1873, Henry Turner and wife took up their residence in East Saginaw. They were apparently in easy circumstances. He soon thereafter acquired title to property, real and personal, worth \$50,000; but by several instruments bearing date from the 18th of March to the 13th of December, 1877, inclusive, he conveyed the same to defendant, his wife, reciting an aggregate consideration of \$58,865. On the 31st of August, 1878,—eight months and a half after the execution of the last of said conveyances,—he filed a petition in the district court

for this district, praying to be allowed the benefit of the bankrupt law, and was accordingly in due time adjudged a bankrupt, and complainant was appointed assignee of his estate. His liabilities as proven amount to \$1,700, and his assets to \$191.50. The assets being insufficient to pay the debts, complainant filed this bill for the purpose of having said conveyances annulled, on the ground that they were executed without consideration, and with the intent to hinder, delay, and defraud creditors. The defendant has answered, explicitly denying the alleged fraud, and affirming that said conveyances were executed in good faith, and for the considerations therein recited. The issue is therefore one of fact.

There is no positive evidence of an actual fraudulent intent in the execution of these conveyances, or either of them; but it is insisted that there are badges from which the fraudulent intent ought to be inferred. A badge of fraud is any fact calculated to throw suspicion upon the particular transaction. But badges of fraud are not conclusive; they may be explained. Has such explanation been made in this case? In this regard no proof has been offered except the evidence of the defendant and her husband. They were called and examined by the complainant. Their examination consumed four days. They were asked a great many questions, pertinent and impertinent, collateral and frivolous, but their answers, if true, clearly disprove complainant's case. They say the defendant owned a separate property in China which yielded an annual rent of \$5,000, which, by her direction, was paid to her husband; that he used this fund so paid to him to pay for the property (or a portion of it) in controversy, and took the title in his own name; that in this way he became her debtor, and that he honestly and in good faith made the conveyances assailed by this proceeding in liquidation of his said indebtedness. The complainant, however, after thus taking and reading the depositions of these witnesses, contends that they contain discrepancies and contradictions which cannot be reconciled, from which he deduces the conclusion that their testimony is false. Is he at liberty to thus assail the integrity and truthfulness of his own witnesses? He not only took, but read, their depositions on the trial of the case, and thereby vouched for their credibility. But he was not absolutely concluded by their evidence. The courts recognize the possibility of surprises in such matters. One may without fault examine an unworthy and unreliable witness, and afterwards discover that he has been duped and imposed on. He is, therefore, not concluded by what the witness may say. He may show by other evidence, if he can, that the facts are otherwise than deposed to by such witness, or, as in this case, where the evidence is in depositions, decline to read them on the hearing. But he will not be permitted to impeach the reputation for truth, or impugn the credibility of his own witness. Greenl. Ev. pp. 442, 443; and 2 Phil. Ev. (4th Amer. Ed.) pp. 982, 983. Nor will he be permitted, by argument based on the assumption that the witness is interested against him, and is dishonest, to destroy the effect which the law requires the court to give to evidence (as against the party offering it) voluntarily adduced by a party to a cause. If complainant believed the depositions of these witnesses,

as he now contends, to be untrue, he ought not to have read them. If false, why offer them in evidence? What purpose could they subserve to be first read and then argued away as being untrue? The absurdity of such a practice is obvious. To tolerate it would but be a waste of time. Having introduced the depositions, complainant is bound thereby, unless there is other proof in the record showing the fact to be otherwise. There is no such proof, and it follows that complainant is not entitled to a decree on the ground that the conveyances mentioned were made to hinder and defraud creditors.

But complainant urges another ground of relief. He insists that, conceding the testimony of these witnesses to be true, he is entitled to a decree. They both admit that the rents realized from defendant's separate property, which constitutes the consideration for the conveyances attacked, were paid to the husband by the wife's direction and request; and thereupon it is contended that "when a married woman, living with her husband, consents to and permits her husband to receive the income of her separate estate," the estate thus received "becomes absolutely his, and that he is not answerable to her for it," and that the receipt of such income "is not a sufficient consideration to support a conveyance from the husband to the wife," as against his creditors, unless there is an agreement by him "to repay or invest the same for her." We concur in the proposition as stated; but we think the evidence (if the testimony of the witnesses mentioned is to be received as true) brings this case within the exception. The rents realized from defendant's property were by her direction paid to her husband, but it was so paid upon an "understanding" that he would invest the same for her benefit. This understanding was repeatedly recognized by him. He thus became her debtor, morally and legally. His obligation to account was enforceable in a court of conscience, and the conveyances made in discharge thereof are supported by a valid consideration. Complainant's bill will be dismissed, with costs.

MELVILLE v. MISSOURI RIVER, F. S. & G. R. Co.

(Circuit Court, W. D. Missouri, W. D. May, 1880.)

1. MASTER AND SERVANT—DUTY TO EMPLOY SKILLFUL FELLOW-SERVANTS.

A company employing helpers to its blacksmiths is bound to see that they are reasonably skillful in that work; but this duty is discharged if the foreman employing them exercised ordinary care therein.

2. SAME—NEGLIGENCE OF FELLOW-SERVANT.

A blacksmith, injured by the careless blow of a skillful helper, cannot recover from their common master, unless the helper was habitually careless, and that fact was known to the master, and not to the blacksmith.

3. SAME—ACCIDENTS—RISKS OF EMPLOYMENT.

A servant, injured by a mere accident, incident to the work in which he is employed, cannot recover from his master.

At Law. Action for damages for personal injuries.

KREKEL, J., (*charging jury.*) The case about to be submitted to you, in the application of the principles which must govern it, is of importance, and deserves, and I have no doubt will receive, careful consideration at your hands. Melville, the plaintiff in the case, sues the receiver of the Ft. Scott Railroad Company for \$10,000 damages on account of injuries received while in the employment of the company as a blacksmith. The injury for which the damages are claimed is the loss of one eye, which was caused, as alleged by plaintiff, by the unskillfulness of a helper or striker in the defendant company's employ. The evidence tends to show that Melville, on the 11th day of August, 1876, was engaged upon a piece of blacksmith work in the shop of the defendant company. His usual striker or helper being absent, and he, Melville, needing help, he rapped upon the anvil in the customary way for help, and one Matoon, a striker or helper of an adjoining fire, stepped up to answer the call. The piece of iron had to be bent in order to square it. After having been sufficiently bent over for squaring, a flatter was held over the bent part to be stricken sidewise by the helper so as to bring the bent iron plate to a square. It is claimed by plaintiff, Melville, that in striking the flatter the helper did it so unskillfully that thereby a piece of iron was detached by the blow, which struck and put out his, plaintiff's, eye. All of this might be true, as alleged by the plaintiff, and yet the company is not liable unless the striker was unskillful, applying the term "unskillful" to the work for which he was engaged. If the helper was skillful, and struck a foul blow, or even if an unskillful blow did not cause or contribute to the injury, the consequences of such foul blow must be borne by the plaintiff, and the company is not liable therefor. All the defendant company is bound to do is to supply a sufficiently skilled striker or helper for the work in hand. It is not liable for neglect or carelessness of the helper, unless such neglect or carelessness was habitual, and was known, or by the use of reasonable diligence might have been known, to the company, and was unknown to the plaintiff. The law is that laborers who engage in joint work assume to run all ordinary risks growing out of the occupation and work in which they are engaged, including acts of skillful co-laborers. There are no complaints of any fault in the tools or appliances furnished by the company. Three questions are to be determined by you: (1) Was the striker or the helper, Matoon, sufficiently skillful for the work in which he was engaged? (2) Did plaintiff directly or indirectly contribute to the injury? (3) Was the injury an accident? The law applicable to these several propositions I will proceed to discuss in the order in which I have stated them.

Whether striking or helping in a blacksmith shop, or work such as has been testified to, is a skilled profession, to be learned by practice, and what amount of skill and practice is required to become a skillful striker, is for you to determine from the evidence. In trying to arrive at a proper conclusion you will carefully consider the testimony bearing upon the question, and take into consideration, also, the acts of the plaintiff. The testimony shows that plaintiff had been engaged in different companies' shops for five years before the occurring of the in-

jury complained of. The knowledge he must have had of the work upon which he was engaged, and the amount of skill necessary on part of the helper to aid him; his knowledge of the helpers in the shop who could obey his call; his failing to complain,—all this will be considered by you for the purpose of arriving at the conclusion whether Melville considered such helpers, including Matoon, sufficiently skilled to aid him; for, had he been dissatisfied, he could have quit the service of the company at any time. Much has been said about rules and the grading of mechanics in well-regulated shops, inapplicable in this case. The Ft. Scott Railroad Company had a right to make its own rules and regulations regarding its mechanics and the employment of its hands, and if the manner in which it was done was known to this plaintiff he is supposed to have acquiesced in it, and has no cause of complaint, though such employment and control differed from other similar or like establishments. It was the duty of the defendant company to supply suitable helpers, and the plaintiff had a right, in the absence of knowledge to the contrary, to presume that helpers employed were sufficiently skilled; but this obligation on part of the railroad is fully discharged if ordinary care was exercised by the foreman in the employment of helpers. Of this you are the judge under the testimony. To one thing I desire to call your attention specially, and it is this: That if you find from the testimony that Matoon was sufficiently skillful for the work in which he was engaged, and struck the blow which caused the injury negligently or carelessly, the railroad company is not responsible for the consequences of such neglect or carelessness. The consequences of such acts must be borne, as already stated, by those engaged in the common work.

Passing to the second proposition,—the contributing on part of plaintiff to the injury,—I may dispose of this branch of the case by saying that if you shall find from the testimony that plaintiff, by his own acts, materially contributed towards bringing about the injury complained of, he cannot recover.

I now pass to the third and most important part of the case, and invite your close attention thereto, namely, to the question, was the injury received by the plaintiff caused by an accident? It is for you, under the evidence, to determine whether the injury received by plaintiff was accidental. If accidental, the misfortune must be borne by him upon whom it falls. The law furnishes plaintiff no redress. The theory is that either a scale or a small piece of iron was detached by Matoon's blow from the flatter, which flew into plaintiff's eye, and destroyed it. The flatters and hammers have been described to you. The testimony tends to show that both, when new, are made somewhat rounding on their face; that by the blows both the hammer and flatter are gradually flattened, presenting, after considerable use, ragged edges, pieces of which by use are detached. It further appears from the testimony that the strokes, even when most carefully made by the best of strikers, do not always fall upon the same place on the face of the flatter. You have been told by the witnesses how, after long use, flatters wear down to

near the edge. You must judge from the testimony and experience how many blows it takes to wear out a flatter, the use of flatters generally, the number of injuries similar to the one under consideration occurring, and determine whether what happened was an accident or not. If you come to the conclusion it was an accident, the plaintiff is remediless, and the company not liable.

PRICE v. PRICE *et al.*

(District Court, E. D. Virginia. June, 1880.)

1. BANKRUPTCY—POWERS OF ASSIGNEE—SUIT IN STATE COURT.

The assignee of a bankrupt cannot, either voluntarily or by service of process, become a party to a suit in a state court to enforce a lien against the bankrupt's lands, except by express authority from the bankrupt court, as that court, under the bankruptcy act, has exclusive jurisdiction over the entire estate.

2. SAME—ESTOPPEL.

But, although the assignee is made a party without such authority, the bankrupt himself cannot, after litigating the case during five years to a final decree in the state supreme court, have an injunction in the bankruptcy court against the execution of such decree.

In Bankruptcy. Bill by Warfield Price against Tazwell Price and others to enjoin the enforcement of a decree rendered in a state court. On motion to dissolve a preliminary injunction. Granted.

J. A. Meredith and E. Barksdale, for plaintiff.

Hansbrough & Hansbrough and Guy & Gilham, for defendants.

HUGHES, J. In this case a lien creditor filed a bill in a state court in September, 1874, to subject land of the bankrupt's estate bound by trust-deed, and joined the bankrupt and his assignee in bankruptcy, among others, as defendants. It was competent for the creditor to do so, if he could secure the assignee in bankruptcy as a defendant; but the assignee had no legal authority to become such defendant unless by special order of the bankruptcy court; that court having exclusive jurisdiction over the bankrupt's estate, real as well as personal. See sixth clause of section 711, the eighteenth of section 563, and section 4972, Rev. St. U. S. Unless express authority from the bankruptcy court were necessary to authorize an assignee to be sued in respect to the bankrupt's estate vested by law in him, the law of congress giving exclusive jurisdiction to the bankruptcy court over the bankrupt's estate would be futile, and that jurisdiction would be of no avail. The complainant in the suit in the state court had no right to call the assignee in bankruptcy into that court; nor could the assignee consent to be a party there, except by express order of this court, granting leave. The suit in the state court was therefore faulty in its inception. Nevertheless it went on to a final decree, and was taken up from that decree by petition for appeal to the appellate court of highest resort in the state, and the peti-

tion for appeal was unanimously denied by all the judges of that court. I do not know whether the defective inception of the proceeding was shown or relied upon by the defense, either in the court below or in the appellate court. I suppose it was not. The record seems to show that it was not. The cause seems to have been determined in the state court on its merits, and the question of jurisdiction as to the assignee in bankruptcy seems not to have been raised. If the assignee had applied to this court for leave to make himself defendant in the state court it would have been granted unless strong cause had been shown against doing so; and, if the bankrupt had shown, as charged in this case, that the assignee was acting in collusion with the complainant in the suit in the state court to defraud his estate, still the order would have been given, but the assignee complained of would have been removed, and another assignee appointed. But the bankrupt (nor any other person) did not apply to this court either for an order restraining the assignee from being made, or from becoming party defendant to that suit, or for an order removing the colluding assignee and appointing another. The suit was allowed to go on upon its merits, without the fact being brought to the attention of this court, which had in fact made an order directing the removal to the western district of the bankruptcy proceeding in this cause. And now, nearly six years after the suit in the state court was instituted, the bankrupt himself files his bill here asking that the complainant and officers in the state court be enjoined from the execution of the decree of the state court. The question is whether the ground indicated above, which was a good one at the inception of the suit in the state court, if then promptly availed of, to stop the suit there, is of such a nature as now to justify this court in arresting proceedings under the decree of the state court. I think the objection was of such a nature as, if not availed of at the proper time, was cured by the acquiescence of the bankrupt. After actively participating in a litigation for five years, until he had availed himself of every expedient allowed by law in the state court for the protection of his interests, and finally lost his cause there, he will not be heard here in arguing a technical objection to the proceeding there, which he has slept upon for five years. The injunction which has been granted by this court must be dissolved.

UNITED STATES v. LEE HOY.

*(District Court, D. Washington, N. D. December 15, 1891.)***CHINESE MERCHANTS—RE-ENTRY WITHOUT CERTIFICATE—DECISION OF COLLECTOR.**

The presence of a Chinese merchant, otherwise entitled to be in the United States, is not rendered unlawful by the fact that upon his return from a visit to Canada the collector permitted him to land, upon the certificates of private persons and his own personal knowledge, without the viséd certificate required by section 6 of the amended exclusion act, (Act Cong. July 5, 1884;) since that section also provides that "the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the secretary of the treasury, and not otherwise."

At Law. Appeal by Lee Hoy from a conviction before a United States commissioner of being unlawfully in the United States. Reversed.

P. H. Winston, U. S. Atty.

William H. White, for defendant.

HANFORD, J. The defendant in this case came to the United States from China in the year 1880, and has made his home in this country ever since. For eight years after his arrival he belonged to the laboring class, and was employed as a cook. With the capital accumulated by saving his wages he purchased a stock of merchandise, and for upwards of three years past he has been a merchant at Port Angeles, in this state. There is no question as to his identity, nor as to any of the facts above stated. The defendant is as well known in the community where he lives as any other merchant there. He has frequently visited a relative at Victoria, but has never been out of the United States since his first arrival in 1880, except for the purpose of making said visits. In going to Victoria and returning he always traveled by regular passenger steamboats, and always landed, on returning, with the knowledge and consent of the collector or an acting collector of customs at Port Townsend, his identity and occupation as a merchant being proven by a certificate given him by well-known prominent citizens acquainted with him. On the occasion of his last return from Victoria the acting collector of customs permitted him to land, upon the evidence of such certificates in part, but chiefly upon his own personal recognition of the man, and knowledge as to his residence and business, and he was allowed to go to Port Angeles as usual, and was not molested for a period of some two weeks thereafter, when he was arrested upon a charge of being a Chinese person not lawfully entitled to be or remain in the United States. Upon a hearing before a United States commissioner he was convicted, and a warrant for his deportation to China was issued. From the judgment of the commissioner he has appealed to the judge of this district, under the provisions of the thirteenth section of the act approved September 13, 1888, (25 U. S. St. 479.)

The only reason for supposing that this defendant is not lawfully in this country, or that he can be lawfully deported, is that, having been out of the United States, he returned without a certificate properly issued

and viséd according to the sixth section of the restriction act, as amended by the act of July 5, 1884, (23 U. S. St. 116.)

If the right of the defendant to land on the occasion referred to had been denied by the custom-house authorities; and if he now appeared before the court as an applicant for affirmative relief, so that a decision in his favor would operate as a mandate to compel the collector to reopen the gate for his admission to the country without presentation of the required certificate, my decision would be controlled by the recent decision of the circuit court of appeals for the ninth circuit, in the *Case of Lau Ow Bew*, 47 Fed. Rep. 641. But the decision of the collector was in favor of the right to land, and it is now a question whether the defendant can be lawfully banished from the country in which he has been domiciled for 11 years, and in which his property and business is situated. By reason of his being in the United States prior to the date on which the first restriction act went into effect the defendant's right to be in this country and to enjoy all the rights, privileges, and immunities allowed to citizens and subjects of the most favored nations is expressly guarantied, both by a national treaty and by acts of congress not yet abrogated or repealed; and, by reason of being a merchant, the same rights are accorded to him by the second section of the act of September 13, 1888. The statute providing for the arrest and deportation of Chinese persons expressly requires that there shall be a judicial inquiry, and that a Chinese person can be sent out of the country only after being convicted and "adjudged to be one not lawfully entitled to be or remain in the United States." To determine this case adversely to the defendant something more is required than to find that the manner of his coming into the country was unlawful by reason of his failure to produce and exhibit to the collector the legal evidence to prove his right. It must be found that he is not lawfully entitled to remain in the United States. The several statutes referred to contain provisions requiring the collector of customs to examine the lists of all passengers coming into the country by vessels from foreign countries, and confer upon him power, as the agent of the government, to decide as to the right of a Chinese person to land from such vessel. Section 12 of the act of September 13, 1888, reads as follows:

"Sec. 12. That before any Chinese passengers are landed from any such vessel the collector or his deputy shall proceed to examine such passengers, comparing the certificates with the lists and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law; and the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the secretary of the treasury, and not otherwise."

In making his decision in this case, the collector was guided by regulations and instructions promulgated by his superior officer, the secretary of the treasury, and especially by a circular dated July 3, 1890, from which the following is an extract:

"*Second.* Chinamen, who are not laborers, and who may have heretofore resided in the United States, are not prevented by existing law or treaty from returning to the United States after visiting China or elsewhere. No certificates or other papers, however, are issued either by the department or by any of its subordinate officers, to show that they are entitled to land in the United States, but it is suggested that such persons should, before leaving the United States, provide themselves with such proofs of identity as may be deemed proper, showing that they have been residents of the United States, and that they are not laborers, so that they can present the same to and be identified by the collector of customs at the port where they return."

It is impossible for merchants of Chinese nativity, established and domiciled within this country, to obtain from the government of China or any other country certificates meeting the requirements of the sixth section of the restriction act as it has been amended, for which reason the treasury department has interpreted that law as being inapplicable to them, and has made the above regulation to enable them to go and return, without opening a way for others to gain admittance fraudulently. Pursuant to this regulation, many merchants of this class have been permitted to go out of the country temporarily with the assurance from United States officials of the right to return, and have been permitted by United States officials to return without having certificates issued to them by any government. All such merchants who are now within the United States are liable to be arrested and banished if the law requires that this defendant be so treated. I am not inclined to hesitate about enforcing the law, even if it be harsh, but it is my duty to carefully inquire and find authority for it in the law before making a decision which may work ruin to a large number of unoffending persons. The defendant did not return from his visit to Victoria clandestinely or fraudulently. Every question as to his right to return has been once passed upon by a representative of the United States, specially authorized and required to make careful inquiry as to the facts, and decide such questions. There is no law providing for a review of any decision of that officer in such a case by any court; on the contrary, the law does require that the collector's decision shall not be subject to review except by the secretary of the treasury. Of course, if any officer of the executive branch of the government misconstrues or misapplies the law, his action based upon such error may be annulled or disregarded by a court in any case coming within its jurisdiction. But by a line of decisions of the supreme court a general principle has become fixed as part of our national jurisprudence. It is this: When an officer or special tribunal is expressly empowered to receive and examine proofs, and decide any question of fact necessary to be determined in the course of administration of the government or execution of the laws, and no power of review is given to the courts by any statute, the finding of facts made by such officer or special tribunal pursuant to such authority is conclusive upon the parties affected and upon the courts, unless it can be impeached for fraud. Upon this principle the courts are precluded from reopening a case once passed upon by such an authorized officer or special tribunal for the mere purpose of inquiring whether or not the decision was predi-

cated upon legal or sufficient evidence. *Johnson v. Towsley*, 13 Wall. 72; *Steel v. Smelting, etc., Co.*, 106 U. S. 451, 1 Sup. Ct. Rep. 389; *Baldwin v. Stark*, 107 U. S. 465, 2 Sup. Ct. Rep. 473. For the reasons above given I conclude—*First*, that the defendant is not in fact one of the class of persons not lawfully entitled to remain in the United States; *second*, That, having been permitted by a collector of customs to land, after a temporary absence from the United States, without fraud on his part, the defendant cannot be lawfully sent out of the United States because of a mere error of a collector in not exacting legal evidence of the facts as to his identity and the nature of his business. In my opinion, the law does not authorize, but forbids, the execution of the warrant issued by the commissioner in this case. It is the judgment of this court, therefore, that the order and judgment of the commissioner be reversed. The United States attorney having signified a desire to have my decision reviewed by the court of appeals for this circuit I will not discharge the defendant, but will admit him to bail, upon a recognizance with sureties, conditioned for his appearance at the next term of this court, and to abide the final determination of this case after the decision of the appellate court.

UNITED STATES *v.* SPRAGUE *et al.*

(District Court, E. D. Wisconsin. November Term, 1892.)

1. UNITED STATES BONDS—FRAUDULENT IMITATIONS.

Under Rev. St. U. S. § 5430, denouncing a punishment against any one having in possession "any obligation or other security" after the similitude of any obligation issued by the United States with intent to sell or otherwise use the same, it is no offense to so have in possession a bond issued by a mining company, and resembling a United States bond, but not purporting to be executed by any party whatever. The want of execution is not merely a fact which the jury may consider in determining as to the degree of similitude, but is a complete bar to a conviction.

2. SAME.

To constitute the offense it is not necessary that the instrument should purport to be an obligation of the United States, or bear such a likeness thereto as to deceive experts or cautious men. It is sufficient if it is calculated to deceive a sensible and unsuspecting man of ordinary observation and care, dealing with a man supposed to be honest.

At Law. Indictment of James D. Sprague and others for having in possession fraudulent imitations of United States bonds. Heard on motion for new trial. Motion granted.

G. W. Hazelton, Dist. Atty., for the United States.

N. S. Murphy, for defendants.

DYER, J. The defendants have been convicted, under section 5430 of the Revised Statutes, of the offense of having in their possession an obligation engraved and printed after the similitude of an obligation issued under the authority of the United States, with intent to sell or oth-

erwise use the same. A motion for a new trial has been argued, and is now to be decided.

It was shown on the trial by the testimony of a bank expert that the instrument which the defendants had in their possession and attempted to exchange for money, resembles in color, style of printing and engraving, and in general appearance, a 5-20 government bond. The same witness testified that in form and size it differs from a genuine government bond, and, in fact, examination of the instrument shows that it purports to be, not an obligation of the United States, but an obligation of the United States Silver Mining Company, of Denver, Colo., by which that company acknowledges itself to be indebted to the bearer in the sum of \$1,000, payable at the American Exchange National Bank, in the city of New York, March 1, 1890, with interest at 7 per cent. On the face of the instrument is printed in large gilt letters the word "gold," and interest coupons, payable semi-annually, are annexed. At the foot of the bond and of each coupon are printed the words "Pres't" and "Sec'y," with spaces left before each of those words for signatures; but no signatures are written or printed in the spaces thus left for the purpose, so that on the face of the paper it appears to be an unexecuted instrument.

On the trial the court held that to constitute the offense declared in the statute referred to, it was not essential that the fraudulent or fictitious obligation should in terms purport to be an obligation of the United States. And following the ruling, as here produced in manuscript, of Judge CALDWELL, of the eastern district of Arkansas, in *U. S. v. Wilson*, understood to be unreported, the court charged the jury that—

"To constitute an offense under the statute it is not necessary that the similitude between the false and the true security should be such as to deceive experts, bank officers, or cautious men. It is sufficient if the alleged fraudulent bond bears such a likeness or resemblance to one of the genuine bonds of the United States as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary observation and care, dealing with a man supposed to be honest. If it does, then the similitude required by law to make out the offense exists."

The court further charged the jury that, where the similitude is of the character stated, the offense is not disproved by showing that the alleged fraudulent bond bears no signature, or that careful examination discloses that it does not purport to be a bond of the United States, but that, on the contrary, it purports to be a bond issued by some mining company. There was clearly no error in holding that to constitute the offense it is not essential that the fraudulent bond or instrument should on its face purport to be an obligation of the United States. The language of the clause in section 5430, upon which the indictment is based, is that every person "who has in his possession or custody, except under authority from the secretary of the treasury or other proper officer, any obligation or other security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same," shall be punished, etc. The object of this statute evidently was to make it unlawful for

any person to have in his possession without proper authority, and with intent to sell or otherwise use the same, any obligation or security, whether purporting to be but not in fact issued under the authority of the United States, or purporting to be or in fact made or issued by any individual or any public or private corporation, engraved and printed after the similitude of a genuine obligation or security of the United States. No other construction of the statute is consistent with its language and evident meaning. The serious question involved is: Must not the instrument claimed to be made after the similitude of a government obligation or security be in fact, or purport to be, an executed obligation or security, to make a case within the statute? Of course, the defendants cannot be prosecuted in this court on the ground that they are confidence men, or that they have attempted to perpetrate a fraud. Their prosecution must proceed wholly under this statute, and their conviction must rest wholly upon proof of the charge that they unlawfully had in their possession an obligation made after the similitude of an obligation of the United States. As we have seen, the words of the statute are that every person who has in his possession "any obligation or other security," etc. The words "obligation or other security," as here used, seem clearly to imply an executed instrument, or at least one which on its face purports to be executed by somebody. In the case in hand the false or bogus bond bears no signatures whatever. It is a mere blank, so far as signatures or execution are concerned. Can it then be said to be an obligation or security, or to be even a pretended obligation or security? True, it is a paper made after the similitude of a United States bond, but it is unexecuted, unsigned by anybody. In that regard, as just observed, it is a blank, and there is not on its face even a pretense of execution by any person or corporation. The statute was aimed at the issue or execution, whether real or pretended, of obligations or securities made after the similitude of the obligations or securities of the United States; and I am constrained to believe that what is meant by the language of the section referred to is an instrument that is either in fact executed, or purports to be executed, by somebody; otherwise it is not and does not purport to be an obligation.

Very forcible argument was made by the learned district attorney that the instrument in question, though bearing no signature, may be as effectually used for the purposes of deception and fraud as in case it purported to be executed or signed. This may be so, but, after all, the court cannot supply omissions in the statute, but must accept and construe the statute as we find it; and if the case in hand does not come within the letter and meaning of the statute, it is the duty of the court so to decide. The instrument in evidence is not an obligation or other security, and does not purport to be such, because it was never executed or signed by anybody, and therefore it is not such an instrument as the statute covers. In that respect it is no more than a blank piece of paper. It was also argued by the district attorney that the fact that the instrument in evidence was not signed or executed should be treated by the court as merely a fact entering into

the principal question of similitude to be submitted to the jury; and, as the jury have found that the alleged similitude exists notwithstanding the absence of such signatures as would make the instrument either an actual or pretended obligation, the court cannot disturb the verdict. In other words, the contention is that the non-execution of the instrument or paper is merely a fact bearing upon the question of similitude; and that it is the province of the jury alone to say in the light of all the facts whether the alleged similitude exists or not. This was the view to which the court was inclined when the question first arose, and in support of the proposition thus stated, counsel have cited *U. S. v. Morrow*, 4 Wash. C. C. 733. That case, however, only holds that in a case of forged coins the question of resemblance or similitude is one for the jury, and this no one will dispute. But when a statute, as in the present case, declares in effect that the false instrument must be an obligation or security, it cannot be that because the question of similitude is one for the jury, the court is not to determine whether the case made is within the statute. Whether the instrument is an obligation or not is a question as to its legal effect. That is a question for the court, and, if it is apparent that the alleged fraudulent obligation or security is not an obligation or security at all, within the meaning of the statute, it must follow that the conviction cannot be sustained, although the jury have determined that the paper in evidence, in its body and general form and style, is made after the similitude of a United States bond. The case of *People v. Ah Sam*, 41 Cal. 645, was referred to on the argument, but it is inapplicable to the case at bar. In that case the defendant was indicted for having in his possession blank and unfinished bank-bills in the form and similitude of a bill for the payment of money, with intent to fill up and complete the same; and the statute under which the indictment was found declared it to be an offense to have in possession blanks having the form or similitude of bills for the payment of money, etc. On the whole, my opinion is that the conviction of the defendants cannot be sustained. They undoubtedly attempted to commit a gross fraud, but the statutory offense of which this court has jurisdiction is not established. The difficulty in the way of maintaining a conviction is attributable to a defect in the statute, and that defect congress alone can remedy. Motion for new trial granted.

MILLNER v. VOSS *et al.*

(Circuit Court, W. D. Virginia. June, 1882.)

PATENTS FOR INVENTIONS—COMBINATION—ANTICIPATION.

Letters patent No. 9,108, issued to Jackson C. Millner for a tobacco curer, consisting of a combination of two fire-places of different sizes on each side of a chimney, leading through suitable heaters, which traverse the building to a common flue, connecting with a central heater, which serves as a return flue, connected with the chimney, are void as being a mere combination of old parts, which have long been used in substantially the same manner.

In Equity. Suit by Jackson C. Millner against H. F. Voss & Co. for infringement of a patent. Bill dismissed.

T. S. Flournoy and M. M. Tredway, for plaintiff.

R. W. Peatross, for defendants.

BOND, J. This is a bill in equity, filed by the complainant, charging the defendants with an infringement of letters patent No. 9,108, granted him for improvement in tobacco-curing furnaces. The prayer of the bill is for an injunction and general relief. The defendants, by their answer, deny, among other things, the novelty and utility of the plaintiff's so-called invention, and also that they have infringed. The plaintiff, in the specification describing his invention, alleges that the object of it is to effect the more thorough and uniform curing of tobacco, and that the novelty of it consists in the construction and arrangement of its parts. The furnace described in the specifications consists of two fire-places of different sizes on each side of a chimney, out of each of which issues a flue, which traverses the floor of the house in which the tobacco is hung to be cured, and then enters a flue which runs at right angles to it, which flue is common to all the flues issuing from the furnaces. In the center of this common flue is another flue, which also traverses the floor of the curing house, reverses back to the chimney, serving to convey the smoke to the chimney, while it also serves as a heater. Each of these flues, with the exception of the common flue, has a damper or valve to regulate the heat, and on the flues from the furnaces are adjusted pans to hold water and furnish moisture during the process. The claim of the patent is, in a tobacco-curing apparatus, a gang of furnaces, each having heating surfaces, and all connecting with a common flue combined with a return flue, which also serves as a heater, and connects the common flue with an escape pipe or chimney, as herein specified. (1) The combination in a tobacco curer of two sets of furnaces of different capacities, leading through suitable heaters to a common flue, connecting with a central heater, which serves as a return flue, connected with a chimney located at the furnace end of the drier, as specified, and for the purposes set forth. (2) In a tobacco curer, the combination of the furnace, A, A, direct heaters, B, B, B, B, cross-flue, B, return heater, B, and chimney, C, located at the furnace end of the curer, are the valves or cut-offs, *a, a, a, a*, substantially as and for the purposes set forth.

Each of the parts of this combination is old. The patentee does not claim that he is the inventor of a flue or cut-off, nor chimney, and, if he did, the evidence sufficiently disproves the fact. His patent is for a combination of old devices, and there is nothing new in it but the combination, if that be new. The evidence shows that long before the date of complainant's patent tobacco growers had used in their drying houses flues for the curing of the tobacco by heat. These flues were connected with a furnace near each corner of the front of the tobacco house, united at the rear of the house in a common flue, and had a return flue to the chimney, placed between the furnaces at the center of that side of the tobacco house; and the patent of Green, offered in evidence, which is an English patent for drying peat, issued March 5, 1849, has two furnaces so situated, and the flues going from them to a common flue, and returning thence by a return flue to the chimney, placed on the same side of the house. But the specification of the complainant requires on each side of the chimney two furnaces or more, alike in all respects except in size, and this is claimed as part of his patent. But surely there can be no invention in this. Where one stove is found to be unequal to the heating of a room, to put another beside it, even though smaller, requires no invention; and if at the time of the issue of plaintiff's patent there was in use for curing tobacco, or anything else, single furnaces, with flues entering a common flue, with a return flue to the chimney, it is not a patentable combination to put two furnaces side by side, to accomplish the same purpose, even though one be smaller than the other.

The plaintiff's combination produces no new result. It works in no different manner. It is a mere colorable variation from the old method of building furnaces, required no exercise of the inventive faculty, and is not patentable.

The complainant has offered in evidence the large amount of sheet-iron piping sold by the defendants to be used in tobacco curers, to show the utility of this invention; but there is no evidence to show that this piping was used with this particular patented combination. Indeed, the evidence shows that the complainant does not use the combination of the large and small furnace on each side of the chimney in such furnaces as he erects, and in the argument at bar claims that a single furnace on each side of the chimney, with the common flue and return flue, is within the scope of his patent. This is not so, and, if it were true, in law his patent is void, having been anticipated by Green, as above stated, and by the old curers shown to be in use by tobacco planters long before his patent was issued. The injunction is refused, and the bill dismissed.

HAMMOND BUCKLE CO. v. HATHAWAY *et al.*

(Circuit Court, D. Connecticut. January 16, 1892.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—SHOE-BUCKLES.

Letters patent No. 301,884, issued July 15, 1884, to Theodore E. King and Joseph Hammond, Jr., are for an improvement in shoe-buckles and similar articles, consisting in a tongue-plate composed of a single piece of metal doubled upon itself, and forked at its rear and next the catch-plate. The tongue swung in this bifurcation, its pivot being located underneath the tongue-plate. Indentations in the under-fold of the tongue partially embraced the ends of the pivot-pin, which was held between the two folds. The object of this construction was to cause the tongue-plate to extend rearward of the tongue, forming there a bearing surface for the catch-plate. The first claim was: "In combination, the catch-plate, the tongue, pivoted directly to the tongue-plate, and the tongue extending rearward of the pivot, and in contact with the catch-plate, when the parts are engaged." Held, that the patent was infringed by a buckle composed of two plates riveted together, the lower being provided with projections, in which the pivots of the tongue turn, and which fit into openings in the upper plate when the two lie together; and the upper, which is a spring-plate, being bifurcated, and extending on both sides of the tongue rearward, to afford a bearing surface for the catch-plate, though the lower plate has no extension.

2. SAME.

The fact that the upper plate is a spring-plate, and similar in construction to the spring-plate of an older patent, (No. 191,758, also issued to King and Hammond,) does not prevent infringement, since, as combined with the under plate, it forms a tongue-plate substantially like that of the double plate of the patent.

48 Fed. Rep. 805, affirmed.

On rehearing.

SHIPMAN, J. This is a petition by the defendants for a rehearing of so much of the above-entitled cause as relates to the infringement of the first claim of letters patent No. 301,884 by the manufacture of "Exhibit Weld Buckle D." The tongue-plate of the patented buckle consists of the double leaves of a single piece of metal folded upon itself. The under fold partially embraces the ends of the pivot-pin, which it holds between itself and the upper fold. When the tongue passes through the forks of the tongue plate, they are sprung apart, which causes a slight locking action. This latter peculiarity is the subject of the fourth claim of the patent, and does not exist in any of the defendants' buckles. Buckle D is composed of two plates superimposed upon and closely fastened to each other. The tongue does not crowd apart the forked extension of a tongue-plate, but the upper plate is a spring-plate, which is "pressed away from" the lower plate by a projection upon the middle part of the tongue. As was said in the former opinion, the upper plate "is bifurcated, and extends on both sides of the tongue rearward, to afford a bearing surface for the catch-plate, but the lower plate has no such extension beyond the tongue-pivot." The foundation of the defendants' argument against infringement is that the tongue-plate of buckle D is the lower plate, and that the upper plate is simply a spring-plate, and is the spring-plate of No. 191,758. If the tongue-plate is the lower plate alone, there is no infringement, because it does not extend rearwardly, so as to afford a support for the catch-plate, and the tongue is pivoted at a point slightly above its surface. While the tongue-plate

of the patent is a double-leaved plate, folded upon itself, this precise construction cannot be vital, but a double-leaved plate, securely fastened together, must be the same thing as a folded piece of metal. Neither can it be vital that the two leaves of the plate should both extend rearwardly of the pivot. The defendants do not rest upon these minor details of construction, but their point is that the upper plate is a substantial repetition of the spring-plate of No. 191,758, which was confessedly not a tongue-plate. To one end of the tongue-plate of 191,758 was attached a strip of spring-metal, having one end free, and manifestly detached from the tongue-plate. To the free end of this spring plate a tongue was hinged, and was, in this way, indirectly pivoted to the tongue-plate. The tongue bore or acted upon the tongue-plate by means of a lever end forming part of the tongue, and in the rear of its pivot. The spring-plate of buckle D is closely attached to the lower plate, and is a form of the double base plate, which is familiar in arctic buckles; but I do not think it material, if true, that, as a spring-plate, it is like the spring-plate of 191,758. It is, like other double plates of its class, also a tongue-plate. The fact that the upper plate is a spring-plate, and is like an older spring-plate, does not modify my opinion that the double plate of buckle D is the same thing as the double plate of No. 301,884, and that its bifurcated extension is substantially the same thing as that shown in the patent, although the two leaves do not extend rearwardly together or in contact with each other. It is true that the spring action of buckle D is effected in a different way from that of the patent, and it is probable that it is effected in the way which had been previously indicated; but it seems to me that the principle of the first claim of No. 301,884 has been reproduced in buckle D in substantially the same way, and that the way in which spring action is obtained does not materially affect the question of infringement of the first claim. The petition is denied.

THE WM. GATES.

BAKER *et al.* v. THE WM. GATES.

(District Court, E. D. Virginia. July 13, 1881.)

MARITIME LIENS—PRIORITIES.

Among the holders of maritime liens equal in dignity he shall be preferred who first institutes proceedings to enforce his claim.

In Admiralty. Libel by Baker and others against the Wm. Gates to enforce certain maritime liens, which were all of equal dignity.

Sharp & Hughes, for libelants.

Ellis & Thom, for petitioners.

HUGHES, J. Clarke's Praxis, which is of highest authority on admiralty law, lays down the following principles in title 44 under the head of "The Seizure of Goods by Different Creditors:"

"If any one is indebted to different persons, for the purpose of recovering their debts of that person separate judicial warrants will lie against the goods of the debtor, to procure their arrest. If the goods seized are not sufficient for the payment of all the creditors, he is to be preferred, and will first obtain a judicial decree for the possession of the goods, who first institutes his suit aforesaid, or had the goods aforesaid seized. The same order and form is also to be observed as to the remaining creditors, if, after the full payment of the first creditor, any goods remain, although not enough to pay all the rest."

I think the general teaching of the cases reported is in support of these principles, the exceptional rulings being due to exceptional circumstances presenting themselves in particular cases. I feel bound to decree in accordance with these principles, paying Baker first, Mayer & Co. next, and then the petitioners *pari passu*.

THE MINNIE L. GEROW.

BAIN *et al.* v. THE MINNIE L. GEROW.

(District Court, E. D. Virginia. June 30, 1880.)

WHARFAGE—RATES.

The principal wharf-owners of Norfolk and Portsmouth agreed among themselves on a schedule of rates, in which the rate on the entire tonnage of large vessels was fixed at \$1 for each 100 tons. Prior thereto the customary rate was \$1 per hundred on the first 300 tons and 50 cents per hundred on the remainder, and it appeared that few of those who signed the schedule afterwards charged more than these rates. *Held* that, in the absence of an agreement with the vessel, the court would enforce only this rate, though the wharf-owner testified that he was not at liberty to charge less than the schedule rate.

In Admiralty. Libel by Bain & Bros. against the ship Minnie L. Gerow for wharfage. Decree for defendant.

Walke & Old, for libelants.

Sharp & Hughes, for respondent.

HUGHES, J. The claim here is for wharfage due from the libeled vessel. There was no agreement between the agent of the vessel and the wharf-owners as to the amount to be paid. The charge was at the rate of \$1 per 100 tons per day for 30 days upon the entire tonnage of the vessel, which was 1,304 tons; or \$391.20. Deposit in the registry of the court has been made on behalf of the vessel at the rate of \$1 per hundred on the first 300 tons, and half a dollar per hundred the rest of the tonnage, for a period of 30 days, or \$240.60.

The only question is whether a dollar or a half dollar per day per 100 tons on the excess over 300 tons of the vessel's tonnage is the proper

charge. The decision must be controlled by the evidence in the case on this point. It is proved that the custom in Norfolk, in cases where no special agreement is made, is to charge half a dollar per hundred after the first 300 tons. That also seems to have been the schedule rate observed in Portsmouth before 1874. Yet in respect to this rate, both in Norfolk and Portsmouth, all the witnesses who testified on the point stated that in cases where special rates were agreed upon they were always lower. In the year 1874 a new schedule of wharf rates was established as between themselves by eight owners of the principal wharves in Portsmouth. In that schedule wharfage on vessels was put down at one dollar per hundred on the entire tonnage of large vessels. The libel in the present case is by one of the firms who were induced to sign that schedule, and it claims wharfage in accordance with that schedule. It seems that there are but few wharves in Portsmouth at which very large vessels can be moored with convenience. Mr. Peters, the head of one of the few firms owning such a wharf, says that he never charges more than half a dollar after the first 300 tons, and that his firm refused to sign the Portsmouth schedule. Mr. Neeley, one of the firm whose name stands first on the Portsmouth schedule, says that he has never charged, and would not charge, more than half a dollar. Mr. Bain, one of the libeling firm, says that he charges the schedule rate in all cases where there is no special agreement, and does not feel at liberty to "cut" the agreed rates. I think, on the whole, that the weight of testimony is that a dollar per hundred on the whole tonnage of large vessels is too high; and I am inclined to infer from all the circumstances that it was through inadvertence that that particular item got, in the form in which it stands, into the Portsmouth schedule. The rates of both schedules for wharfage on large vessels appear to me to be too high; but I am not at liberty to set my individual judgment in such a matter against that of leading business men of two cities. I was inclined, at the trial of this cause, to think myself concluded by the signatures appearing on the Portsmouth schedule; but on reflection the weight of evidence seems to condemn the charge there prescribed for wharfage on large vessels, and to show that, if it is adhered to at all by wharf-owners, it is only, as in the present case, because they feel bound not to "cut" rates agreed upon among the signers of the schedule. Indeed, it does not seem that many even of the signers of this Portsmouth schedule feel bound by their signatures to adhere to its charge for wharfage on large vessels, and I do not feel at liberty, therefore, to enforce that charge. The amount deposited in the registry by the agent of the owners of the ship Minnie L. Gerow must therefore be accepted as full compensation of the wharfage in this case, and I will so decree; but each party must pay his own costs.

CITIZENS' INS. Co. *et al.* v. KOUNTZ LINE *et al.*

(Circuit Court, E. D. Louisiana. June 4, 1883.)

1. CARRIERS OF GOODS—CONNECTING LINES—PARTNERSHIP.

Where the owners of several steam-boats are not in fact partners, and do not own or use any property in common, or share any of the profits, the fact that they allow their boats to be advertised as forming a line under a common name, and have a common agent, who solicits custom and transacts business for all, does not make them jointly liable for the torts and contracts of each other.

2. SAME—BILL OF LADING—NOTICE.

The fact that a bill of lading for goods shipped on one of the boats was made out in her name only was sufficient notice to the shippers that she and her owners alone were bound by the contract.

10 Fed. Rep. 768, affirmed.

In Admiralty. Appeal from the decision of the district court.

John A. Campbell and *O. B. Sansum*, for libelants.

Singleton, Browne & Choate, for respondents.

J. M. Harding, *H. H. Walsh*, and *The United States Attorney*, for interveners.

Woods, J. The suit was brought *in personam* against the Kountz Line, the H. C. Yeager Transportation Company, the C. V. Kountz Transportation Company, the K. P. Kountz Transportation Company, and the M. Messe Transportation Company. These respondents were all incorporated companies, organized under the laws of the state of Missouri. The findings of fact show that they were distinct and independent corporate bodies, each owning in severalty its own property, carrying on its own business, without any sharing of profits by the other companies; the only connection between them being that there were some persons who held stock in all the companies, and that the Kountz line was the common agent of all the other companies. There was no evidence or finding to show that these several companies had ever agreed to form a partnership with each other, and no facts are shown or found from which a partnership between them could be inferred. It is sought, however, to charge them with a joint liability, because, it is alleged, they held themselves out, or suffered themselves to be held out, to the public as forming a combination in the nature of a partnership, or as being jointly bound for the contracts, misfeasances, and negligence of each other. We think nothing is disclosed by the record which sustains this contention of the libelants. The most that the findings established is that the boats of the several transportation companies had formed a line or combination to run in connection with each other, and under the management of a common agent, and the existence and the superior advantages offered by this line were advertised in various ways. But nothing appears, either in the evidence or the findings of fact, which would justify any shipper or passenger in supposing that these several corporations held or suffered themselves to be held out as jointly bound for the contracts of each other, or that each one would become an insurer for the

performance of the contracts, or for the diligence and good conduct, of the others.

This question is therefore presented: Where the owners of several steam-boats are not in fact partners, and own and use no property in common, and there is no community of profits, but they allow their boats to be advertised as forming a line under a common name, and have a common agent, who advertises and solicits custom and transacts business for all, is every boat and owner jointly liable with the other boats and their owners for their contracts and torts? We are of opinion that this question should be answered in the negative. In support of this view the following authorities are in point: *St. Louis Ins. Co. v. St. Louis, etc., R. Co.*, 104 U. S. 146; *Irvin v. Railway Co.*, 92 Ill. 103; *Briggs v. Vanderbilt*, 19 Barb. 222; *Bonsteel v. Vanderbilt*, 21 Barb. 26.

There can be no well-founded contention in this case that the libelants, or those under whom they claim, were deceived, for the bills of lading issued by the Henry C. Yeager were made out in her own name, and amounted to notice to the shippers, and was a contract with them, that the Henry C. Yeager and her owners, the H. C. Yeager Transportation Company, were alone bound.

We are therefore of opinion that there was no joint liability of the respondents, or of any of them, and that the libel should be dismissed.

THE LYNDHURST.

MAGEE v. THE LYNDHURST.

(District Court, S. D. New York. January 11, 1893.)

1. REPAIRS AND SUPPLIES—FOREIGN VESSELS—LIENS—BONA FIDE PURCHASERS—LACHES.

Supplies being furnished to a vessel known to belong in another state; and the libel not being filed until the last day of the year after the supplies were furnished; and the vessel having been in the mean time twice sold to *bona fide* purchasers for full value, without notice, from six to eight months after the supplies were furnished, though they made special efforts to learn of any existing liens; and the vendor becoming in the mean time insolvent; and the vessel being all the time amenable to process daily: *Held* that, as against the *bona fide* purchasers, the maritime lien was lost, through laches.

2. STATE LIENS—CONSTRUCTION—NOT APPLICABLE TO FOREIGN VESSELS—ADMIRALTY LAW NOT CONTROLLED BY STATE LEGISLATION.

The law of the state of New York allowing a lien for supplies furnished to any vessel upon filing a notice within 30 days in the county clerk's office, the lien to continue "for one year," *held*, (1) following *The Chusan*, 2 Story, 455, that the statute was not applicable to foreign vessels on which a maritime lien existed for the same supplies; and, (2) if the statute was applicable at all to foreign vessels, that state legislation was incompetent to change the rules of decision in admiralty as respects the scope, effect, or priority of liens as regards other lienors or *bona fide* purchasers, or to impart to such state liens any superior qualities or attributes over maritime liens; that both are subject to the same limitations, as respects laches; and on both grounds the libel was dismissed.

In Admiralty. Libel for repairs. Dismissed.

Carpenter & Mosher, for libellant.
Alexander & Ash, for claimant.

BROWN, J. In July, 1890, the libellant furnished materials to the value of \$70.44 for the repair of the steam-tug Lyndhurst, at Athens, Green county, within this state, on which \$24.44 were paid on account, leaving a balance of \$50, to recover which the above libel was filed. On the 18th of August following a notice was filed in the county clerk's office of Green county, pursuant to law, claiming a lien under the state statute. The owner of the tug resided in New Jersey, and the tug belonged at Hoboken. The evidence shows that the libellant had notice of these facts when the materials were furnished. In November, 1890, the owner not being able to pay a mortgage which had become due upon the vessel, the mortgagee, who was also a resident of New Jersey, took possession of her. In December she was arrested under numerous claims for liens, which the mortgagee got released by filing bonds therefor; and on the 24th of January, 1891, he sold her to F. and J. Russell, *bona fide* purchasers, without notice of the present claim, for \$6,500, her full value, which was paid in cash. On the 28th of March following she was sold and conveyed by them *bona fide* and for a full consideration to the Newtown Creek Towing Company, which is the claimant defendant, and of which the Messrs. Russell were then and are now managing officers. Before the sale to Messrs. Russell was consummated, searches and careful inquiries were made for any outstanding liens. None were heard of except those which had been bonded. The libellant's lien was not among those claims, and no notice of it was discovered by the purchasers or their attorneys, nor was there anything to put them upon inquiry in Greene county. This libel was filed on July 18, 1891. The tug was engaged in the ordinary towing business of this port, and was amenable to process daily from the time when the repairs were made.

The lien in this case was a maritime lien. As against a *bona fide* purchaser who makes all reasonable efforts to discover incumbrances, and fails to find any, such a lien, after a delay of nearly a year to take any steps to enforce it, where the vessel has been all the time within easy reach of process, and the vendor, meantime, as in this case, has become insolvent, is lost through laches. After such ample opportunity to enforce the lien, the loss should fall upon the lienor, and not on the *bona fide* vendee. The period of limitation of liens in admiralty, as against a *bona fide* purchaser, is "a reasonable opportunity to enforce them." *The Chusan*, 2 Story, 455; *The Utility*, Bl. & H. 218; *The Eliza Jane*, 1 Spr. 152; *The Lillie Mills*, Id. 307; *The Bristol*, 11 Fed. Rep. 156, 163. In affirming the decision of this court in the case last cited, WALLACE, J., says, (20 Fed. Rep. 800:) "Admiralty denies the privilege of enforcing a lien which has been suffered to lie dormant without excuse until the rights of innocent third persons would be prejudiced if it should be recognized." In the present case there was no good reason for the long delay.

The libellant, however, claims that his lien continues for a year under the express provision of the state statute. It is unreasonable, however, to suppose that the design of the state statute was to provide a lien for supplies in cases already covered by the maritime law; that is to say, to create two independent liens for the same thing. Judge STORY in the case of *The Chusan*, 2 Story, 455, referring to a similar claim under the New York statute, held that the statute was not applicable to foreign vessels; and I have not been referred to any different decision. This should be followed until overruled by higher authority. Even if the statute could be held to refer to foreign vessels at all, I doubt whether it is competent for state legislation to change the maritime law, or the rules of decision to be applied by courts of admiralty in the administration of that law, further than by the mere establishment and annexing of a lien to marine contracts or torts, which liens courts of admiralty alone may recognize and enforce. See the *J. F. Warner*, 22 Fed. Rep. 342, 345; *Holmes v. Railway Co.*, 5 Fed. Rep. 75; *The Garland*, Id. 924; *Brookman v. Hamill*, 43 N. Y. 554; *Vose v. Cockcroft*, 44 N. Y. 415; *Poole v. Kermit*, 59 N. Y. 554. In *The Chusan*, *supra*, STORY, J., held that state legislation could not abolish a maritime lien. The maritime law deals largely with interstate and international rights and relations. The constitution, in conferring upon the federal courts exclusive jurisdiction of admiralty and maritime causes, manifestly designed to provide for a single harmonious national system of maritime law. To accomplish this it confined its administration to the national tribunals alone. *The Lottawanna*, 21 Wall. 558, 575; *In re Long Island, etc., Transp. Co.*, 5 Fed. Rep. 599, 619; *The Manhasset*, 18 Fed. Rep. 922. No such national system could exist if its principles and rules of decision were subject to the legislation of 44 different states. Instead of one system, we should have 44 or more state systems, and no strictly maritime law at all, save what each state might choose to leave standing. Such a condition would be one of chaos in our international relations, and full of confusion and complexity as between the states. The inference is that the constitution designed to avoid precisely these difficulties. Nor is it reasonable to suppose that the constitution designed to permit state legislatures to prescribe the rules of law by which the federal courts should adjudge causes *in rem*, when it expressly withdrew from the state courts all cognizance of such causes.

In the case of *The Guiding Star*, 18 Fed. Rep. 263, 268, Mr. Justice MATTHEWS says:

"In enforcing the statutory lien in maritime causes, admiralty courts do not adopt the statute itself, or the construction placed upon it by the courts of common law or of equity, when they apply it. Everything required by the statute as a condition on which the lien arises and vests must, of course, be regarded by courts of admiralty; for they can only act in enforcing a lien when the statute has, according to its terms, conferred it; but beyond that the statute, as such, does not furnish the rule for governing the decision of the cause in admiralty, as between conflicting claims and liens. The maritime law treats the lien, because conferred upon a maritime contract by the

statute, as if it had been conferred by itself, and consequently upon the same footing as all maritime liens; the order of payment between them being determinable upon its own principles."

And in the case of *The Madrid*, 40 Fed. Rep. 677, 681, Mr. Justice LAMAR observes that "this lien given by the local statute * * * is itself in the nature of a maritime lien;" that is, as the context shows, as respects its *status* and scope. See, also, *The Wyoming*, 35 Fed. Rep. 548, 550; *The Menominee*, 36 Fed. Rep. 197, 204; *The North Cambria*, 40 Fed. Rep. 656.

By an exceptional practice stated by Mr. Justice BRADLEY in *The Lotawanna*, 21 Wall. 558, 580, to be anomalous, but founded upon colonial usage, the authority of state legislation to establish a lien *in rem* for the satisfaction of maritime contracts, or maritime torts, is recognized, (*The J. F. Warner*, 22 Fed. Rep. 342, 345, and cases there cited;) and see *Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. Rep. 559. But this exceptional and anomalous authority is not to be extended beyond the mere allowance of a lien, when conferred. *The Sylvan Glen*, 9 Fed. Rep. 336. Amid somewhat conflicting decisions, the weight of authority is, I think, to treat state liens, in respect to their *status*, scope, and effect, the same as strictly maritime liens, (*The Madrid, supra*;) and in effect, as Mr. Justice LAMAR observes, "in the nature of a maritime lien itself." While having, therefore, similar attributes and privileges, they must be subjected to the same limitations as regards laches and the rights of other lienors or *bona fide* purchasers, as those maritime liens which they most resemble, without reference to any superior qualities or attributes sought to be imparted to them by state legislation. See cases above cited. On both grounds the libel must be dismissed, with costs.

THE ELEANOR.

THE THOMAS W. HAVEN.

THE ELEANOR *et al.* v. THE THOMAS W. HAVEN.

(District Court, D. South Carolina. January 15, 1892.)

1. SALVAGE—COMPENSATION.

A schooner worth \$15,000, with a cargo worth \$5,000, bound from New York to Georgetown, S. C., when off Frying-Pan shoals, discovered an apparently abandoned vessel, water-logged, and with her cargo of lumber washing about her deck. The schooner lay by her all night, and the next day towed her to Georgetown bar. Finding that she could not cross the bar, the master of the schooner procured two tugs, went on the lumber vessel with a small crew, and had her towed to Charleston. Neither life nor property of the salvors was in any danger. The vessel was sold for \$1,950, and her cargo for \$1,500. *Held*, that the harbor expenses, pilotage, harbor towage, wharfage, etc., should be charged to the ship, the layage and expense of discharging the cargo to the cargo, and that \$950 should be allowed as salvage.

2. SAME.

The fact that the master of the lumber vessel had not abandoned her finally, but had gone to seek the assistance of a tug, and had taken his crew because he thought it dangerous to leave them there without a boat, was immaterial to the amount of the recovery, as the rule of a generous recompense would be applied, as in all other cases of salvage.

In Admiralty. Libel for salvage. Decree for libelant.

J. N. Nathan, for libelant.

G. D. Bryan, for respondent.

SIMONTON, J. The *Eleanor*, a three-mast schooner, valued at \$15,000, with a cargo valued at about \$5,000, was on her regular voyage from New York to Georgetown, S. C. On 2d October last, when off Frying-Pan shoals, about 12 m., she sighted the schooner *Thomas W. Haven*, and bore down on her. The schooner was in 9 fathoms water, about 25 miles from land, loaded with lumber, under deck 153,000 feet, and on deck 87,000 feet, water-logged, sails flapping, some halyards cut, hatches afloat and drifting, deck-load loose and washing about the deck. Not being able to get aboard of her that day, the master of the *Eleanor* lay along-side that night, and the next day boarded her. He found no one aboard, no boats, no charts or nautical instruments, and no provisions. Concluding that she was derelict, and with reason, (*The Ann L. Lockwood*, 37 Fed. Rep. 233,) the master of the *Eleanor* put his mate and two men aboard, and, taking her in tow, proceeded on his way to Georgetown. The *Haven* steered badly, as she was full of water, and, pitching about, parted the hawser. Another and a stronger one was bent, and they reached Georgetown bar without incident the next morning. Finding that the *Haven* could not cross that bar, the master of the *Eleanor* secured the services of two tugs, the *Brewster* and the *Congdon*, and, leaving his own vessel in charge of his mate and the pilot, he went on the *Haven* with a small crew, and was towed to Charleston by the tugs. That port was reached in safety. With the exception of a choppy sea and swell the first day, and a fresh breeze between 10 and 2 o'clock on the last night, the weather was fine. Although the *Haven* was found apparently abandoned as stated, her master says that he left her to seek the assistance of a tug; that he took his whole crew, because he had but one boat, and did not like to leave any one on board so far from land; that landing at Little river he got conveyance to Smithville, hired a tug, and went out in search of his schooner, and could not find her.

It is not necessary to go into the question whether the *Haven* was really derelict. Whether derelict or not, the salvage award will not depend on any fixed rule of proportion. It will be reached as in every other case of salvage, (*Post v. Jones*, 19 How. 161,)—a generous recompense to the salvors, so as to encourage them and also to stimulate others. The service is the relief of property from an impending peril of the sea. Humanity induces the relief, whether the value of the property be great or small. The merit consists in the relief, not in the magnitude of the property saved. *The Pomona*, 37 Fed. Rep. 444. The conduct of the salvors, and their motives, so far as they can be gathered

from their conduct, enter largely into the estimate of the reward. The salvors thought, and had every reason to think, that the property was derelict. In this case there was no danger to life incurred or averted. And the salving vessel was at no time placed in peril. With great propriety she went at once to a vessel evidently in distress, and when she found her helpless, and apparently abandoned, lay by her all night, and the next day took her in safety. The gross value of cargo and vessel have been ascertained by sale,—cargo at \$1,500; vessel at \$1,950. Certain harbor expenses have been incurred, and the cargo has been discharged. The harbor expenses, pilotage, harbor towage, wharfage, etc., will be charged to the vessel; layage and expenses attending discharge of cargo, to the cargo. Salvage award is fixed at \$950, with costs, to be apportioned between the gross value of the vessel and of the cargo.

THE PEERLESS.¹

BYERS *et al.* v. THE PEERLESS.

(District Court, S. D. New York. January 6, 1893.)

COLLISION—HELL GATE—EAST CHANNEL—DUTY TO ALTER COURSE IN ACCORDANCE WITH WHISTLE—RULE 19.

A tug, with two small schooners in tow on a hawser, was going up the east channel of Hell Gate with the first of the flood-tide, and was about in the middle of the channel. A steam-yacht, bound west, took the east channel to avoid meeting two sailing vessels, directly in front of her. On seeing the tug, the yacht gave one whistle and ported her helm. The tug immediately responded with one whistle, but did not alter her wheel. As soon as the yacht saw that the tug did not change her course she reversed, but too late to avoid the tug, which was sunk. *Held*, that the yacht had the right to take the east channel, and her navigation was without fault; that the cause of the collision was the failure of the tug to alter her course in accordance with the whistle, which there was nothing to prevent her from doing, and she was consequently solely liable for the collision.

In Admiralty. Suit to recover damages caused by collision. Libel dismissed.

Carpenter & Mosher, for libelants.

Wing, Shoudy & Putnam, for claimant.

BROWN, J. At about 8 o'clock P. M. on June 26, 1891, the libelants' steam-tug Thomas Y. Boyd, while going up the easterly channel of Hell Gate between Flood rock and the Astoria shore, in the first hour of the flood, and having in tow, on a hawser of 40 fathoms, two small schooners, each about 65 feet long, came in collision with the steam-yacht Peerless, bound west, at a point a little below the line running from Hallet's Point light to the northerly end of Flood rock. The stem of the yacht ran into the starboard side of the tug. The force of the blow, with the

¹Reported by Edward G. Benedict, Esq., of the New York bar.

flood-tide, carried both together near the dredge at the upper end of Flood rock, and, as soon as the yacht was disentangled from the tug, the latter sank, and became a total loss. This libel was filed to recover damages, alleging negligence of the yacht in not taking one of the westerly channels, viz., either the middle or the main ship channel, and in not keeping out of the way of the tug. The claimant contends that the accident arose wholly from the negligence of the tug in not porting her wheel as she might and ought to have done after the exchange of one whistle between the two steamers.

The most important fact in dispute between the two parties is the position of the tug at the time of collision. The clear weight of evidence is that the tug was then in mid-channel, with the schooners directly astern of her; that is to say, about 300 feet to the westward of the Astoria shore, and not within 100 or 150 feet of the Astoria shore, as several of the libelants' witnesses allege. This appears, not only from the greater number of witnesses who testified to this fact, including some called by the defendant who were in the best position for seeing the true place of the tug in the channel, but from other circumstances, which confirm the weight of the direct evidence; for the tug after collision was carried by the force of the blow with the yacht close to the dredge on the western line of the channel, and this could not have happened if the collision had been close to the Astoria shore and the light. With the Peerless backing and the flood-tide, the tug could not have been carried so far to the westward; and she must also have been swept further to the north-eastward. The schooners, moreover, after the collision, the hawsers being cut or broken, continued on in about mid-channel, and passed about 100 or 150 feet to the eastward of the boats in collision.

The Peerless, at the time of the exchange of one whistle, was upon a course about west, which course she had taken from about 300 feet off Negro point, and which made her cross from Negro point to Hallet's point two points to port of the channel line. The exchange of one whistle was made when the Peerless had nearly reached the light on Hallet's point, and the tug opened up below it. The boats must then have been at least 1,000 feet apart, and probably more. The Peerless was running at half speed, about 7 knots through the water or 5 knots by land; the tug, about 4 knots by land or 2 knots through the water. The signal of one whistle which the yacht gave to the tug, and which the tug immediately answered with one, imported that the boats should pass port to port, and that the tug would keep to the right. The tug did not do so, but kept a straight course, and without slacking speed until collision. The yacht ported hard, and, as soon as she saw that the tug was not turning to starboard, reversed, but not in time to avoid collision. Under her port wheel she changed before collision about two points to starboard, so as to head nearly directly across towards the dredge at the north end of Flood rock.

I find that there was nothing to prevent the tug from porting her wheel, and going to the right, as her signal agreed she would do. Despite the claimant's testimony this is evident, not merely from the evidence

of the libelants' experts, but from the fact that the two schooners lashed together behind passed on without difficulty, notwithstanding the fact of the collision. It is self-evident that a tug like this, which is handled easily, could have gone to the right, as her signal imported she would do, with perfect ease, and so saved collision with herself. Nothing prevented the slacking of her hawser for a moment, if that was necessary for a quick turn; and the schooners would not have been thereby in the slightest degree endangered, as their subsequent passage proved. As the tug could have pursued this course without difficulty, she was legally bound to do so, both under the agreement made by the exchange of one whistle and by the rule of the starboard hand, (rule 19.) Her failure to do this brought on the collision, for which the tug is therefore to blame.

I find no fault proved in the yacht. She was meeting two schooners under sail that were beating to the eastward through the gate, and were right in front of her in different positions. The course adopted by the yacht under such circumstances, viz., to go through the easterly channel, was deemed by her master to be the most prudent course to adopt to avoid the two schooners, and, so far as I can perceive, was a proper one. If the tug, when below at Astoria, gave any long whistle, as some of her witnesses testified, it was not heard by anybody on the yacht or other vessels near. The yacht, therefore, had a right to suppose that the easterly channel was clear. But even had the tug's long whistle been heard, if she gave any, her position in the easterly channel was not such as to forbid the yacht to take that channel when two schooners impeded the course towards the middle and north channels; for, upon the westerly course that the yacht was holding, the evidence shows that there was no difficulty in her going to the westerly side of the easterly channel, and that when the exchange of one whistle was made there would have been no difficulty in passing the tug, had the tug observed her duty. The yacht had a right to assume that the tug would go to the right, as her whistle and the rule required. As soon as the whistles were exchanged, the yacht did all that was required of her in porting her wheel; for there was time enough and space enough for the tug to go to the right. I am satisfied that the yacht backed as soon as she could perceive that the tug was not doing her duty. She was under no obligation to stop and back as soon as the exchange of one whistle was made, because that exchange of whistles was a suitable and sufficient provision for avoiding the collision, had the tug performed her part. That exchange of whistles for the time being, therefore, determined the risk of collision, as the yacht had a right to assume; and, as soon as risk of collision could reasonably be apprehended anew, the yacht reversed. This was all that was required of her by the rules, or by common sense and prudence. The collision being, therefore, the fault of the tug, the libel must be dismissed, with costs.

THE J. E. TRUDEAU.

PICKLES v. THE J. E. TRUDEAU.

(District Court, E. D. Louisiana. January 11, 1892.)

COLLISION—MISSISSIPPI STEAM-BOAT—VESSEL AT LANDING.

The steam-boat Trudeau, descending the Mississippi, attempted to land at the foot of Canal street, New Orleans, but caught an obstruction in her rudder, became unmanageable, and ran into a tug-boat lying at a wharf. Opposite and above this landing is a strong eddy, well known to boatmen, and the usual and prudent course is for descending boats to keep outside of it until past the landing, and then to turn and approach it from below. The Trudeau, however, kept in the eddy, and attempted to turn opposite the point of landing. *Held*, that the collision was not an inevitable accident, but was due to the prior fault of the Trudeau.

In Admiralty. Libel by Thomas Pickles, as owner of the tug-boat Josie, against the steam-boat J. E. Trudeau, for damages for a collision. Decree for libelant.

James McConnell and Frank N. Butler, for libelant.

Jos. P. Hornor and Guy M. Hornor, for claimants.

BILLINGS, J. This is a libel by the owners of the tug-boat Josie against the steam-boat J. E. Trudeau for damages for a collision. The libel sets out that on January 31, 1890, the Josie, which was used as a night ferry-boat plying between New Orleans and Algiers, was moored at her wharf in this city at the foot of Canal street, when she was run into and sunk, and totally lost, through the want of skill and negligence of those who were in command of the Trudeau. The answer admits the collision, but avers it was the result of an inevitable accident; that "a log or some obstruction of that character was caught in the rudder of the Trudeau, and so blocked it that it became unmanageable, and the wheel could not be moved one way or the other;" whereby, it is in substance averred, in spite of all the efforts of the officers of the Trudeau, guided by all the requisite skill, the collision took place. It is to be observed that it is conceded by the pleadings that the Josie, which was moored at her wharf, was guilty of no fault; that the Trudeau ran into her; and the only question presented is whether the Trudeau was so situated that what damage she did should be deemed an inevitable accident. It is said she became unmanageable by reason of a log or some similar obstruction getting afoul of her helm. I think this general fact is established, that for some reason, for a certain length of time, and just before the collision, the helm was unmovable; and it may be that, if no anterior facts existed which cast blame upon the claimants' steamer, this impossibility of controlling the movements of the vessel by the helm might have brought her owners within that class of persons whose property does damage to that of others through inevitable accident,—*vis major*,—and that thus they would be exonerated from liability. This presents the most important question of fact in the case, which I have tried to

thoroughly consider,—whether, notwithstanding the catching of the log by the helm, the collision might not have been avoided if the preceding management of the Trudeau had been such as proper skill in navigation required. The weight of evidence shows that opposite and above the point of the landing which the Trudeau was endeavoring to make, there was a large and powerful eddy, well known to the navigators of the Mississippi river; that the usual and prudent course of descending boats desiring to make a landing at this point was to keep outside of the eddy, *i. e.*, further towards the Algiers side than the eddy, and fall a little below the point of landing, and then turn and proceed to the landing through the eddy a little upstream. There is conflict of testimony, but I think the preponderance and the reason of the thing tend to establish this mode of proceeding as being the proper and safe mode. This was not the mode resorted to by the Trudeau. She kept in the eddy, and attempted to turn towards the point of landing while within the eddy, and at a point not below but opposite to it. Had she kept outside of the eddy, and kept on to a point below Canal street, so that her turning would have been without the eddy, and her motion towards her landing would have been a little upstream, though her helm became incapable of governing the motion of the vessel, the wheel might nevertheless have been made, simply by its revolutions, to have prevented the Trudeau from running into the Josie. No question was made at the argument but that, and I think it is settled, as a rule of law, that, in cases of collision it is the efficient, controlling management of the vessel charged with fault which must be looked at, and that, though her management at the very moment of or for a few moments preceding the collision was faultless, nevertheless if her anterior and controlling management contributed to the disaster, and was injudicious, and lacking in skill or in the observance of the known methods of navigation, either local or general, she is deemed to be in fault. I think this principle of law upon the evidence leaves a case established against the Trudeau. Judgment will therefore be entered in favor of the libellant, and against the claimants.

FREEMAN *et al.* v. CLAY *et al.*

(Circuit Court of Appeals, Fifth Circuit. November 27, 1891.)

1. **APPEAL TO CIRCUIT COURT OF APPEALS—CITATION—DEFECT CURED BY APPEARANCE.**
The citation on appeal must be signed by the judge or justice, and, under rule 14, par. 5, must be made returnable not exceeding 30 days from the day of signing, whether the return-day fall in vacation or in term-time; but a defect in such particulars is cured by the filing of the transcript and an entry of a regular appearance by appellees' counsel.
2. **SAME—APPROVAL OF BOND.**
The appeal-bond must be approved by the judge or justice. An approval by the clerk alone is not sufficient, and is ground of dismissal.

Appeal from the United States Circuit Court for the Northern District of Mississippi. Motion to dismiss the appeal. Granted conditionally.

Edward Mayes and *Frank Johnston*, for appellant.

W. L. Nugent, for appellees.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, J. In this case the appellees have moved to dismiss the appeal in this court for the following reasons:

"(1) The bond is not approved by the trial judge, nor are the names of the sureties inserted in it. (2) The citation is not signed by the trial judge, but by the clerk, and was signed September 12th, executed September 14th, and made returnable on the third Monday in November, contrary to paragraph 5, rule 14."

An inspection of the record shows that on the 30th day of June, 1891, the court below, on motion of complainants, granted an appeal to the next term of the United States circuit court of appeals for the fifth circuit, to operate as a *supersedeas* upon their entering into bond in the penalty of \$5,334.50, with two or more good and sufficient securities, conditioned according to law. That thereafter, on the 8th of September, 1891, an appeal-bond was filed, in which the names of the sureties are not inserted, and upon which was the following indorsement: "I approve the above bond. September 8th, 1891. G. R. HILL, Clerk,"—but no approval by any judge. That upon the 12th day of September, 1891, G. R. Hill, clerk, issued a citation, directing the appellees to be and appear before the United States circuit court of appeals for the fifth circuit at the next term thereof, to be held in the court-room of said court at New Orleans, in said fifth circuit, on the third Monday of November, 1891. From this showing it appears that the motion to dismiss the appeal in this cause is well founded as far as the facts are concerned; for, in taking and perfecting the said appeal, neither the law (Rev. St. § 1000) nor the rules of this court have been complied with. The citation should have been issued and signed by the judge of the court below, directing the appellees to appear within 30 days; and the judge signing the citation should have required and accepted a sufficient bond to perfect the appeal, instead of which it appears that the judge

granting the appeal did not sign the citation, accept the bond, nor make the return-day within the rules. The records of this court, however, show the transcript has been filed; and that the appellees, by counsel, have entered a regular appearance; so that, so far as defective citation and return-day are concerned, no injury to appellees has resulted. It is otherwise with regard to the bond. In this respect, the case seems to be very similar, if not identical, with that of *O'Reilly v. Edrington*, 96 U. S. 724, wherein Mr. Chief Justice WAITE, speaking for the court, says:

"None of the objections to this appeal are, in our opinion, well taken, except the one which relates to the approval of the bond. That, we think, must be sustained. The security required upon writs of error and appeals must be taken by the judge or justice. Rev. St. § 1000. He cannot delegate this power to the clerk. Here the approval of the bond was by the clerk alone. The judge has never acted; but, as the omission was undoubtedly caused by the order of the court permitting the clerk to take the bond, the case is a proper one for the application of the rule by which this court sometimes refuses to dismiss appeals or writs of error, except on failure to comply with such terms as may be imposed for the purpose of supplying defects in the proceedings. *Martin v. Hunter's Lessee*, 1 Wheat. 361; *Dayton v. Lash*, 94 U. S. 112."

And we think that the like order may go in this case as was given in *O'Reilly v. Edrington*, *supra*, to-wit: This cause will stand dismissed unless the appellant shall, on or before the first Monday in January next, file with the clerk of this court a bond, with good and sufficient security, conditioned according to law, for the purposes of the appeal; and it is so ordered.

**CENTRAL TRUST CO. OF NEW YORK v. MARIETTA & N. G. RY. CO.,
(HIAWASSEE Co., Intervener.)**

(Circuit Court of Appeals, Fifth Circuit. December 7, 1891.)

1. APPEALABLE ORDER—DECISION ON CLAIM OF INTERVENER.

The decision of a circuit court, on a petition of intervention in a foreclosure suit, sustaining the intervener's claim, is a "final decision," within Act Cong. March 3, 1891, c. 517, § 6, giving the circuit courts of appeals jurisdiction to review final decisions of the circuit courts.

2. FORECLOSURE OF RAILROAD MORTGAGE—CLAIMS OF INTERVENER—CONDITIONAL SALE—ESTOPPEL.

An improvement company, interested in the construction of a railroad, and whose president was a stockholder in the railroad company and largely interested as a contractor in the construction of the railroad, equipped the railroad with rolling stock, and caused the same to be marked with the name of the railroad company; the intent of the improvement company being to enable the railroad company to issue certain bonds, secured by mortgage on its railroad as an equipped railroad, and such bonds were issued and placed through the instrumentality of the president of the improvement company. In a suit by a holder of the bonds to foreclose such mortgage, an assignee of the improvement company intervened, claiming the rolling stock. *Held*, that the improvement company and its assignee were estopped to allege that the transaction in question constituted a gratuitous loan of the rolling stock, or to deny the title of the railway company thereto as against plaintiff.

48 Fed. Rep. 32, reversed.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

Bill in equity by the Central Trust Company of New York against the Marietta & North Georgia Railway Company, to foreclose a mortgage made by the railroad company. The Hiawassee Company intervened, claiming title to certain rolling stock in the possession of the receiver appointed in the suit. Decree for intervener. Plaintiff appeals. Reversed.

Act Cong. March 3, 1891, c. 517, § 6, provides that the circuit courts of appeals established by the act shall exercise appellate jurisdiction to review any "final decision" in the district court and circuit courts, in all cases except as otherwise provided.

STATEMENT BY PARDEE, J.

On the 17th March, 1891, the Hiawassee Company filed a petition, as an intervention, in the suit of Central Trust Company of New York v. Marietta & North Georgia Railway Company, for the foreclosure of mortgage, pending in the circuit court of the United States for the northern district of Georgia, wherein a receiver had been appointed and put in possession of the railway property. Intervener claimed certain railway equipment, then in possession of J. B. Glover, receiver of the Marietta & North Georgia Railway, as follows: One Brooks locomotive, shop No. 5, railroad No. 13; four Baldwin locomotives, Nos. 11, 12, 14, and 15; two combination mail, baggage, and express cars, Nos. 11 and 12; two first-class passenger-cars, Nos. 13 and 14. This petition was demurred to by Central Trust Company of New York, and thereupon was amended on 28th March, 1891, making the claim as follows:

"The property described and claimed by it was purchased by the North Georgia Improvement Company from original owners. It was placed upon the line of the M. & N. G. R. R. Company by the North Georgia Improvement Company, through the instrumentality of Geo. R. Eager, who was largely interested in both companies, but without any contract of purchase or lease by the M. & N. G. R. R. Company, and nothing has been paid on the same by said railroad company, nor has it any claim of any kind on said property. The right of possession to all of said property is in the Hiawassee Company, and the title to all of said property has vested in it, except the title to engines Nos. 14 and 15. These engines were bought from Burnham, Parry, Williams & Co. All of the purchase money has been paid on the same except six notes dated May 30, '89, for \$818.00 each, due, respectively, 17, 20, 21, 22, 23, and 24 months from date. Upon the payment of these notes the title to said engines also will vest in the Hiawassee Company."

It is to be noted that the intervener, in its amended petition, alleges the title to two of the locomotives, Nos. 14 and 15, is in Burnham, Parry, Williams & Co. The intervention, without being put in issue, having been referred to a special master in chancery, the testimony of George R. Eager and J. B. Glover, receiver, was taken. This testimony, together with exhibits introduced by intervener, shows substantially the following facts: That George R. Eager was the contractor to build the Marietta & North Georgia Railway; that he was also the president and a

large stockholder in a company organized under the laws of New Hampshire, known as the North Georgia Improvement Company, with its headquarters in Boston, Mass.; that said Eager, as contractor, was to receive stock and bonds of the Marietta & North Georgia Railway for its construction; that said Eager procured the North Georgia Improvement Company to purchase and pay for the whole equipment hereinbefore stated, except the sum of \$4,908, the balance due Burnham, Parry, Williams & Co., of Philadelphia, for engines Nos. 14 and 15, which amount was evidenced by six notes outstanding, not produced at the hearing of the cause, presumably in the hands of the payees; and that the Hiawasse Company was organized under the laws of Maine, and was, among other things, authorized to invest in stocks, bonds, and real estate; that the said equipment was purchased from various original vendors, was marked in name of said Marietta & North Georgia Railway Company, and put in the possession, custody, and control of said company, the Marietta & North Georgia Railway Company, by said Eager, contractor and president, as aforesaid; that by the writings executed by Burnham, Parry, Williams & Co. and the North Georgia Improvement Company, the title was reserved until full payment, and the locomotives are stated to be loaned to the lessees, to be used "upon their railroad," etc.; that by writing executed between Jackson & Sharp Company and North Georgia Improvement Company, it is stated that the cars are to be used on the Marietta & North Georgia Railway Company; that for the engine bought from S. W. Groom there was no written agreement; that the Marietta & North Georgia Railway had been in possession of locomotive engines 14 and 15 since about May, 1889, upon which was still due the sum of \$4,908 to Burnham, Parry, Williams & Co., represented by six notes still held and owned by them; that the railway company had been in possession of the two first-class passenger-cars, 14 and 15, one combination mail, baggage, and express car, numbered 11, and one combination mail, baggage, and express car, numbered 12, since April 17, 1889, and that said company had been in possession of locomotive engines Nos. 11 and 12 since about 20th day of December, 1888.

George R. Eager testified, as is shown on pages 17 and 18 of the transcript of the record, as follows:

Question. What was your plan, Mr. Eager, in regard to the purchase of this rolling stock? Did you control a majority of the stock of the M. & N. G. Ry.? *Answer.* Yes; I and my friends controlled three-fourths of it. *Q.* What was your plan with regard to this rolling stock,—in regard to the future? *A.* Our plan was, when we got the road fully completed, it would improve our mines, and we bought as much rolling stock as we should want for the immediate present; that we would endeavor to arrange equipment, and issue equipment bonds for sufficient amount to cover all the rolling stock, and to secure all the rolling stock we thought it would be necessary to have. *Q.* Up to this time no contract between the M. & N. G. Ry. and the North Georgia Improvement Company was made? *A.* No, sir; none whatever. *Q.* Was there any agreement, verbal or otherwise, between the improvement company and the railway company as to the improvement company furnishing stock to the railway company? *A.* No, sir; no agreement in any shape.

The rolling stock was sent down there with the idea that the railway company very soon would be done, and would make a car trust,—get somebody to let them have money, and make a car trust.”

It further appeared from the exhibits introduced—*First*, that Burnham, Parry, Williams & Co., of Philadelphia, had contracted with the North Georgia Improvement Company concerning the two locomotives, 14 and 15, whereby the title was reserved until they were paid for; but this contract, although dated 13th May, 1889, was not proved until the 19th January, 1891, and was never recorded at all; *second*, that on the 27th day of January, 1891, more than a week after the Marietta & North Georgia Railway was placed in the hands of the receiver, the North Georgia Improvement Company executed a paper purporting to be an absolute sale to the Hiawassee Company of all the railway equipment hereinbefore set forth.

On this testimony the special master found in favor of the interveners, as follows:

“I do therefore respectfully report that the intervener, the Hiawassee Company, has a valid claim and title to all of said property, except to Nos. 14 and 15 Baldwin locomotives, and upon payment of the balance due on said two locomotives will have a valid title to them; and that the present value of all said rolling stock, including interest at six per cent., calculated up to April 7, 1891, is \$64,653.03. I further report that said rolling stock is absolutely necessary to the operation of the said Marietta & North Georgia Railway, and that it is advisable that the receiver be allowed to purchase all of said rolling stock at the sum of \$64,653.03; that the said outstanding notes for Baldwin locomotives Nos. 14 and 15 be paid out of this amount.”

To this report exceptions were duly filed, which, on hearing, the court ordered—

“(1) That the case be resubmitted to the master, to take evidence and report upon the question of the value of the equipment mentioned in said intervention on the 19th of January, 1891, when the receiver was appointed. (2) To take evidence and report upon the relations existing between the Marietta and North Georgia Railway Company and the North Georgia Improvement Company, by contract or otherwise, and the relations existing between said two companies and George H. Eager, and the relations existing between said two companies and said Eager and the Hiawassee Company, so far as they throw light upon or affect this case.”

After the first hearing before the master, and prior to a second hearing, the Central Trust Company filed in the court certain answers, setting up defense substantially as follows: (1) A general denial of the statements made in the original and amended intervention. (2) Averment as to the appointment of receiver on 19th January, 1891, and that Burnham, Parry, Williams & Co. were still due the sum of \$4,908, balance upon two locomotives, Nos. 14 and 15, and that the North Georgia Improvement Company had paid in full to parties from whom it was purchased for all the other equipment mentioned in said petitions. That upon such payment full right and title to said equipment vested in said Marietta & North Georgia Railway Company, without any lien or reservation of title on the part of the North Georgia Improvement Company; and that, if any sum was due for such equipment, so paid

for by said North Georgia Improvement Company, it was only an open account debt, and that said equipment was purchased by said North Georgia Improvement Company, and placed in the possession and control of said Marietta & North Georgia Railway Company for its special use and benefit, and became and was subject to the lien of the mortgage now being foreclosed. (3) Setting forth that the North Georgia Improvement Company on the 27th of January, 1891, undertook to sell and to convey to the Hiawassee Company said equipment, and converting the right of said improvement company to make such sale as to the two locomotives 14 and 15, because the title was in Burnham, Parry, Williams & Co. as to them, and as to the other equipment, because, it having been fully paid for by the North Georgia Improvement Company, the title was in the Marietta & North Georgia Railway Company. (4) That when the Hiawassee Company, on the 27th of January, 1891, accepted from the North Georgia Improvement Company the writing undertaking to convey the title to said equipment, said Hiawassee Company knew, or was bound to know, all that the North Georgia Improvement Company, or its officers, knew in relation to said equipment. (5) That George R. Eager negotiated for all of said equipment, and at the time was president of the North Georgia Improvement Company, and was a very large stockholder and controlling spirit therein, and had absolute control of said company in every way; and that the deed of trust securing the bonds of said railway, delivered to said Eager, as contractor, recited that they were for the purpose of improving, completing, and equipping said railway. (6) That the information and knowledge of Eager, contractor, as to the purchase of said equipment, was legal and actual notice to the North Georgia Improvement Company. (7) That the title to the two locomotives, 14 and 15, was in Burnham, Parry, Williams & Co., etc. (8) That the title to the remainder of said equipment, having been paid for by the North Georgia Improvement Company, was in the Marietta & North Georgia Railway Company, etc. And, further, that the Hiawassee Company is composed of stockholders who hold claims and debts due to them by the North Georgia Improvement Company, and occupy intimate and confidential relations with said company, and as such they were put upon notice and bound to know the relations existing between Eager, the North Georgia Improvement Company, and the Marietta & North Georgia Railway Company. (9) Calling attention to the provisions in the deed of trust now being foreclosed, as to how the bonds should be issued, and that the railway should be constructed and equipped out of the proceeds of said bonds, etc. (10) That the North Georgia Improvement Company or Eager caused said equipment to be delivered to the Marietta & North Georgia Railway, as Eager, as contractor, was in duty bound to do, and without any reservation and title thereto, and thereupon Eager procured the Marietta & North Georgia Railway Company to execute, in accordance with the mortgage now being foreclosed, certificate, or certificates, that the railway had been completed and equipped, to the extent to authorize the issuing of said bonds, which certificate Eager caused to be deliv-

ered to Central Trust Company of New York, and thereupon procured the issue by said Central Trust Company to Eager, as contractor, of the bonds of said Marietta & North Georgia Railway Company.

Upon the resubmission, the only witness examined in this intervention was J. B. Glover, the receiver, whose testimony shows substantially as follows: That all the railway equipment set forth in the Hiawasse intervention was placed upon the road by George R. Eager, and marked with the name of the Marietta & North Georgia Railway Company, and went into the custody, control, and use of said railway, the same being received by said Glover, who was then superintendent of said railway. That at that time Eager was the contractor, building part of the Marietta & North Georgia Railway, and broadening the gauge of other parts. Eager was the chief stockholder in said railway, was the president and general controller of the North Georgia Improvement Company, and his sister, H. A. Eager, was treasurer, with headquarters at Boston, Mass. That in addition to the duties of superintendent of the railway, said Glover was the agent of Eager, receiving a salary of \$75 a month. That, as the line of railway was constructed, the North Georgia Improvement Company paid many of the bills due for such construction. That the North Georgia Improvement Company would frequently furnish to Glover, as agent of Eager, money with which to pay claims due laborers under Eager, as contractor, and also freight on rolling stock coming to the North Georgia Improvement Company or to Eager, and which Eager caused to be placed on the Marietta & North Georgia Railway. That whenever the Marietta & North Georgia Railway would pay claims against Eager, contractor, or against the North Georgia Improvement Company, Glover, as agent for Eager, would then send the bills to H. A. Eager, treasurer of the North Georgia Improvement Company, at Boston. That if there was any charge for freight upon locomotive or passenger equipment consigned to or received by the Marietta & North Georgia Railway, a charge would be made up against George R. Eager, and sent to H. A. Eager, treasurer of the North Georgia Improvement Company, and that drafts would be drawn on H. A. Eager, as such treasurer, to settle these accounts, and the vouchers would be sent to her. That there were three ways that Glover, as agent for Eager, obtained money for claims due laborers for construction or for freight upon the railway equipment furnished the Marietta & North Georgia Railway: (1) By drawing on H. A. Eager, treasurer; (2) by checks drawn by George R. Eager upon some bank in Boston or New York; (3) by drafts drawn by George R. Eager on H. A. Eager, treasurer,—that is, whatever was paid out of the funds of the Marietta & North Georgia Railway Company by Glover, as superintendent, for debts due by George R. Eager, as contractor, or for debts due by George R. Eager or the North Georgia Improvement Company for freight on railway equipment sent to the Marietta & North Georgia Railway, was reimbursed in one of the three ways above mentioned. That George R. Eager was contractor, not only to build and widen the gauge of the Marietta & North Georgia Railway in the states of Georgia and North Carolina, but he was at the same time

contractor to build the Knoxville Southern Railroad, then being constructed in the state of Tennessee, and which was afterwards consolidated with the Marietta & North Georgia Railway, under that name.

There was also introduced on said second hearing documentary evidence, to-wit:

"This is to certify that the Marietta & North Georgia Railway has been completed ——— miles, and is now ready for operation ——— miles of the same between ——— and ———, and that there has been delivered and in good working order upon said railway an amount of rolling stock and equipment bearing the same proportion to the whole rolling stock and equipment requisite for the proper and efficient working of the railway as the number of miles completed at the date of this certificate bears to the total mileage of said railway, and that the stations included in the sections herein certified have been fully and completely equipped with all usual and necessary apparatus, appliances, and furniture."

An agreement was made on 25th August, 1888, between Hambro & Son, of England, Marietta & North Georgia Railway Company, George R. Eager, contractor, and Knoxville, Cumberland Gap & Louisville Railway Company, whereby the said Hambro & Son were, among other things, to place \$1,000,000 of the consolidated mortgage bonds of the Marietta & North Georgia Railway Company, now being foreclosed in the main suit, upon certain terms, conditions, promises, and agreements set forth in said contract. This agreement was signed by George R. Eager, as general manager for the Marietta & North Georgia Railway Company, and by George R. Eager, contractor, and by George R. Eager as general manager of the Knoxville, Cumberland Gap & Louisville Railroad, and for the Cumberland Gap Construction Company. Further, there was an indorsement upon this contract by which George R. Eager signed his own name, and also signed as attorney in fact for Royal M. Pulsifer, and guarantied that the contract between Hambro & Son and others should be carried into effect, and the completion of the Marietta & North Georgia Railway assured, by Eager and Pulsifer, at their own cost and expense, if the proceeds of the sale of the mortgage bonds were not sufficient for the purpose. This contract recites "that it has been agreed, for the purposes of this agreement, completed sections shall consist of not less than five miles, with the corresponding proportion of rolling stock and equipment;" and therein it is agreed by the Marietta & North Georgia Railway Company that no certificate of completion shall be given until there shall be delivered and in good working order an amount of rolling stock, etc. This contract and agreement also had attached to it authority from the Marietta & North Georgia Railway Company, giving George R. Eager the power to enter into such agreement with Hambro & Son; and it appears that thereafter the form of the certificate was changed so as to show completed sections fully equipped with rolling stock. Also three separate contracts and agreements: (1) Contract made between the Marietta & North Georgia Railway Company by Joseph Kinsey, its president, and George R. Eager, whereby Eager was employed as contractor to do certain work on that railroad, and the company was to furnish certain convicts and make certain payments to Eager. This contemplated

only a narrow-gauge road. (2) Agreement between Eager and the Marietta & North Georgia Railway Company, made on the 4th of August, 1881, whereby Eager was employed as contractor to build certain line of railroad for said company. (3) Another contract between George R. Eager and the Marietta & North Georgia Railway Company, whereby Eager was to broaden the gauge of the said line of railway, was to put down steel rails not lighter than 56 pounds to the yard, and was to do other things therein set forth, upon the consideration of receiving certain bonds and stock and \$3,000 a mile in cash. In said contract the following language is used:

"The party of the first part agrees, [that is, George R. Eager,] whenever requested to do so by the party of the second part, to survey and lay out its road or roads as hereinbefore agreed to be constructed and equipped, and to acquire by purchase, condemnation, or otherwise, such rights of way," etc.

There was also used at the hearing of the intervention of the Hiawassee Company, under the agreement of counsel, the testimony of C. R. Walton, chief engineer of the Marietta & North Georgia Railway Company, which testimony is substantially as follows: That he was chief engineer of the Marietta & North Georgia Railway Company, and the officer of that road who sent on the certificates, as the road was completed, to the Central Trust Company of New York. That there were 20 of these certificates which were forwarded to Royal M. Pulsifer, president of the railway company, Walton, as chief engineer, having made one copy of such certificates, and forwarded to Pulsifer, and another copy handed to Hammett, secretary of the company at Marietta. That the said certificate was as follows:

"This is to certify that the Marietta & North Georgia Railway Company have completed and in operation one hundred and eleven fifty-two one-hundredths miles of railroad between Marietta, Ga., and Murphy, North Carolina. C. R. WALTON, Chief Engineer."

This was addressed to the Central Trust Company of New York. The first was, in substance, like the second, except in mileage; being for 99 miles. The first certificate was dated June 17, 1887, and the second May 19, 1888. That the certificates, after the first two sent by him, as chief engineer, to the Central Trust Company of New York, contained the following language:

"And there has been delivered and in good working order upon said railway an amount of rolling stock and equipment requisite for the proper and efficient working of the railway, as the number of miles completed at the date of this certificate bears to the total mileage of said railway."

—And that this form of certificate was used in order to get bonds on that portion of the road lying between Blue Ridge and Knoxville, Tenn., as well as on the other parts of the line. That the form of certificate was adopted unanimously by the board of directors on the 8th of April, 1889, as the form to be signed by him as chief engineer, and that such form, so adopted by the board of directors, he continued to send to Central Trust Company, and upon which the bonds were obtained.

It was conceded at the hearing before the court that the mortgage or

deed of trust given by the Marietta & North Georgia Railway Company to Central Trust Company of New York, under which bonds were issued upon certificates of completion and equipment, contained the following:

"And whereas, the said party of the first part is desirous of borrowing money for the purpose of paying off and discharging all of said mortgage indebtedness of said Marietta & North Georgia Railway Company, and for the further purpose of constructing, improving, extending, completing, and equipping its railway, and proposes, in conformity with the laws of said states, to issue its bonds therefor, and to secure the payment of the same by the mortgage of its railway, equipment, and franchise, and all of its other property, whether now in possession or hereafter acquired."

—And that the said mortgage or deed of trust covered all after-acquired property appurtenant to the railroad and its branches.

It further appeared in evidence that about the times the certificates of completed sections, with rolling-stock equipment, were made, other (besides the ones in question here) conditional purchases of rolling stock were negotiated by Eager and the North Georgia Improvement Company, resulting in rolling stock being placed upon the Marietta & North Georgia Railway, to justify the certificates, and that of all the rolling stock found on the Marietta & North Georgia Railway, 231 miles long, at the time the receiver was appointed, outside parties claimed the ownership, except of two locomotives. By agreement, a report of a meeting of bondholders of the Marietta & North Georgia Railway Company, for reorganization purposes, held after the appointment of a receiver, was put in evidence, showing the adoption of a report of a committee, of which George R. Eager was one, recommending the purchase of rolling stock in use on the railway; special care to be taken that the railroad shall acquire a perfect title to the property,—amount stated at \$291,933.

The second report of the master was substantially as follows:

"(1) As to the value of said rolling stock on the 19th January, 1891, the master found the total aggregate value of the same to be \$55,993.59, to which should be added interest at the rate of 7 per cent. per annum from the 19th January, 1891.

"(2) The evidence shows that the North Georgia Improvement Company in 1888 and 1889 bought all of this rolling stock, and placed the same on the Marietta & North Georgia Railway Company. The contract between the North Georgia Improvement Company and the original owners of said rolling stock was in writing; the contract in each case being a conditional sale, with title reserved until fully paid for. These contracts were all duly executed, but none of them have ever been recorded. The North Georgia Improvement Company placed all of said rolling stock on said Marietta & North Georgia Railway, without any contract or agreement, either oral or written, with said company. The evidence shows that the North Georgia Improvement Company has fully paid for all of said rolling stock, except six notes, aggregating \$4,908, payable to Burnham, Parry, Williams & Co. The proof shows that the North Georgia Improvement Company, on the 27th day of January, 1891, duly transferred and assigned all its right, title, and interest in and to said rolling stock to the Hiwassee Company, the intervener in this case. The master is of the opinion that these contracts, reserving title between the original owners and the North Georgia Improvement Company, are good except as to subsequent purchasers or creditors without notice; and, when the

North Georgia Improvement Company had fully paid for said rolling stock, it acquired a valid title, which it could legally transfer. The master is of opinion that, when said rolling stock was placed on said Marietta & North Georgia Railway without any contract, the legal effect was to create a bailment, subject to the termination at option of either party, and that therefore this property was held by the Marietta & North Georgia Railway Company as bailee. Counsel for the Central Trust Company further contend that George R. Eager was under written contract to equip said railway with rolling stock; that said Eager was really the North Georgia Improvement Company; and that, when said company placed said rolling stock upon said railway, it did so in pursuance of said Eager's contract to equip said railway, and therefore it became the property of said railway, and became subject to the mortgage executed by said railway to secure the payment of its bonds. The master does not think that this position is sustained by the evidence. In his opinion, a careful examination of the contract made between Eager and the railway company, the original railroad company, the certificates of C. R. Walton, chief engineer, the contract with Hambro & Son, of London, will show that George R. Eager was not to equip the road with rolling stock. In the opinion of the master, the intervener, the Hiawassee Company, has a valid title to all of said rolling stock, and has a good title to all of said property, except as to Nos. 14 and 15, Baldwin locomotives, upon which there is still due the sum of \$4,908. The evidence shows that this rolling stock is essential to the operation of the railway by the receiver, and I therefore recommend that he be authorized to purchase the same at its value on the 19th of January, 1891, with 7 per cent. per annum interest from said date; the \$4,908 balance due to be included in the amount. As to the ability of the receiver to pay cash for this rolling stock, the master refers to his report filed on June 6th, in the intervention of Samuel W. Groome.

"(3) The master finds that George R. Eager was and is the largest stockholder in the Marietta & North Georgia Railway Company, and that he was the contractor to construct said railway; that said George R. Eager was, until recently, president of the North Georgia Improvement Company. The evidence further shows that the only relation existing between the Marietta & North Georgia Railway Company and the North Georgia Improvement Company, by contract or otherwise, was in reference to this rolling stock, and, in opinion of the master, was that of bailor and bailee. The evidence does not show any connection between said two companies and George R. Eager and the Hiawassee Company, except the transfer by the said North Georgia Improvement Company to the said Hiawassee Company of all its right, title, and interest to the rolling stock covered by this intervention."

The Central Trust Company filed elaborate exceptions to the master's report, mainly on the line of the answer hereinbefore given in substance; the important ones being as follows:

"Because it is shown by the evidence that there was nothing whatever due by the North Georgia Improvement Company to the original vendor for the aforesaid property, except \$4,908, due to Burnham, Parry, Williams & Co. as a balance upon locomotives 14 and 15, and that there was no reservation of title or lien upon these locomotives by the original vendor, or any one else, as against the Marietta & North Georgia Railway Company, but that all of said property has been paid for, except as above stated, and had been placed by George R. Eager, president of the North Georgia Improvement Company, upon the Marietta & North Georgia Railway Company, three-fourths of the stock of which he and his friends control, with the distinct understanding, at the time that said rolling stock was placed upon said line of railway, and that the railway company was thereafter to pay the said North Georgia Improve-

ment Company for the same by issuing equipment bonds; but that the said understanding was only on the part of the said Eager, as president of said improvement company, and without any contract or agreement to the effect being agreed to on the part of the railway company, who took said rolling stock, and used it as its own, unincumbered by any reservation of title or any contract other than the law implies to pay for the same.

"Because the special master did not find and report that George R. Eager, the contractor to build the Marietta & North Georgia Railway, was under obligation to adequately equip said railway with rolling stock; and further, because said special master did not find and report that the relations between said George R. Eager, contractor, and as president of the North Georgia Improvement Company, and as controlling more than three-fourths of the stock of the said Marietta & North Georgia Railway Company, was such that any debt and demand due to the Hiawassee Company by the Marietta & North Georgia Railway Company grounded upon rolling stock furnished said railway company, and paid for by said North Georgia Improvement Company, should not again be paid for to the Hiawassee Company; but that such claim of the Hiawassee Company was void and invalid against said railway company, because of the relations existing between that company, George R. Eager, the North Georgia Improvement Company, and the Marietta & North Georgia Railway Company."

The court on hearing having overruled the exceptions and confirmed the master's report, and having further rendered final decision that the receiver should purchase the railroad equipment mentioned in the intervention, by giving notes due in six months from date, with interest at 7 per cent. per annum from January 19, 1891, the Central Trust Company appealed to this court, assigning, substantially, as error the same points made in the answer and in the exceptions to the master's report. On the hearing in this court counsel for appellee filed a motion to dismiss the appeal on the ground of prematurity, no final decision having been rendered in the main case pending in the court below.

H. B. Tompkins, for appellant.

Hoke Smith, for appellee.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, J., (*after stating the case.*) The decision in the court below on the intervention of the Hiawassee Company was a final decision upon the matter distinct from the general subject in litigation. *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 Sup. Ct. Rep. 736. As a final decision, it comes directly within the jurisdiction given to the circuit courts of appeal in the sixth section of the act, approved March 3, 1891, entitled "An act to establish circuit courts of appeal," etc. While perhaps the court may, for its own protection, hereafter be compelled to insist that causes pending in the circuit and district courts shall not be brought to this court for review piecemeal, we are not inclined to enforce such a rule in this case, even if we have authority so to do. The motion to dismiss the appeal will therefore be overruled.

The mortgage given by the Marietta & North Georgia Railway Company, suit for foreclosure of which is now pending in the court below, covers fully all after-acquired property appurtenant to the railway, and it

contemplated that a fully constructed and equipped railroad should be provided with the proceeds of the bonds. Apparently, however, all the bonds, or the proceeds thereof, under contracts thereto made, were to go to the contractor, who was not in terms, and perhaps not by implication, bound to equip the road. The Hambro agreement more fully and explicitly provided for an equipped railroad. Apparently the process of issuing the bonds upon certificates of a completed road-way ready for the passage of trains was not satisfactory, and the agreement expressly recites:

"It has been agreed for the purposes of this agreement completed sections shall consist of not less than five miles, with a corresponding proportion of rolling stock and equipment."

—And then provides as follows:

"The Marietta & North Georgia Railway Company undertakes and agrees that on and from the date of this agreement every section of completed railway, the subject of every sworn certificate, as aforesaid, shall for the purpose of this agreement comprise not less than five miles of railway; and that no such sworn certificate shall be given unless and until there shall be delivered in good working order upon the said railway an amount of rolling stock and equipment bearing the same proportion to the whole rolling stock and equipment requisite for the proper and efficient working of the railway as the number of miles completed at the date of such certificate shall bear to the total mileage of said railway."

It is to be noticed here that Eager acted for the companies in making the contract, and was a party himself thereto as the contractor.

The Marietta & North Georgia Railway Company had previously in the fullest manner authorized Eager to contract with Hambro & Son for issue and sale of the bonds,—price, terms, and commissions at Eager's discretion; and the railway company immediately ratified the contract by directing that thereafter the form of certificate to the trust company, upon which bonds were to issue, should be as provided therein, and from that date every certificate upon which bonds were issued by the trust company to the contractor or his assigns, for constructing the railroad, contained the statement—

"That there had been delivered, and in good working order, upon said railway an amount of rolling stock and equipment bearing the same proportion to the whole rolling stock and equipment requisite for the proper and efficient working of the railway as the number of miles completed at the date of this certificate bears to the total mileage of said railway."

The Hambro contract that rolling stock and equipment should be delivered upon the road in good working order and in requisite quantity for the proper and efficient working of the railway evidently contemplated that the rolling stock and equipment so delivered should be rolling stock and equipment belonging to the road by some title of ownership, so as to make the same a better security for the bonds than the railroad without rolling stock and equipment would be. Therefore, the agreement precluded a mere temporary gratuitous loan of the rolling stock for the purposes of the certificate. Eager was the contractor constructing the railroad, and, while he had not in terms bound himself as

contractor to furnish the railway with rolling-stock equipment, (only the company so binding itself,) yet Eager, under the terms of the Hambro contract, could obtain no bonds for construction until the rolling stock should be delivered in good working order and in requisite quantity upon the road. The North Georgia Improvement Company, a New Hampshire corporation, owning mining interests along the line of the road, and to some extent a holder of the bonds of the railway, of which company Eager was president and general manager, through Eager, bought the rolling stock in question, and delivered it upon the railroad and had it marked in the name of the railway, as though it was the property of said railway, and the same went by consent of all parties into the custody and control of said railway.

The question for our determination is whether the transfer of the rolling stock, made as aforesaid, was a mere temporary gratuitous loan or sale. As Eager negotiated the whole business for the improvement company, and was the president of the improvement company and the apparent controller of the railway company, the question is reduced to this: Did Eager intend a temporary gratuitous loan or a sale? The elements of a sale—the thing, the price, delivery—are there; and the sale was complete if there was the necessary consent. As recited in the statement of facts, Eager testifies in relation to this matter:

"Our plan was when we got the road fully completed it would improve our mines, and we bought as much rolling stock as we should want for the immediate present; that we would endeavor to arrange equipment and issue equipment bonds for sufficient amount to cover all the rolling stock, and secure all the rolling stock we thought it would be necessary to have."

Again:

"The rolling stock was sent down there with the idea that the railway company very soon would be done, and would make a car trust,—get somebody to let them have money, and make a car trust."

This evidence shows that it was contemplated by Eager that the Marietta & North Georgia Railway Company was to have and keep the rolling stock, and was to pay for it thereafter either by raising money on equipment bonds or through a car trust. The destination and the future use and control of the rolling stock was thus fixed in the Marietta & North Georgia Railway Company, and that by the consent of all the parties. When, in addition to this, it is considered that upon a delivery with apparent title in the railway company of such rolling stock, the bonds of the railway company were to be and were issued, of which Eager was a beneficiary, in the light of honest dealing can any other conclusion be reached than that Eager, acting for all parties, (himself included,) intended a sale of the rolling stock to the railway company, rather than a temporary gratuitous loan, which would have operated a fraud upon the persons dealing in bonds on the faith of the Hambro agreement?

Counsel for appellee urges several points in this connection,—that, as under the Hambro agreement, the rolling stock was only to be delivered upon the railroad, and was not required to be owned by the railway

company, and as Hambro & Son knew that Eager was not bound under his contract for construction to furnish equipment, and understood that the money from the bonds would not pay for equipment, therefore it was not contemplated that the railway company should be the owner of the rolling stock, but that it had the right to furnish equipment through a car trust.

The answer to this seems plain, so far as rolling stock in issue in this intervention is concerned. The railway company did not create a car trust, but it took the property as apparent owner. It is further urged that, when the receiver was appointed in the main suit, in his first report he declared this rolling stock to be owned by the persons now claiming it, and that subsequently to such report the bondholders held a meeting, and elected a committee of five to represent them in connection with the management of the road; and that this committee reported "with regard to the 15th item, rolling stock now in use, your committee recommend this payment, with the remark that special care be taken that the railway shall acquire a perfect title to property," and that this recommendation was subsequently reported back to a meeting of the bondholders, who indorsed it.

Counsel states, although it does not appear in the evidence, that a representative of Hambro & Son constituted one of the committee, and that on the subsequent vote all of Hambro & Son's bonds were voted in favor of the resolution. It does appear that Eager was one of the committee, and one of the bondholders voting in the affirmative. There is nothing to show that the bondholders were fully advised of the actual state of the rolling stock, and the presumption naturally is raised that they acted in the light of Eager's statement and explanations. Besides this, it is to be noticed that the recommendation of the bondholders is for payment as though the contract of purchase had been completed. It is not to be presumed from what the bondholders did do that there was any intention to subordinate the lien of the mortgage to any claim for equipment.

The case, however, as we understand it, does not require that we should find that there was an actual sale of the rolling stock to the railway company. Under the circumstances, as to the placing of the rolling stock on the railway for use by the railway company apparently as owner, the issuance of bonds by the trust company on certificates, in accordance with the Hambro contract, based upon this rolling stock and the beneficiary result thereof to Eager, both Eager and the North Georgia Improvement Company are estopped in equity from attacking the railway company's title to the rolling stock in question as against the interest of the bondholders. As to Eager, this estoppel ought not to be questioned, and we are of opinion that it is equally clear as to the North Georgia Improvement Company, for it was charged with full notice of all the circumstances as fully as Eager himself was informed, and yet, as a volunteer, aided Eager in obtaining the rolling stock, and in delivering it upon the railroad, which otherwise he might not have been able to do, and thereby obtained the issuance of bonds based on delivery of

the rolling stock on the railroad in good working order, etc. The improvement company occupies the same position as the owner who stands by in silence while another sells his property.

It is conceded that the intervener, the Hiawassee Company, stands in the shoes of the North Georgia Improvement Company, so far as the rolling stock is concerned, and can assert no better title thereto than the improvement company could have asserted had no transfer been made.

These views require the reversal of the decree appealed from, and the remanding of the case to the circuit court, with instructions to dismiss the intervention of the Hiawassee Company, with costs. And it is so ordered.

CENTRAL TRUST CO. OF NEW YORK v. MARIETTA & N. G. RY. CO.,
(GROOME, Intervener.)

(*Circuit Court of Appeals, Fifth Circuit. December 7, 1891.*)

1. FORECLOSURE OF RAILROAD MORTGAGE—CONDITIONAL SALE—RIGHTS OF VENDOR.

The vendor of rolling stock to an improvement company by his contract of sale reserved title thereto until payment of the purchase money. The improvement company supplied the rolling stock to a railroad company in order to enable the latter to raise money on bonds secured by mortgage on its railroad and equipments. *Held*, in a suit to foreclose such mortgage, that the original vendor, having no notice of equities existing between the purchasers of the bonds of the railroad company and the improvement company, was entitled to the possession of the rolling stock, title to which he had retained.

2. SAME—ESTOPPEL.

But in such case, the improvement company being estopped from setting up title against the bondholders by the fact that the bonds of the railroad company were placed through its instrumentality, the original vendor could take nothing by a resale to him by the improvement company of such rolling stock.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

Bill in equity by the Central Trust Company of New York against the Marietta & North Georgia Railway Company to foreclose a mortgage made by the railroad company. Samuel W. Groome intervened, claiming title to certain rolling stock in the possession of the receiver appointed in the suit. Decree for intervener. Plaintiff appeals. Reversed.

H. B. Tompkins, for appellant.

Hoke Smith, for appellee.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, J. The case on this intervention is the same in pleadings, master's report, exceptions, and assignments of errors as the case of *Central Trust Co. v. Marietta & N. G. Ry. Co. (Hiawassee Co., Intervener)*, 48 Fed. Rep. 850, (just decided,) except that the appellee, Groome, was the original vendor of the rolling stock in question to the North Georgia Improvement Company, and in his contract retained the title until pay-

ment of the purchase price should be fully made, and that the North Georgia Improvement Company has not paid the entire purchase price, some \$5,500 of the original \$22,500 being still due and unpaid; and the appellee, Groome, shows a written contract for the resale of the property to him by the North Georgia Improvement Company, made since his first intervention claiming the rolling stock in controversy was filed. The case is, however, to be distinguished from the *Hiawassee Case* in this: that Groome was not charged with any notice of the equities existing in favor of bondholders as against Eager or the North Georgia Improvement Company, and he made a conditional sale of his property, retaining the title thereto to the North Georgia Improvement Company, who transferred it, without paying the full price, to the Marietta & North Georgia Railway Company. We think it is clear that the appellee, Groome, has never forfeited his rights under his original contract, and that he is now entitled to a return of the property, or to the payment of the balance of the price still due. We do not think that Groome took anything by the contract with the North Georgia Improvement Company for the resale of the property, as that company (as we have seen in the *Hiawassee Case*) was estopped from setting up title against the bondholders. As the master reported that the use of the rolling stock in question was necessary to the operation of the railway in possession of the receiver, the receiver should pay the balance of the purchase price still due to appellee, or give up the property. On the other points involved, we will hold as in the *Hiawassee Case*. It is therefore ordered and adjudged that the decision appealed from be reversed, with costs, and that this cause be remanded to the circuit court, with instructions to enter an order directing the receiver to pay, within 15 days from date thereof, the balance due to intervenor, Samuel W. Groome, on his contract for the sale to the North Georgia Improvement Company of the rolling stock described in his intervention; and, in case of inability to pay as directed, the receiver shall deliver the property.

CENTRAL TRUST CO. OF NEW YORK v. MARIETTA & N. G. RY. CO.,
(JACKSON & WOODIN MANUF'G CO., Intervener.)

(Circuit Court of Appeals, Fifth Circuit. December 7, 1891.)

1. FORECLOSURE OF RAILROAD MORTGAGE—CONDITIONAL SALE—RIGHTS OF VENDOR.

A railroad company issued equipment bonds, and executed a mortgage to secure the same, covering "all after-acquired" property of the company. Afterwards an improvement company, interested in the railway company, purchased certain rolling stock from a car-building company, which, by the contract of sale, retained title to the rolling stock until the purchase price thereof should be fully paid. The rolling stock was then furnished by the improvement company to the railroad company, under an agreement by which the improvement company undertook to equip the railroad company. *Held*, in a suit to foreclose the mortgage, that the car-building company, having no notice of any equities in favor of the holders of the railroad company's bonds against the improvement company, arising out of the contract of the improvement company to equip the railroad in order to enable it to

issue such bonds, was not estopped to intervene and assert its title to the rolling stock in question, and was entitled to the possession of so much thereof as it had furnished to the railroad company.

2. **SAME—RECORDING CONTRACT OF SALE RESERVING TITLE—OPERATION OF STATUTE.** Laws Ga. 1889, p. 188, validating contracts for the sale of rolling stock made or to be made to the owner or operator of a railway within the state of Georgia, with reservation of title, and requiring such contracts to be recorded within six months after execution, has no application to such a contract, made before the passage of such act, by two foreign corporations, outside of the state, for the sale of rolling stock to be used within the state, neither corporation being the owner or operator of a railway in the state.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

Bill in equity by the Central Trust Company of New York against the Marietta & North Georgia Railway Company to foreclose a mortgage made by the railway company. The Jackson & Woodin Manufacturing Company intervened, claiming title to certain rolling stock in the possession of the receiver appointed in the suit. Decree for intervener. Plaintiff appeals. Affirmed.

Laws Ga. 1889, p. 188, validates sales of rolling stock made or to be made to "any railroad company or person owning or operating a railroad in this state," with reservation of title, and provides that such contracts made prior to the passage of the act shall be recorded in the county of the state of Georgia in which is situated the principal office of the company, etc., within six months after the passage of the act, and that such contracts made after the passage of the act shall be so recorded within six months after their execution.

STATEMENT BY PARDEE, J.

The facts of the case, and the exceptions relied upon by the appellant, are sufficiently stated in the master's report, as follows:

"*First.* That the Jackson & Woodin Company sold the North Georgia Improvement Company thirty 8-wheel gondola-cars, and twenty 8-wheel box-cars, for which it received thirty-four notes, dated August 1, 1890, and due as follows: One note payable December 1, 1890, and monthly thereafter, until September 1, 1893. The aggregate amount of these thirty-four notes is twenty thousand five hundred and eighty-nine dollars and four cents, (\$20,589.04.) There was also another note given by said North Georgia Improvement Company on account of said purchase, due August 26, 1890, for five thousand eight hundred and twenty-nine dollars sixty-two cents, making a total of \$26,418.66. I have added to this aggregate amount six per cent. interest on past-due notes, and deducted from the aggregate amount six per cent. interest from those not due, and I find the principal and interest due on said notes, April 7, 1891, is \$25,357.18. I further find from the proof that the North Georgia Improvement Company, being unable to pay any of said notes, relinquished all claim upon said property to the intervener, the said Jackson & Woodin Manufacturing Company. I further find that the said North Georgia Improvement Company delivered said fifty cars to the Marietta & North Georgia Railway Company, and that said fifty cars are now in the possession of J. B. Glover, receiver of the Marietta & North Georgia Railway Company, and are in daily use in the operation of said road. I also find that the title to the said fifty cars is still in the intervener, the said Jackson & Woodin Manufacturing Company, and they are entitled to possession

of same. * * * It is claimed by the Central Trust Company of New York that the interveners have no lien whatever upon the equipment set forth in their petition and intervention superior to the mortgage bonds now being foreclosed in this court, because said equipment was sold and delivered in the year 1889 under a verbal contract made for said equipment with the interveners by George R. Eager, as president of the North Georgia Improvement Company, and that said George R. Eager then caused said equipment to be delivered to the said Marietta & North Georgia Railway Company, which last-named railway company, in the year 1889, took possession of said railway equipment, without an understanding, either verbal or written, that any title or right or claim was reserved in said equipment by said interveners. The Central Trust Company further contend that at the time said equipment was delivered to said railway the said George R. Eager was under contract to construct and equip said line of railway, and that he delivered said equipment to said railway, as he was in duty bound to do, under his said contract. The evidence shows that said equipment was sold to the North Georgia Improvement Company some time in the spring of the year 1889; that the negotiations for the sale of said equipment were had between said interveners and George R. Eager, president of the North Georgia Improvement Company; that it was distinctly understood at the time that the title to said equipment was to remain in the interveners until it was fully paid for; and that as an evidence of this fact each car was marked on a plate with the following inscription: 'M. & N. G. Ry., Jackson & Woodin Mfg. Company, Berwick, Pa., owners.' Nothing was paid on said equipment at the time of the purchase, and nothing has been paid on it since. Afterwards, to-wit, on the 1st day of August, 1890, a written contract of lease was made between interveners and North Georgia Improvement Company, by which said contract the interveners were clearly recognized and admitted to be the owners of said equipment, and were to continue as such owners until said equipment was fully paid for. Upon said contract of lease is an agreement with Marietta & Georgia Railway Company to act as bailee for the Jackson & Woodin Mfg. Company of said cars, and to do all in its power to carry out the contract made between Jackson & Woodin Manufacturing Company and the North Georgia Improvement Company. This contract, with the above-stated agreement indorsed on it, was duly recorded October 29, 1890, in the clerk's office of the superior court of Cobb county. The master is of the opinion that the verbal contract made between the North Georgia Improvement Company and the Jackson & Woodin Manufacturing Company was good as between the parties to it, and it does not appear that any equities have arisen as to third parties. The master is also of the opinion that the Marietta & North Georgia Railway Company had possession of this rolling stock under the written contract of bailment, as above stated, and that, even before said written contract of bailment was made, said railway company held said rolling stock as bailee, and that, therefore, the general mortgage given to secure the payment of the bonds did not attach to said rolling stock. The master, therefore, finds and reports that the interveners, Jackson & Woodin Manufacturing Company, have a valid claim to said rolling stock, and are entitled to its possession. The North Georgia Improvement Company, subsequent to the filing of this intervention, executed to the Jackson & Woodin Manufacturing Company a relinquishment to all of this rolling stock; but, as the evidence shows the Jackson & Woodin Manufacturing Company have never been paid anything on said rolling stock, the master thinks their claim is valid without relinquishment. As to the contention of the Central Trust Company that George R. Eager was under contract to equip said railway with rolling stock, the master repeats his opinion in the intervention of the Hiwassee Company, that the evidence does not sustain this position. But, even if it were true

that said Eager was to equip said railway, it could not affect the right of the interveners to recover their property, as nothing has ever been paid, and as it was placed on the railway with the distinct understanding that it was to remain the property of the interveners until fully paid for."

H. B. Tompkins, for appellant.

Hoke Smith, for appellee.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, J. We do not think it necessary to recapitulate or analyze all the evidence, nor to pass upon all the exceptions and assignments of error with which the record teems, because it is clear that appellee never parted with the title and ownership of the property sued for; that it had no notice, and is charged with none, of the equities claimed to exist as between Eager, contractor, and the bondholders of the Marietta & North Georgia Railway Company, in regard to rolling stock furnished said railway company as a preliminary to the issuance of bonds; that the contract or conditional sale between appellee and the North Georgia Improvement Company was made outside of the state of Georgia between two foreign corporations, and is not affected by the Georgia law of 1889 relied upon by appellant, however the same may be construed, particularly as the contract was made months before said law was passed, and neither one of the parties thereto was the owner or the operator of a railway in the state of Georgia, and that the appellee is entitled to the return of its property or to payment for the same. We are satisfied there is no error in the decree rendered in the court below prejudicial to the appellant, and it is therefore affirmed, with costs.

CENTRAL TRUST CO. OF NEW YORK *v.* MARIETTA & N. G. RY. CO.,
(GROOME, Intervener.)

(Circuit Court of Appeals, Fifth Circuit. December 7, 1891.)

1. FORECLOSURE OF RAILROAD MORTGAGE—LIEN ON AFTER-ACQUIRED PROPERTY—CONDITIONAL SALE—RIGHTS OF VENDOR.

A railroad company issued bonds secured by a mortgage to a trust company covering "all after-acquired" as well as existing property of the railroad company, which was duly recorded. Thereafter the railroad company purchased certain cars from a car-builder, under an agreement by which the car-builder retained title to the cars until they should be fully paid for, which agreement was in writing, but was never recorded. In a suit by the trust company to foreclose its mortgage the car-builder intervened, claiming the cars under his reservation of title. *Held*, that the trust company was not a third party, within the meaning of Code Ga. § 1955c, (Laws 1881, p. 143,) providing that, in order to retain title to personal property sold and delivered, as against third parties, "title must be reserved in writing, and the paper duly executed and recorded as a mortgage on personality," and that the trust company could derive no advantage from the car-builder's failure to record his reservation of title, as the act was intended only for the benefit of subsequent purchasers and creditors of the vendee.

2. SAME—CONSTRUCTION OF STATUTE.

Nor, in such case, were the rights of the car-builder affected, as against the trust company, by Laws Ga. 1889, p. 188, validating conditional sales of rolling stock to

railroad companies with reservation of title, but requiring (section 3) that such reservation shall be in writing, and shall be recorded within six months after the execution thereof; as that act was also intended only for the benefit of third parties, and operated to repeal section 1955a no further than to provide a different method for the execution of contracts for the conditional sale of railroad equipments.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

Bill in equity by the Central Trust Company of New York against the Marietta & North Georgia Railway Company to foreclose a mortgage made by the railway company. Samuel W. Groome intervened, claiming title to certain cars in possession of the receiver appointed in the suit. Decree for intervenor. Plaintiff appeals. Affirmed.

H. B. Tompkins, for appellant.

Hoke Smith, for appellee.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, J. Samuel W. Groome filed an intervention in the suit of *Central Trust Company of New York vs. Marietta & North Georgia Railway Company*, which was a suit for foreclosure of mortgage pending in the circuit court of the United States for the northern district of Georgia, claiming that he had made a conditional sale to the Marietta & North Georgia Railway Company of certain rolling stock; that the terms of the sale had not been complied with; that he was entitled to possession of the property, which was in the possession of the receiver in the main case; and asking an order for its restoration. The contract for the conditional sale of the property was in writing, but the writing was not recorded. The case was referred to a master, who made a report in favor of the intervenor. The Central Trust Company has filed exceptions thereto, not necessary to here set forth. The court referred the case back to the master, with instructions to take additional evidence, and report any suggestions or recommendations as to what the court should order in reference to the purchase of said cars and trucks, and as to what price should be paid in view of the new evidence taken. After hearing additional evidence, the master filed a second report in favor of intervenor, among other things as follows:

"The evidence shows that these cars were leased by Samuel W. Groome, the intervenor, to the Marietta & North Georgia Railway Company on February 1, 1890, and notes were given by the company to Groome covering the value of the cars. On payment of these notes by the company the title to said cars was to vest absolutely in the railway company, without any further conveyance. In the opinion of the master, this contract, while called a 'lease,' was in fact a conditional sale; the principal condition being that the title was to remain in the vendor, Groome, until the cars were fully paid for. This contract is executed properly, but has never been recorded. It is contended by counsel for the Central Trust Company, the trustee of the bondholders, that, this contract of Samuel W. Groome never having been recorded, as provided by section 1955a of the Code of Georgia, he has no lien on said cars superior to that of the mortgage executed by the railway company to secure the payment of the bonds. The section of the Code referred to requires

that, 'in order to retain title to personal property sold and delivered, title must be reserved in writing, and the paper duly executed and recorded as a mortgage on personalty.' The mortgage to secure the payment of the bonds was executed 1st January, 1887. The contract between Groome and the railway company was made in 1890, and the cars were delivered to the railway company in 1890. The general mortgage executed to secure the payment of the bonds covers not only all property owned by the railway at the date of its execution, but also all after-acquired property. In the opinion of the master, Samuel W. Groome, the intervener, under the facts of this case, has a lien on these cars superior to that of the general mortgage given to secure the payment of the bonds now being foreclosed by the Central Trust Company of New York. The railway company did not acquire title to said cars, and the general mortgage, covering all future acquired property of the railway company, attached only to such interests therein as the company acquired. The master thinks that the failure to record the contract retaining title in Groome until the cars were paid for does not deprive him of his lien except as to subsequent innocent purchasers and creditors of the Marietta & North Georgia Railway Company. In support of this opinion the master cites the decision of the supreme court of Georgia in the case of *Conder v. Holleman*, 71 Ga. 93, and the case of *U. S. v. Railroad Co.*, 12 Wall. 362, and the case of *Meyer v. Car Co.*, 102 U. S. 1. The facts in these last two cases are very similar to the facts in the *Groome Case*, and the master desires to call especial attention to the case cited from 12 Wall. * * * The aggregate net value of all this rolling stock which came into the possession of the receiver on the 19th day of January, 1891, was \$41,105. The evidence shows that these box-cars and coal-cars are necessary for the operation of the road by the receiver, and I therefore recommend that he be allowed to purchase the same for the aggregate net sum above stated, with seven per cent. interest from the 19th January, 1891. The evidence shows, however, that the receiver has no money with which to purchase said rolling stock, as the road is not earning its current expenses; and that, therefore, it will be necessary for the receiver to issue receiver's certificates to raise the money to purchase said rolling stock."

To this report the Central Trust Company filed four exceptions, all of which can be summed up in this:

"The master erred in finding that there was any conditional sale made by Groome to the Marietta & North Georgia Railway Company as against the Central Trust Company, trustee, because the act of sale was not executed and recorded according to the law of Georgia."

—And the 11 alleged errors, as assigned by the appellant for the purposes of appeal after the court below had affirmed the master's report, cover no more extensive ground; and counsel for appellant takes this view, for in his brief, after briefly reciting the facts, he says:

"The sole question is, then, did this equipment come into the use, custody, and control of the Marietta & North Georgia Railway Company charged with a contract of lease or a mortgage or a lien, so that it did not become subject to the after-acquired property clause in the mortgage now being foreclosed in this court?"

Further on:

"It is conceded that the authorities go to this extent: that, if the title to the equipment did not pass to the mortgagor, the Marietta & North Georgia Railway Company, or if it passed incumbered with a mortgage or lien or lease which could be enforced between the vendor (the intervener here) and the railway company, by retaking the property, rather than by demanding

full payment for it, then the property did not become subject to the lien of the mortgage being foreclosed under the after-acquired property clause. The question is whether, under the act of the Georgia legislature of 1889, (page 188,) any mortgage or retention of title or lease was executed in favor of the vendors upon the railway equipment under the facts in this case?"

The law of Georgia, which, it is claimed, controls this case, is as follows:

"An act to require the conditional sales of personal property to be evidenced in writing, and for other purposes.

"Section 1. Be it enacted by the general assembly of Georgia, that from and after the passage of this act, whenever personal property is sold and delivered, with the condition affixed to the sale that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise; and the written contract of every such conditional sale shall be executed and attested in the same manner as is now provided by existing laws for the execution and attestation of mortgages on personal property: provided, nevertheless, that, as between the parties themselves, the contract as made by them shall be valid, and may be enforced, whether evidenced in writing or not.

"Sec. 2. Be it further enacted by the authority aforesaid, that the existing statutes and laws of this state in relation to the registration and record of mortgages on personal property shall apply to and affect all conditional sales of personal property as defined in the preceding section.

"Sec. 3. Be it further enacted by the authority aforesaid, that all laws and parts of laws in conflict with this act be, and the same are hereby, repealed.

"Approved September 27th, 1881."

Georgia Laws 1880-81, p. 143.

"An act to authorize contracts providing for the conditional sale of railroad equipment or rolling stock, or the leasing of the same, to be used in this state; to fix the time and place within and at which such contracts shall be recorded; to make valid such contracts heretofore made and recorded in the manner herein set forth; to authorize the record of such contracts heretofore made; and for other purposes.

"Section 1. The general assembly of the state of Georgia do hereby enact that it shall be lawful for any person or corporation to make a contract in writing with any railroad company or person owning and operating a railroad in this state to furnish said company or person with rolling stock or other equipment, deliverable either immediately or subsequently at stipulated periods, by the terms of which contract the purchase money for said property, in whole or in part, is to be paid thereafter, and in which contract it may be agreed that the title to the property so sold or contracted to be sold shall not pass to or vest in the vendee until the purchase money for the same shall have been fully paid, notwithstanding the delivery of such property to, and the possession of the same by, the vendee; but that, until said purchase money shall have been fully paid, the title to said property remain in said vendor and his or its assigns.

"Sec. 2. Be it further enacted, that it shall also be lawful for the manufacturer, owner, or assigns of any railroad equipment or rolling stock to make a written contract for the lease of such equipment or rolling stock to any railroad company or person owning or operating a railroad in this state; and in such contract it shall be lawful to stipulate for a conditional sale of said property to the said lessee on the termination of such lease, and to stipulate that

the rental received for said property may, as paid, or when fully paid, be applied and treated as purchase money, and that the title to such property shall not vest in such lessee or vendee until the amount of such purchase money shall have been paid in full to the lessor or vendor, or to his or its assigns, notwithstanding the delivery of such property to, and possession of the same by, such lessee or vendee; but that, until such purchase money shall have been fully paid, the title to such property shall remain in said lessor or vendor, or in his or its assigns.

"Sec. 3. Be it further enacted, that every such contract hereby authorized shall be good, valid, and effectual to retain the title to said property in said vendor or lessor, or in his or its assigns, as against the said vendee or lessee, and against all persons claiming thereunder: provided—*First*. That such contracts, if made within this state, shall be executed in the presence of, and attested by, or be proved before, a notary public, or justice of any court in this state, or a clerk of the superior court. If made without this state, it shall be executed in the presence of, and attested by, or proved before, a commissioner of deeds for the state of Georgia, or a consul or vice-consul of the United States, (the certificates of the foregoing officers, under their seals, being evidence of the fact,) or by a judge of a court of record in the state where executed. *Second*. That such contract shall be recorded within six months after the date of its execution, in the office of the clerk of the superior court of the county where is situated the principal office, in this state, of the said railroad company. *Third*. That each locomotive engine and each car so sold, or contracted to be sold, or leased, as aforesaid, shall have the name of the vendor or lessor plainly placed or marked on the same, or be otherwise so marked as to plainly indicate the ownership thereof.

"Sec. 4. Be it further enacted, that all such contracts heretofore made, executed, and recorded in the manner herein authorized and provided for shall be deemed as valid, and shall have the same effect as if the same had been made, executed, and recorded under the terms and by authority of this act.

"Sec. 5. Be it further enacted, that all such contracts heretofore made shall be valid, and be entitled to the provisions of this act, upon compliance with the terms thereof, and upon record of the same, as herein provided, within six months after the date of the passage of this act.

"Sec. 6. Be it further enacted, that all laws and parts of laws in conflict with this act be, and the same are hereby, repealed.

"Approved November 13, 1889."

Georgia Laws 1889, p. 188.

If the said law of 1889, as claimed by appellant, governs this case, and the contract of conditional sale between appellee and the Marietta & North Georgia Railway Company is invalid against the vendee and all persons claiming thereunder because of the failure to record the same as provided in said law, still we fail to see wherein the appellant will be benefited. Appellant's mortgage covers only after-acquired property of the railway company. For the mortgage to have effect, the property must first be acquired by the railway company. If the only title the railway company pretends to have is invalid, must not the title to the property in question still be in the appellee, who has never parted with it otherwise than is stipulated in the alleged invalid contract? As to third persons and subsequent creditors who have dealt with the railway company as the apparent owner of the property in its possession, there would be no difficulty in treating the property as belonging to the railway company on the doctrine of estoppel; but there can be no estoppel

as between the appellee and the Central Trust Company claiming the property as acquired by the railway company.

Whether or not the title passes in a conditional sale is most thoroughly considered in *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51, where Mr. Justice BRADLEY in an exhaustive opinion reviewing the whole subject on principle and authority, decided that a conditional sale does not as a matter of law and fact actually pass the title as between the parties. See, also, *Segrist v. Crabtree*, 131 U. S. 287, 9 Sup. Ct. Rep. 687; *Equipment Co. v. Bank*, 136 U. S. 268, 10 Sup. Ct. Rep. 999. It is very doubtful if a well-considered adjudged case can be found holding in a contract of conditional sale, which expressly reserved title in the vendor, that the title actually passed by reason of subsequent failure to record or register the contract in accordance with local law. But it is not necessary to pursue this line of inquiry. The law invoked is a registry law. It can have no other purpose than to give notice to the parties dealing with the vendee or lessee. In *Conder v. Holleman*, 71 Ga. 93, a case very like the present, the supreme court of Georgia says:

"It is insisted by counsel for plaintiff in error that under the act of 1881, (Code, § 1955a,) this being a conditional sale from the claimant to the defendant in execution, whereby the title to the property levied on was reserved to claimant, and inasmuch as the same was not recorded within thirty days, that it was subject to the judgment lien of plaintiff, although such judgment had been obtained long prior to the sale by claimant to the defendant in execution. One provision in the statute referred to is, 'the existing statutes and laws of this state in relation to the registration and record of mortgages on personal property shall apply to and affect all conditional sales of personal property as defined in this section.' Hence it becomes necessary that the conditional sale in this case should be recorded within thirty days, the same as the record of mortgages on personal property. But the object of the registration of mortgages is to give notice to all persons having dealings with the mortgagor of the existence of the mortgage; and in this case it appears that the dealings had between the plaintiff in execution and the defendant had taken place long before the sale of the property levied on, which was sold by the claimant to the defendant in execution; and the judgment in said case had been obtained long before said conditional sale. Then, whether said conditional sale had been duly recorded or not, it would not in any manner affect the plaintiff, whose judgment had been obtained before the sale, and as to him it made no difference whether the sale was recorded or not. A judgment creditor of a mortgagor, whose judgment was obtained before the making of a mortgage, would not be affected by the record of such mortgage in any way. So this judgment creditor is in no wise affected by the non-record of this conditional sale. No right has accrued to him between the making of the conditional sale and the record of the same. He is not hurt by its non-record, and as to him it is the same as if the sale had been duly recorded. The title to this property was in the claimant, he having reserved the same until it was paid for by the defendant in execution; and he did not lose the same, nor render it liable or subject to the judgment and execution of plaintiff, by reason of not having his conditional sale recorded within thirty days. The lien of this judgment never attached to the property levied on. Such being the judgment of the court below, the same is affirmed."

It is to be noticed that the Code of Georgia under which the above decision was rendered (and hereinbefore given) declares all conditional

sales not recorded according to its requirements void as to third parties, and the court held that third parties with prior judgments were not benefited by the failure to register according to law. In *U. S. v. Railroad Co.*, 12 Wall. 362, the supreme court of the United States, in considering the effect of a railroad mortgage covering after-acquired property, and the effect of registry laws, says:

"The appellants contend, in the next place, that the decision upon the facts was erroneous; that the mortgages, being prior in date to the bond given for the purchase money of these locomotives and cars, and being expressly made to include after-acquired property, attached to the property as soon as it was purchased, and displaced any junior lien. This, we apprehend, is an erroneous view of the doctrine by which after-acquired property is made to serve the uses of a mortgage. That doctrine is intended to subserve the purposes of justice, and not injustice. Such an application of it as is sought by the appellants would often result in gross injustice. A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property, and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors."

See, also, as to the effect of the after-acquired property clause, *Fosdick v. Schall*, 99 U. S. 235; *Meyer v. Car Co.*, 102 U. S. 1.

A careful examination of the said act of 1889 leads to the conclusion that it was not intended to invalidate any contract that under the general law was valid; that it was rather intended to facilitate the making of conditional sales and leases of railroad equipments to be used on the railroads in the state. In terms it declares nothing invalid, and it is only by implication that contracts for a conditional sale of railroad equipment are invalidated for not complying with the act as to registry. The law of 1881, as found in the Code, is not repealed, except by implication, which is not favored, (*McCool v. Smith*, 1 Black, 470;) and that only as to one kind of personal property, the many being left to the operation of the prior law. It seems clear that the act of 1889 is a registry law intended for the benefit of third parties; that it does not repeal the law as contained in the Code further than to provide a different method of executing contracts for the conditional sale or lease of railroad equipment where the vendor or lessor retains title, and the recording and otherwise giving notice to the public of the character of the railroad's ownership; that a mortgagee in a prior mortgage, although his mortgage covers after-acquired property, is not a third person, within the meaning of the registry laws of Georgia; and that a failure to record a conditional sale of railroad equipment according to the Georgia act of 1889

does not invalidate the contract as between the parties or in favor of a prior mortgagee. The decision appealed from should be affirmed, and it is so ordered.

CENTRAL TRUST CO. OF NEW YORK v. MARIETTA & N. G. RY. CO.,
(JACKSON & SHARP CO., Intervener.)

(Circuit Court of Appeals, Fifth Circuit. December 7, 1891.)

FORECLOSURE OF RAILROAD MORTGAGE—CONDITIONAL SALE—RIGHTS OF VENDOR—
INCREASED VALUE OF ROLLING STOCK.

In a suit to foreclose a railroad mortgage, wherein an intervener claimed title to certain rolling stock as vendor under a conditional sale thereof, the evidence showed that the value of rolling stock had increased 10 per cent. since the time when the rolling stock in question was furnished by the intervener. *Held* that, in determining the sum which the receiver in the suit should pay in order to retain possession of the rolling stock, 10 per cent. should be added to the cost thereof before deducting a percentage per annum for wear and tear.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

Bill in equity by the Central Trust Company of New York against the Marietta & North Georgia Railway Company to foreclose a mortgage made by the railway company. The Jackson & Sharp Company intervened, claiming certain rolling stock and railway equipment in possession of the receiver appointed in the suit. Decree for intervener. Plaintiff appeals. Affirmed.

H. B. Tompkins, for appellant.

Hoke Smith, for appellee.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, J. The Jackson & Sharp Company intervened in the case of *Central Trust Co. of New York vs. Marietta & Georgia Ry. Co.*, a suit pending for the foreclosure of a mortgage in the circuit court of the United States for the northern district of Georgia, claiming that the certain rolling stock and railway equipment described, then in the possession of the receiver in the main case, belonged to the intervener, and praying that the receiver be directed to turn over said property, with full compensation for its use, or else to pay the value thereof as stated, \$60,000. The court allowed the intervention to be filed, referred the same to a special master, directing him to report as to the validity of the claim of the petitioner, and as to the advisability of the purchase of the property by the receiver. Thereafter the petitioner, under leave of the court, filed an amended petition, stating that the cars claimed were placed on the Marietta & North Georgia Railway through the instrumentality of George R. Eager, as president of the North Georgia Improvement Company, and with the full knowledge and consent of the vice-president and acting president of the railway company; that the property belonged to the intervener; and that the title was to remain in it; further

showing that the intervenor has never received one cent from the improvement company, or from any other source, on account of said cars, except two certain cars mentioned. Pending the hearing before the master, the Central Trust Company, complainant in the main suit, filed an answer to the intervention, controverting on various grounds the intervenor's right to recover.

Other facts necessary to the proper consideration of this case will be found in the extracts quoted from the special master's report, as follows:

"First, as to the value of said rolling stock. Under the ruling of the court in similar interventions, I find the value of the rolling stock on the 19th January, 1891, the date when the receiver was appointed. I find the value of the first-class passenger-car No. 15 and the parlor-car No. 16, if entirely new, January 19, 1891, to be ten per cent. advance of what they were sold for to the North Georgia Improvement Company in November, 1889. The price at which both cars were sold to the North Georgia Improvement Company was \$9,700. Ten per cent. advance added to this sum makes the value of said two cars, if entirely new, \$10,670, on January 19, 1891. The evidence shows that they have been in use by the Marietta & North Georgia Railway Company about twelve months, and that the percentage of deterioration for wear and tear and use of cars is 6 per cent. per annum. The amount to be deducted, therefore, on account of wear and tear, is \$640.20, leaving the net value of said cars, January 19, 1891, as \$10,029.80. I find and report this, therefore, as the value of said cars at said date, with interest at 7 per cent. per annum from said date. The intervenors were paid about \$3,000 on account of said cars by the North Georgia Improvement Company, but, as the said North Georgia Improvement Company transferred all its interest in said cars back to the intervenors before the filing of this intervention, I do not think this payment is material. The evidence shows that the seven passenger-cars, if entirely new, were worth, on the 19th of January, 1891, \$32,725; and that the three combination mail, baggage, and express cars, if entirely new, were worth on said date the sum of \$3,550,—an aggregate amount for the ten cars of \$41,275. The evidence shows that these ten cars have been in use by the Marietta & North Georgia Railway for about four months. Deducting from this amount, at the rate of 6 per cent. per annum for deterioration from use, 2 per cent. for the four months, the sum of \$825.50, leaves the net value of these cars on January 19, 1891, \$40,449.50. I therefore find and report the value of the twelve cars on January 19, 1891, to be \$50,479.30, to which 7 per cent. annum interest must be added from said date. The evidence shows that all of said cars are necessary to the operation of the road by the receiver, and I therefore recommend that he be authorized to purchase the same at their value, as above stated, on January 19, 1891, with 7 per cent. per annum added from said date. As to the receiver's ability to pay for the same, I refer to my reports filed in the Hiawasse Company intervention and Jackson & Woodin Company intervention. The evidence in this case shows that these cars were purchased by the North Georgia Improvement Company from the intervenor, Jackson & Sharp Co.; the first-class passenger-car No. 15 and parlor-car No. 16 having been purchased by written contract November 1, 1889, but not legally executed until the 19th day of January, 1891. In said written contract title was reserved in the vendors until fully paid for. As to the other ten cars, there was no consummated contract or purchase, either oral or written, but it was understood, both by the intervenors, by the North Georgia Improvement Company, and by Lenox Smith, vice-president of the Marietta & North Georgia Railway Company,

that these cars were to remain the property of the Jackson & Sharp Co. until they were fully paid for; and the evidence shows that they have not been paid for. All of these cars were placed upon the Marietta & North Georgia Railway without any contract, either oral or written. Counsel for trust company contend in this case, as in the other cases, that the interveners have no lien on said rolling stock as against the mortgage bonds now being foreclosed in this court, as said written contract covering the two cars was never recorded, and there was no written contract as to the other cars. In support of this position he cites the act of the legislature approved October 13, 1889. The master is of the opinion in this case, as in the other cases, that the contract as to the first two cars, though not recorded, is valid as to the parties thereto; and that the verbal contract as to the other ten cars is valid as to the parties thereto; and that the Marietta & North Georgia Railway Company acquired no title whatever to said property, but simply held possession of it under an implied contract of bailment. The master reiterates in this case his opinion in the other cases, that George R. Eager was not required by his contract, or by any evidence introduced in the case, to equip and pay for the rolling stock placed on the Marietta & North Georgia Railway Company."

To the special master's report the Central Trust Company filed exceptions, as follows:

"*First.* The special master had no right or authority to hear evidence or to make a finding as to what the first-class passenger-car No. 15 and parlor-car No. 16 would have been worth, if entirely new, on January 19, 1891; but it was only proper that the special master should find what said cars were worth on 19th of January, 1891, taking into consideration the agreed price for which they were sold, and deducting therefrom such percentage as was proven they had deteriorated by use. And the said special master has found that such deterioration for wear and tear and use of the cars was at the rate of 6 per cent. per annum from November, 1888, to 19th of January, 1891; and he therefore should have deducted that amount from \$9,700, the price at which said cars were sold, and not from that price, with 10 per cent. added thereto, making \$10,700. *Second.* Said Central Trust Company objects and excepts to the finding of said special master in respect to the seven passenger-cars and the three combination mail, baggage, and express cars for the same reason and upon the same grounds set forth and alleged in the foregoing objection, No. 1; that is, because the master took into consideration what the said ten cars last above referred to, if entirely new, might have been worth on the 19th of January, 1891, etc., instead of finding the value of said cars on January 19, 1891, by ascertaining the price for which they were sold, and deducting therefrom the percentage for wear and tear. *Third.* Said Central Trust Company further objects and excepts to said master's report because it finds anything in favor of the intervener; and this respondent avers that under the evidence in this cause, and the law as applicable thereto, the intervener, Jackson & Sharp Co., did not reserve or retain any title whatever to said railway equipment, or any part thereof; and, therefore, when the North Georgia Improvement Company placed said equipment, through George R. Eager, upon the Marietta & North Georgia Railway, that then and there the title to said equipment vested in said railway company, and that no lien or reservation of title attached to said property as against said railway company superior to the lien of the mortgage bonds now being foreclosed."

The court below affirmed the master's report, and the Central Trust Company appealed, assigning for error on appeal the same questions made in the exceptions to the master's report. We therefore consider the case as made by the exceptions.

The first two exceptions are with reference to the method of the master in arriving at the value of the property on January 19, 1891, the date the receiver obtained possession, and which was the date which the court in other like interventions had, at the instance of the Central Trust Company, fixed for the determination of the value of rolling stock in possession of the receiver claimed by outside parties. It appears that the rolling stock claimed in the present intervention was new when, shortly before January 19, 1891, it was delivered to the Marietta & North Georgia Railway Company; and the master ascertained the actual value on January 19, 1891, by finding what it would have been if new, and then deducting the per cent. of deterioration in value by use. The evidence adduced as to value before the master was not given directly as to the value on the 19th of January, 1891, and could not well have been, as the hearing was nearly six months later, and none of the witnesses testifying as to the value had inspected the rolling stock on that day. The evidence showed a sharp increase—10 per cent.—in the value of rolling stock in the time between the delivery of the rolling stock in question and January 19th, and was as to the actual value of similar rolling stock new on January 19th, and then as to the per cent. of usual decrease in value of rolling stock by wear and tear when in use. The master was therefore limited by the evidence to the method he followed in giving the value on a given day. The contention that the value of rolling stock on January 19th was what it had been agreed was the value at the time of the lease or sale, less deterioration by use to January 19th, cannot be admitted, because, as before said, the evidence showed the stock had increased in value prior to January 19, 1891.

The third exception was to the finding of anything in favor of the intervenor, because exceptor avers that, under the evidence in the case and the law applicable thereto, the intervenor did not reserve nor retain any title whatever in the said railway equipment. The evidence fully sustains the report of the master in finding that, as a matter of contract, the intervenor did retain the title and ownership of the rolling stock in question. Whether or not the law applicable to the transaction defeated the express retention of ownership by reason of the failure to record the titles in accordance with the Georgia act of 1889 has been considered and determined adversely to the appellant in the case of *Central Trust Co. v. Marietta & N. G. Ry. Co.*, 48 Fed. Rep. 865, (just decided,) and we see no reason to go over the ground again. It is not pretended in this case that the intervenor had notice of, or is in any wise charged with notice of, the equities alleged to exist between the bondholders of the Marietta & North Georgia Railway Company and George R. Eager, contractor, to construct, and perhaps equip, the said railroad, arising out of the Hambro agreement, and the issuance of certificates thereunder by which Eager obtained the issuance of railroad bonds. Our conclusion of the whole case is that there is no error prejudicial to the appellant in the decree rendered by the court below, and that said decree should be affirmed. And it is so ordered.

HOLLY MANUF'G CO. *et al.* v. NEW CHESTER WATER CO. *et al.*¹

(Circuit Court, E. D. Pennsylvania. September 19, 1891.)

1. CONTRACTS—RIGHTS OF THIRD PERSONS.

The New Chester Water Company made a contract with B. & Co., water-works contractors, to build its works, agreeing to pay them with its stocks and bonds. These stocks and bonds were, as earned, pledged to W. G. H. & Co., to secure advances. After all the advances had been made, said B. & Co. and W. G. H. & Co. and R. D. W. & Co. made a tripartite agreement, which recited that the stock and bonds pledged to W. G. H. & Co. had been sold to R. D. W. & Co., and that B. & Co. represented that the New Chester water-works and three others could be completed for \$300,000, and by which W. G. H. & Co. agreed to advance that sum to B. & Co., to be applied by R. D. W. & Co., who guaranteed the completion of the works of the four undertakings clear of all liens ahead of securities held by W. G. H. & Co., specifying certain proportions of the \$300,000 to be applied to each work. A less proportion of the money than that specified was employed at the New Chester Company's works, but the whole amount, and \$105,000 additional, was expended on the four works. B. & Co. purchased engines for the New Chester water-works from complainants, but only partly paid for them. *Held* that, complainants not being parties to the tripartite agreement, and being strangers to the consideration therein, R. D. W. & Co. were not personally liable for the price of the engines on account of said agreement.

2. CORPORATIONS—STOCKHOLDERS—LIABILITY FOR UNPAID ASSESSMENTS.

Where stock of a corporation has been transferred for labor done, and the good faith of the transaction is not impeached, nor a failure of consideration shown, the holder is not liable personally on the grounds that said stock is unpaid capital stock, and that the unpaid assessments are a trust fund for the payment of the corporation indebtedness.

3. FIXTURES—PUMPING-ENGINES.

B. & Co., a firm engaged in fitting up water-works, ordered from an engine-building company two pumping-engines, to be set up in the works of a water company they were fitting up at Chester, agreeing to pay for them in installments, and that the engine building company should "have a lien on" the "engines and connections," and "should remain in full possession thereof." The engines were erected on land of which B. & Co. then held the legal title, in such a way that they could readily be taken down and removed; and remained under the control of the engine building company's agents, to whom the engines had been consigned at Chester. *Held*, the engines did not become realty, and a valid lien in favor of the vendors existed against B. & Co. and the water companies.

4. CORPORATIONS—NOTICE TO OFFICERS OF LIEN.

The New Chester Water Company transferred all its shares of stock either directly to B. & Co. or to B. & Co.'s employes, and put itself in the "absolute control" of B. & Co., its officers being B. & Co.'s servants. B. & Co. purchased machinery, making it subject to a lien, and placing it in the works of said water company. Some of the directors of the company had actual notice of the lien. *Held*, the company had notice of the lien.

5. SALE—VENDOR'S LIEN—NOTICE.

The retention of open control by a vendor's employe over machinery placed in the works of a company which were being fitted up by the vendee, is notice to said company of the existence of a vendor's lien.

6. SAME—MECHANIC'S LIEN.

The fact that the land and buildings of a water company are not subject to lien under the mechanic's lien laws of Pennsylvania does not prevent a movable piece of machinery, delivered conditionally to such a company, from being subject to a valid contractual lien. *Foster v. Fowler*, 60 Pa. St. 27, discussed.

7. JURISDICTION OF CIRCUIT COURTS—CITIZENSHIP OF PARTIES.

The parties giving a contractual lien on machinery, who, in purchasing the machinery, had acted solely as the agents of the respondents in the suit, and had conveyed away all title to the property, were, subsequently to the filing of the bill, made parties plaintiff by amendment, not for purposes of relief, but to bring all parties before the court. Said parties were citizens of the same state as were the original complainants. *Held*, upon the objection that said parties should have been joined as parties respondent, and, when thus joined, the court had no juris-

¹ Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

diction, that they, being in the position of mortgagors who had parted with all interest in the property, were merely formal parties, and their joinder did not affect the jurisdiction.

8. TRUSTS—ACTIONS RELATING TO TRUST PROPERTY.

The trustee of a corporation mortgage need not be joined as a party defendant in a suit to enforce a specific lien which does not involve the validity of the trust mortgage, or affect its lien, when all the bondholders are before the court, and the joinder would oust the jurisdiction.

9. EQUITY—ENFORCEMENT OF VENDOR'S LIEN.

A bill in equity is the proper means to enforce a contractual vendor's lien on machinery to secure unpaid purchase money.

In Equity. Bill by the Holly Manufacturing Company, a corporation organized under the laws of the state of New York, and having its principal place of business in the city of Lockport in county of Niagara, and a citizen of the state of New York, against the New Chester Water Company; the South Chester Water Company; W. G. Hopper and Harry S. Hopper, trading as W. G. Hopper & Sons; William Bucknell; Richard Wood, George Wood; Walter Wood, and Stuart Wood, trading as R. D. Wood & Co.; the Bienville Water Supply Company, (afterwards, James H. Little, Craig Lippincott, and Harry S. Hopper, trustees, and William Hopper being made parties defendant, and Samuel R. Bullock and J. S. Bullock, trading as S. R. Bullock & Co., being joined as complainants.) Decree for complainants.

Roland Evans, Richard L. Ashhurst, and L. F. & G. W. Bowen, for complainants.

William C. Hannis, for respondents W. G. Hopper & Sons.

W. Ward, for respondents New Chester Water Company and South Chester Water Company.

Richard C. Dale, for intervener, Thomas A. Parott.

ACHESON, J. The proofs in this case are unusually voluminous, and the transactions thereby disclosed are many and complicated. Some matters which we regard as immaterial to the real issues we will not discuss or mention. The controlling facts we find to be as follows:

In the year 1885 charters of incorporation were obtained for four water companies, namely, the New Chester Water Company, the South Chester Water Company, the Penn Water Company, and the Upland Water Company, formed for the purpose of furnishing water for public and domestic use to the city of Chester and adjacent boroughs, in Delaware county, Pa. On December 9, 1886, before any work was done by them, a written agreement was entered into between the four companies in their corporate capacity, all the stockholders thereof individually, and Samuel R. Bullock & Co., a firm of water-works contractors. The leading purpose of the parties to this agreement is expressed in the following clause of the preamble:

"And whereas, the stockholders are desirous of selling their said shares of capital stock, and of transferring and surrendering the absolute control of the water companies, and the vendees (Bullock & Co.) are desirous of purchasing and acquiring the same."

Accordingly the stockholders thereby agreed to transfer all the stock of said companies to Samuel R. Bullock & Co., and to deliver to them

"all the charters, certificates of organization, books, papers, deeds, maps, plans, estimates, stock-certificate books, transfer books, minute books, receipts, accounts, contracts, the corporate seals, and all other property of any and every description, kind, or nature belonging to the water companies, or any of them;" and, in consideration thereof Bullock & Co. agreed to enter into a contract with the water companies, on terms to be arranged, for the construction and equipment of a system of water-works for furnishing water to the places which the companies were authorized to supply. The stockholders having complied with their part of this agreement, the following transactions took place and contracts were entered into, all on March 21, 1887: Resolutions were adopted by the stockholders of the Penn Water Company and Upland Water Company to sell and convey the franchises and property of those companies to the South Chester Water Company, and such written transfers were executed. Resolutions were adopted by the stockholders of the South Chester Water Company to increase its capital stock from \$1,000 to \$600,000, and to issue its bonds for \$300,000, to be secured by a mortgage upon its franchises and property. Resolutions were adopted by the stockholders of the New Chester Water Company to increase its capital stock from \$500,000 to \$1,000,000; to issue its bonds for \$500,000, to be secured by a mortgage upon its franchises and property; and that the company guaranty the said bonds of the South Chester Water Company. The New Chester Water Company and the South Chester Water Company entered into an agreement, which, *inter alia*, provided that the former company, by its machinery, and from its reservoirs, would supply water through the pipes of the latter company to its territory. And finally a contract in writing was entered into between Samuel R. Bullock & Co. and the New Chester Water Company, whereby the former agreed to provide the necessary land for an engine and boiler house and a reservoir site, and to furnish all material and labor for and to construct and equip water-works at Chester, to be accepted by the water company after completion and satisfactory inspection and test, for the consideration to the contractors of \$500,000 in the mortgage bonds of the water company and 17,000 shares of its capital stock of the par value of \$50 each. At that date, March 21, 1887, the stockholders of the New Chester Water Company and the number of their respective shares were as follows: Samuel R. Bullock & Co., 9,995 shares; J. L. Forwood, 1 share; W. H. Miller, 1 share; E. F. Fuller, 1 share; Ellis Morrison, 1 share; Charles M. Berrian, 1 share. Each of the last-named five persons then held one share of stock in each of the other-named water companies, Bullock & Co. holding the rest of the stock thereof. The proofs fully warrant the conclusion that these holdings of stock by Forwood, Miller, Fuller, Morrison, and Berrian were nominal and formal, merely to give a legal *status* to the organization. These five persons constituted the board of directors of the New Chester Water Company, Forwood being president, and Miller secretary. Fuller was chief engineer of the company, and an employe of Bullock & Co. Berrian was the attorney of the company, and private counsel of Mr. Bullock. All these five directors were com-

pletely under the control and direction of Samuel R. Bullock & Co. Emil Woltman, the treasurer of the company, was the confidential clerk of that firm.

Samuel R. Bullock has here testified:

"An arrangement was perfected whereby the *personnel* of the New Chester Water Company was subordinated to the management, direction, and control of my firm, based upon the idea that we would carry out the objects for which that company was incorporated."

This statement is true. At the dates of the several transactions to which reference is about to be made, and from March 21, 1887, continuously down until November, 1888, Samuel R. Bullock & Co. had "the absolute control" of the New Chester Water Company, and the organization of that company was wholly under the management and practically in the hands of that firm. The directors acquiesced in whatever that firm did, and practically were but its agents. On April 1, 1887, the New Chester Water Company executed a mortgage of its franchises and property then owned or thereafter to be acquired to the Farmers' Loan & Trust Company, a corporation of the state of New York, to secure payment of \$500,000 of its bonds, payable to Samuel R. Bullock & Co., or bearer; and the South Chester Water Company executed a like mortgage to the same trustee to secure like bonds to the amount of \$300,000. On May 31, 1887, an agreement in writing was entered into between the South Ward Water-Works, a corporation, the city of Chester, and the New Chester Water Company, whereby, for a consideration mentioned, and moving from the last-named company, the first-named corporation agreed to sell, transfer, and convey all its property, real and personal, to the New Chester Water Company. On June 13, 1887, a contract in writing was made between William G. Hopper & Co. and Samuel R. Bullock & Co., whereby, for a specified consideration, the former agreed to furnish to the latter advances of money upon the bonds of the New Chester Water Company, as earned by and delivered to Bullock & Co., and the notes of that firm, with a deposit as further collateral security of all the stock of the New Chester Water Company and the property of the South Ward Water-Works. On July 7, 1887, Hopper & Co. made a special advance of about \$300,000 to Bullock & Co. to enable them to consummate the purchase of the South Ward Water-Works, and as security therefor Bullock & Co. delivered to Hopper & Co. the above-mentioned \$300,000 of bonds of the South Chester Water Company. In pursuance of written authority signed "J. L. Forwood, President," and "W. H. Miller, Secretary," the real estate of the South Ward Water-Works, by the deed of that corporation dated and executed July 7, 1887, was conveyed to Samuel R. Bullock in fee. On July 12, 1887, Samuel R. Bullock, by deed of that date, conveyed the said real estate to H. S. Hopper, who, on July 29, 1887, executed and gave to Bullock an instrument in writing setting forth that the conveyance to him was made as security for advances made and to be made by Hopper & Co. to Bullock & Co. All the advances which Hopper & Co. ever made under their contract of June 13,

1887, were made prior to September, 1887. On August 3, 1887, Samuel R. Bullock & Co. and the Holly Manufacturing Company, a corporation of the state of New York, entered into a written contract, whereby the latter agreed to manufacture two pumping-engines of specified capacity, and set up the same at the city of Chester for the sum of \$50,000, payable \$8,333.33 on each engine when delivered in Chester, and the like sum on each engine when it has been properly run 30 days, and the like sum on each engine 30 days thereafter. The contract contains the following clause:

"When said engines and connections are completed and ready for service, and on notice thereof to the party of the first part (Bullock & Co.) to that effect, the same shall be subjected to a fair trial of their capacity and efficiency for not exceeding twenty-four hours, and, on the successful testing thereof, the liability of the party of the second part (Holly Company) hereunder shall cease and determine; but it is expressly understood and agreed that the party of the second part shall have a lien on all of said engines and connections, and the party of the second part may remain in and have full possession thereof, until the whole amount of the purchase price of said engines and connections shall have been fully paid to the party of the second part or its assigns."

One payment only, namely, the sum of \$8,333.33, was made to the Holly Company under its contract, and at the date of the bringing of this suit the balance, or sum of \$41,667, was due that company on said engines. On October 26, 1887, a tripartite agreement was entered into between Samuel R. Bullock & Co., R. D. Wood & Co., and William G. Hopper & Co., whereby, after reciting contracts between Bullock & Co. and Hopper & Co. for advances by the latter to the former upon a pledge of bonds and stocks of water companies, an assignment by Bullock & Co. to Wood & Co. of the bonds and stock so pledged as collateral security for materials they had furnished, and contracts between Bullock & Co. and Wood & Co., by which the latter had undertaken to complete water-works at Chester, Greencastle, and Mobile, and the representation by Bullock & Co. that \$200,000 would enable them to complete those works, William G. Hopper & Co. agreed to advance to Bullock & Co. \$200,000, the same to be applied by Wood & Co. to the completion of the water-works at the three named places in certain specified proportions; Wood & Co. to present to Hopper & Co. the detailed applications by Bullock & Co. for money as needed, and Hopper & Co. thereupon to furnish such amounts (within the limit stated) to Wood & Co., who should give their checks for the same to Bullock & Co., who should disburse the moneys for the purposes aforesaid; and, in consideration of this advance by Hopper & Co., Wood & Co. agreed to procure the completion of the water-works at the three named places "clear of all liens ahead of the securities held by William G. Hopper & Co." Under this agreement Hopper & Co. advanced the \$200,000, which was all applied to the water-works at the three named places, but not in the proportions mentioned in the contract. The specified amount applicable to the works at Chester was \$129,800, whereas the sum actually applied was \$61,000 only. But the representation by Bullock & Co. that \$200,-

000 would suffice to complete the works at the three places proved to be incorrect, for, besides the money so advanced by Hopper & Co., Wood & Co., in the completion of those works, used \$105,000 of their own money, and even then the balance of \$41,667 due the Holly Company on the pumping-engines at Chester was left unpaid, and also \$25,000 due that company on engines at Mobile; and it would seem some other debts remained unsettled. All the advances by Hopper & Co. under the tripartite agreement were made before the latter part of January, 1888, except a trifling sum, which was paid shortly afterwards.

In October, 1887, the Holly Company shipped one of the pumping-engines to Chester, and in February, 1888, the other. Each was consigned to that company itself, and its agents at Chester received the engines, and proceeded, at its expense, to put them in place. They were set on the top of masonry foundations, and were attached thereto by a number of two-inch iron bolts. They could not be operated or tested otherwise. The engines stand in a brick building erected on land which the South Ward Water-Works Company agreed to sell and convey to the New Chester Water Company, but actually conveyed to Samuel R. Bullock, who conveyed the same to H. S. Hopper for the purpose set forth in the paper executed by the latter, as already mentioned. Each engine weighs from about 70 to 80 tons; but they can easily be disconnected from the foundations on which they rest without disturbing the foundations, and can readily be taken apart and through the door of the engine-house without injury to the building.

When the first engine was shipped to Chester, John Lockman, by order of the Holly Company, and as its agent, went there to superintend the erection of the engines and to take charge and control thereof. This he did, remaining constantly in charge. The work of setting them up ready for service was not completed until some time in July, 1888, but for the delay the Holly Company was not responsible. From the time the first engine was got in working order Lockman acted as engineer, and he has maintained the exclusive charge and custody of both engines. He has carried a key of the building. His wages have all been paid by the Holly Company, and he has acted throughout as its agent. No formal test of the pumping capacity of the engines, as provided by the contract, was ever made, nor was there any formal acceptance of them by any one. When ready, they were set to work pumping water into the reservoir, and have continued to do so under Lockman's control. It is shown that explicit instruction was given by the Holly Company to Lockman to hold possession of the engines for that company, but the exact date thereof does not appear. Lockman states it was given about midsummer, 1888. Samuel R. Bullock, referring to conversations he had with the officers or representatives of the Holly Company, testified thus: "They told me that they proposed to have Lockman remain there as their representative in charge of the pumps, but they didn't want to interfere with the operations of the company, so he could act as engineer, and run the pumps right along;" and Mr. Bullock further testified that he consented to Lockman remain-

ing in possession and charge, as desired by the Holly Company. This testimony of Mr. Bullock is uncontradicted, and there is no reason to doubt its truthfulness. The bill in this case was filed September 19, 1888, while Lockman was still in control of the pumping-engines, and he has since maintained his charge and custody thereof in the manner stated, as the representative and under the pay of the Holly Company. In November, 1888, Bullock & Co. assigned their entire remaining interest in the bonds and stock of the New Chester Water Company to Wood & Co., and at the same time delivered to them resignations of the officers of the water company. Thereupon new officers were elected, and the water company then took the actual possession of the works, but Lockman's control of the engines continued. Hopper & Co. and Wood & Co. together hold substantially the entire mortgage bond issue of \$500,000 of the New Chester Water Company. Sixteen bonds of \$1,000 each are, indeed, held by Dyer and Black under a pledge made in July, 1887, but only to indemnify them against a claim which the water company itself may have against them as sureties for Bullock & Co., touching a lien of \$15,000 which they were to remove. All the bonds and stock of the New Chester Water Company which Bullock & Co. were to receive under their construction contract had been delivered to them probably before the first pumping-engine reached Chester, and certainly before its erection began. On March 31, 1890, Samuel R. Bullock and wife executed and delivered to the New Chester Water Company a deed of conveyance of the land upon which the engine-house and pumping-engines stand.

Upon this state of facts two questions are presented for our determination: *First*, whether R. D. Wood & Co. are under any personal liability to the Holly Manufacturing Company; and, *second*, whether that company has a valid lien upon or claim to the pumping-engines at Chester enforceable in this suit.

The first question, it seems to us, is not difficult of solution. The Holly Company was not a party to the tripartite agreement of October 26, 1887. That instrument contains no provision expressed to be in its behalf. Neither was any money thereby specifically set apart to pay for pumping-engines either at Chester or Mobile. The agreement was for the mutual benefit of the three parties who executed it, and to promote a purpose in which they had a common interest. To secure the faithful application to that object of the fund which Hopper & Co. proposed then to advance it was stipulated that it should pass through the hands of Wood & Co., but the paper provided that ultimately the money should be distributed by Bullock & Co. It was then believed that \$200,000 would complete the water-works at Chester, Greencastle, and Mobile. So Bullock & Co. had represented. Confiding in the correctness of that estimate, the paper provided for the apportionment of the fund between the three places. But this did not give third persons any right to control the application of the fund, or any vested interest therein. The parties to the agreement did not relinquish their joint dominion over the fund. As between themselves, the agreed apportion-

ment in the first instance was binding, but it was not irrevocable by them. Therefore when they discovered that the fund was insufficient to accomplish all that was intended it was competent for them to change the apportionment. This was done by their mutual consent, and no third person had any right to complain. In point of fact, every dollar of the money so advanced by Hopper & Co. was used in the completion of the water-works at the three places, although not in the proportions originally contemplated.

We note the recital in the tripartite agreement that "Samuel R. Bullock & Co. and R. D. Wood & Co. have entered into certain contracts by which the said R. D. Wood & Co. have agreed to complete the water-works at Chester, Greencastle, and Mobile." But those contracts are not in evidence. We do not know their contents, and they are not here available to the Holly Company. The stipulation that Wood & Co. would procure the completion of the water-works "clear of all liens ahead of the securities held by Wm. G. Hopper & Co.," was for the special benefit of that firm, and the Holly Company is a stranger to the consideration upon which it was based. Moreover, Wood & Co. have made advances out of their own pockets to the amount of \$105,000 not contemplated by the parties. Notwithstanding this unexpected result, they may still be legally answerable to Hopper & Co., but we do not perceive that the Holly Company has any right to equitable relief by virtue of anything contained in the tripartite agreement. Nor does the fact that Bullock & Co. assigned all their remaining interest in the bonds and stock of the New Chester Water Company to Wood & Co. affect the case. The good faith of that transfer is not impeached. Neither, under the proofs, can it be maintained that the stock of the water company in the hands of Wood & Co. is unpaid capital stock, and hence a trust fund for the payment of the debts incurred on behalf of the company. We are, then, of the opinion that no equitable ground to charge R. D. Wood & Co. personally is shown.

We pass now to a consideration of the rights of the Holly Manufacturing Company under the clause already quoted of the contract of August 3, 1887. The language there used is plain, and the purpose unmistakable. The contract not only created a lien upon the engines for the purchase price, but it also provided that the Holly Company "may remain in and have full possession" thereof until the price is paid. The privilege thus conferred upon the Holly Company to maintain possession evidently was for the better security of the purchase-money. This right, it is to be assumed, was to be exercised in such a manner as was consistent with the nature of the property and the use to which it was designed. But certainly the parties did not contemplate any such unqualified delivery of the pumping-engines as would wholly defeat the exercise by the Holly Company of its right to possession. Manifestly the engines were not to become inseparably incorporated with the real estate until they should be subjected to the prescribed "trial of their capacity and efficiency" and were accepted. Had they failed to meet the required test, the vendor would have been compelled to take them away.

Neither was it intended that the engines should be converted from personalty into realty until they were paid for. The Holly Company's right to "remain in and have full possession" of the engines plainly was inconsistent with such a conversion. All this, we think, is very clear. And we here observe that at the date of the contract Bullock & Co. were in possession of the real estate, and the legal title was in Bullock, for the transaction between him and H. S. Hopper—the deed to the latter, and his written acknowledgment—constituted only a mortgage. Bullock & Co., then, were in a position to stipulate as they did with respect to the Holly Company's lien for the purchase money and its right to maintain possession of the engines as additional security.

Is there any rule of public policy which will defeat the undeniable intention of the parties as the same appears on the face of the contract? Now while, by the settled law of Pennsylvania, where personal property is delivered under a conditional sale a provision in the contract preserving to the vendor the title until the property is paid for is void as respects execution creditors of the vendee, or an innocent purchaser from him, yet, as against the vendee himself, the seller may reserve the right of property in the goods until payment, and in default he may reclaim them, or resort to legal remedies. *Hank v. Linderman*, 64 Pa. St. 499; *Krause v. Com.*, 93 Pa. St. 421. All the Pennsylvania cases agree that such a reservation of title to the goods as security for the price is valid as between the parties themselves. *Peck v. Heim*, 127 Pa. St. 500, 17 Atl. Rep. 984; *Summerson v. Hicks*, 134 Pa. St. 566, 19 Atl. Rep. 808; *Levan v. Witten*, 135 Pa. St. 61, 19 Atl. Rep. 945. In the very latest case on this subject, —*Hineman v. Matthews*, 138 Pa. St. 204, 20 Atl. Rep. 843,—where there was a sale of timber on an agreement that the title was not to pass until payment, but the vendee was permitted to remove the timber and convert it into lumber, and then failed to pay, whereupon the vendor took possession of the lumber, it was ruled that he could hold it against a subsequent execution creditor of the vendee. In *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51, upon an exhaustive review of the decisions, the conclusion was reached by the supreme court of the United States that by the general rule of law, unaffected by local statutes or local decisions, a conditional sale of personal property, accompanied by delivery, is valid both as against the parties and third persons; and it was further shown that by the almost unanimous opinion of the courts a purchaser buying with notice from the conditional vendee cannot hold the property as against the claim of the original vendor. The case of *Gregory v. Morris*, 96 U. S. 619, is instructive. There a contract of sale of cattle gave the vendor a lien thereon for the price, and authorized him to designate a person to go along with and retain possession of the cattle, who, upon non-payment, was to sell the whole or a portion of the cattle. The court sustained the lien as between the parties. Chief Justice WAITE, speaking for the court, said:

"The lien at common law of the vendor of personal property to secure payment of purchase money is lost by the voluntary and unconditional delivery of the property to the purchaser; but this does not prevent the parties from con-

tracting for a lien, which, as between themselves, will be good after delivery. So, ordinarily, when the possession of a pledge is relinquished, the rights of the pledgee are gone. In this case, however, Morris was not willing to rely upon the lien which the law gave him as vendor, or upon a mere pledge of the property, but required a special contract on the part of Gregory, securing his rights. This contract created a charge upon the property, not in the nature of a pledge, but of a mortgage. The lien, as between the parties, was not made to depend upon possession, but upon a contract, which defined the rights both of Morris and Gregory, and the power of Morris for the enforcement of his security."

That it was competent for the parties here to agree that the pumping-engine should remain personally until paid for, is not to be doubted under the Pennsylvania authorities. *Shell v. Haywood*, 16 Pa. St. 523; *Harlan v. Harlan*, 20 Pa. St. 303. In *Shell v. Haywood*, *supra*, the court declared that the rule of severance and removal is one subject to the control and modification of the parties representing the property, who may vary the same according to their convenience, pleasure, or regard for right; for, (said CHAMBERS, J.,) "whether attached to the realty or not, or in whatever manner attached, is immaterial, when the parties agree to consider it personal property." All the Pennsylvania cases (and they deal with boilers, engines, and machinery generally) concur in the view that it is not the character of the physical connection which constitutes the test of annexation, but intention is the true legal criterion. *Hill v. Seaward*, 53 Pa. St. 271; *Benedict v. Marsh*, 127 Pa. St. 309, 18 Atl. Rep. 26. It was therefore held in *Vail v. Weaver*, 132 Pa. St. 363, 19 Atl. Rep. 138, that the engine, machinery, and appliances of an electric light plant erected upon and firmly attached to real estate do not pass to a purchaser of the real estate at a sale upon a mortgage of the realty, made and recorded before the plant was placed by the mortgagor on the mortgaged premises, unless it was the intention to make the plant a part of the realty when it was erected. This decision seems to us to be a decisive answer to the argument that the pumping-engines, as after-acquired property, come within the grasp of the mortgage of April 1, 1887, to the Farmers' Loan & Trust Company, in such a manner that the Holly Company's lien was displaced.

This case belongs rather to that class of cases of which *U. S. v. Railroad Co.*, 12 Wall. 362, is the exponent, than to the class represented by *Porter v. Steel Co.*, 122 U. S. 267, 7 Sup. Ct. Rep. 1206. The subject-matter of contest in the former of these two cases was after-acquired rolling stock of a railroad, which by the purchase contract was charged with a lien for the price. To the proposition that a prior general mortgage which in terms covered after-acquired property attached to this rolling stock as soon as acquired, to the displacement of the contractual lien, the court, speaking by Mr. Justice BRADLEY, said:

"That doctrine is intended to subserve the purposes of justice and not injustice. A mortgage intended to recover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time."

It was there added that the result would be different in the case of rails or other materials which became a part of the principal thing. In the case of *Porter v. Steel Co.*, *supra*, railroad bridges were the subject-matter of controversy. But rails and bridges necessarily become an actual part of the permanent structure of a railroad, and are inseparable from it without destruction to the road. In that respect they are like the stones and bricks of a house. But detachable and removable machinery is susceptible of ownership distinct from the land and buildings, and may be the subject of particular and separate liens. *Harlan v. Harlan*, *supra*; *Benedict v. Marsh*, *supra*; *Vail v. Weaver*, *supra*. In the present case it is clear from the terms of the contract of August 3, 1887, that the parties thereto did not intend that the pumping-engines should be converted from personalty into realty until paid for, and the evidence shows beyond any doubt that the engines can be easily detached from their fastenings, and removed without any injury to them or damage to the building.

We think it would be a work of supererogation to enlarge upon the proposition that, as against Samuel R. Bullock & Co., the Holly Company's contractual lien is good. They at least cannot gainsay its validity. Has the New Chester Water Company, upon the undisputed facts of this case, any better right? That company, indeed, was not formally a party to the contract of August 3, 1887, but, if regard be had to the substance of things, it must be treated in this matter as subject to the terms of the contract. For the purpose of the erection of the works at Chester, the water company, as we have seen, had put itself in the "absolute control" of Bullock & Co. In the expressive language of Mr. Bullock "the *personnel* of the New Chester Water Company was subordinated to the management, direction, and control" of his firm. To all intents and purposes the directors and other officials of the water company were the mere servants of Bullock & Co. It appears that some of the directors had positive knowledge of the terms of the contract with the Holly Company, and, under the circumstances, notice thereof is to be imputed to them all. Moreover, the open control which Lockman exercised over the pumping-engines was sufficient to affect the water company with notice of his principal's lien. But, in truth, with respect to this transaction, the distinction between Bullock & Co. and the water company is purely formal and fictitious. Bullock & Co. were the water company in everything but name. They really held the entire capital stock. Now, no court has ever yet decided that an incorporated company in this artificial capacity can be deemed to be ignorant of a matter affecting the company which is known to every individual stockholder. In our judgment, to treat the water company as a *bona fide* purchaser or possessor of the engines without notice of the contractual lien of the Holly Company would be unreasonable and unjust. The water company cannot honestly retain the engines without paying the balance of the purchase price. But to defeat the Holly Company the defendants invoke the decision in *Foster v. Fowler*, 60 Pa. St. 27, that the land and buildings of an incorporated water company

are not subject to a lien under the mechanic's lien act. The Holly Company, however, claims nothing under the mechanic's lien law, nor a lien of the character thereby given. It is asserting a contractual lien, which binds a certain removable piece of machinery, which was not delivered absolutely, but *sub modo*. It would, then, be a misconception of the principle of that decision to apply it here. If a water company should contract for a pumping-engine, to be paid for when set up and satisfactorily tested, would any one contend that, having got the engine within its walls, it could hold on to it without paying for it? But what difference does it make that a short credit of 60 days is given, the contract reserving to the vendor a lien with a possessory right as further security? We fail to see that any one has equities superior to those of the Holly Company. No rights of third persons have intervened. When William G. Hopper & Co. and R. D. Wood & Co. first acquired knowledge of the contract of August 3, 1887, is the subject of dispute; and the testimony is conflicting. Those firms, however, stood in close relations to Bullock & Co., and the facts about the contract for the pumping-engines were easily discoverable by them. The tripartite agreement of October 26, 1887, discloses that they were not unmindful of the possible existence of "liens ahead of the securities held by William G. Hopper & Co.," and it was thereby agreed that the firm should be protected by Wood & Co. against all such liens. Certain it is that neither of those firms advanced any money on the faith of the pumping-engines. Neither did the water company itself part with any of its bonds or stock on the faith thereof. Finally, it appears that the bonds of the water company are still in original hands, Hopper & Co. and Wood & Co., between them, owning substantially all of them, and really representing the whole issue.

But the jurisdiction of the court is challenged because of the joinder as co-plaintiffs with the Holly Company of Samuel R. Bullock & Co., whose true place the defendants contend is on their side; and it is insisted that when so placed the jurisdiction is gone, they being citizens of the same state with the Holly Company. Bullock & Co. were brought upon the record after the bill was filed by an amendment, which set forth that they joined as parties plaintiff, "not as seeking any special or distinct relief in the premises in this proceeding, but in affirmance of the rights of their co-plaintiff, the Holly Manufacturing Company, and in order to invest the court with full jurisdiction in the premises, so that a complete decree protecting the rights of all parties can be made." Their voluntary joinder, with respect to the Holly Company's supposed equitable rights against Wood & Co., is put upon the ground that Bullock & Co. stood to the Holly Company in the relation of trustees, holding the legal title to the contract; and, their interest being with that company, they might arrange themselves on the same side with it, agreeably to the principle recognized in *Railroad Co. v. Ketchum*, 101 U. S. 299. This position we need not discuss, our conclusion upon that branch of the case being adverse to the Holly Company, upon a consideration of the merits of the controversy. So far as the bill seeks to enforce the Holly Company's

lien, it is manifest that there is no dispute between the company and Bullock & Co. Samuel R. Bullock, indeed, was one of the principal witnesses in the case on behalf of the Holly Company to establish its lien, and hence a decree in its favor would conclude him and his firm, if there were any open question on that subject affecting them. But there is no such open question. The Holly Company is not seeking any relief, and needs no decree against Bullock & Co. It is urged, indeed, that that company is proceeding as for a foreclosure without making its debtor, who is the owner of the property, a party defendant. But this is a mistaken view. The ownership of the engines is not in Bullock & Co., and, in truth, was never intended to be in them, for in the purchase they acted in the interest and behalf of the New Chester Water Company. But there can be no longer any pretense of ownership in Bullock & Co., for Samuel R. Bullock, by his deed, has conveyed the title to the real estate to the water company. It is laid down in 2 Jones, Mortg. § 1404, that in an equitable suit for foreclosure the mortgagor, after he has conveyed the whole of the premises mortgaged, is not a necessary party to the suit. Moreover, Bullock & Co. have assigned all their interest in the bonds and stock of the water company to Wood & Co. Therefore they have no longer any interest, near or remote, in this particular controversy. They are altogether formal parties, whose presence does not oust the jurisdiction of the court, coming within the rule laid down in *Wormley v. Wormley*, 8 Wheat. 451, where the applied test was whether a decree was sought against the party. Here the Holly Company seeks to enforce a charge *in rem*, and Bullock & Co. have neither title to nor interest in the thing.

To the objection that the Farmers' Loan & Trust Company is not joined as a defendant in this suit, it is sufficient to say that, as substantially the whole body of bondholders is before the court, the presence of their trustee is wholly unnecessary. Moreover, the enforcement of the Holly Company's specific lien does not involve the validity of the trust mortgage, nor affect its standing as respects the principal mortgaged thing, the controversy relating to a mere incidental matter. Again, as the joinder of the trust company might oust the jurisdiction of the court, the omission to make it a party defendant is fully warranted by equity rule 47. That equity has jurisdiction to enforce liens, whether upon real or personal property, is clear. 2 Story, Eq. Jur. § 1216; 1 White & T. Lead. Cas. Eq. 1108, note to *Cuddee v. Rutter*. In *Schotsmans v. Railway Co.*, L. R. 2 Ch. App. 332, it was declared that a bill in equity will lie to enforce the claim for the price of goods of a vendor who, by the exercise of his right of stoppage *in transitu*, had reinvested himself with the legal title. Lord CAIRNS there said (page 340:)

"I should be prepared to hold this to be a case entirely within the province of this court, and depending on the ordinary principles which regulate in equity the relations of mortgagor and mortgagee, whether of real or personal property, although, for obvious reasons, cases of this kind are more generally and more conveniently brought into a court of law."

It will be remembered that in *Gregory v. Morris*, *supra*, Chief Justice WAITE observed that the contract there created a charge upon the cattle for the purchase-money in the nature of a mortgage. In *Fletcher v. Morey*, 2 Story, 555, 565, Judge STORY said:

"In equity there is no difficulty in enforcing a lien or any other equitable claim constituting a charge *in rem*, not only against real estate, but upon personal estate, or upon money in the hands of a third person, whenever the lien or other claim is a matter of agreement against the party himself and his personal representatives, and against every person claiming under him, voluntarily or with notice; * * * for every such agreement for a lien or charge *in rem* constitutes a trust, and is, accordingly, governed by the general doctrine applicable to trusts."

We have only to add that this case seems to be peculiarly one for a court of equity, in view of the situation of the property, and because the court can grant a reasonable time for the payment of the lien, and, in the event of a sale, may prescribe equitable terms.

Upon the whole case, then, we are of the opinion that the contractual lien of the Holly Manufacturing Company upon the pumping-engines here in question is valid and binding, and is enforceable in this suit. Counsel may prepare and submit the draft of a decree in accordance with the views expressed in this opinion.

ÆTNA INS. Co. v. BRODINAX *et al.*

(Circuit Court, S. D. Georgia. April Term, 1883.)

1. WIFE'S SEPARATE ESTATE—POWER TO CHARGE—INSTRUMENT OF SETTLEMENT.

Code, § 1783, declares that "the wife is a *feme sole* as to her separate estate, unless controlled by the settlement. Every restriction on her power must be complied with. But, while a wife may contract, she cannot bind her separate estate by any contract of securityship, nor by any assumption of the debts of her husband." *Held*, that where a husband settled property on his wife free from all his liabilities, except such incumbrances as the two together shall request the trustee to make, a mortgage given thereon to secure a debt of the husband is valid.

2. SAME.

Such an exception is not repugnant to the grant, but is merely a qualification thereof. Affirmed in 9 Sup. Ct. Rep. 61.

In Equity. Suit by the Ætna Insurance Company against Martha Brodinax and others to foreclose a mortgage. Decree for plaintiff.

Joseph Ganahl, for complainant.

J. B. Cumming and Geo. A. Mercer, for defendants.

MCCAY, J. On the 11th day of June, 1866, Benjamin E. Brodinax, of the county of Richmond, Ga., executed a deed in due form under the laws of Georgia, and in consideration of his love for his wife, Martha Brodinax, to a certain parcel of land in said county to William E. Brodinax, in trust for the said Martha during her life, with other limitations not here important to be considered. The deed contained various other

provisions, as for the alienation and reinvestment of the estate; for the appointment of a new trustee in case the trustee, Brodinax, should fail to act, or die; also, for the making of liens and mortgages on the property,—in each of which cases it was provided that the husband and wife should, in writing, join in what was done. The deed declared that the property should be for the use, benefit, and behoof of the said Martha, free from the debts, contracts, and liabilities of her present or any future husband, except such incumbrances or liens as by the written direction of the grantor and the said Martha might be made thereon. W. E. Brodinax accepted the trust. In January, 1858, he resigned, and the grantor and wife in writing appointed Ephraim Twedy as successor, who accepted. On the 14th of June, 1866, three days after the date of the deed, the trustee, in pursuance of the written request of the grantor and wife, executed a mortgage deed of the premises to the treasurer of the Soldiers' Loan & Building Association, a body corporate, to secure the loan of \$2,000. On the 11th of May, 1867, the trustee, in pursuance of the written request provided for in the deed, executed another mortgage to the complainant for \$3,000; the same being a debt due by note from the said Benjamin to the complainant. On the 4th of December, 1868, the complainant bought the first mortgage, and this bill is filed to foreclose these two mortgages. The defense set up is practically as follows: That both the debts secured by the mortgages were the individual debts of Benjamin E. Brodinax, and that under section 1783 of the Georgia Code it is illegal for the wife to pledge her separate estate to secure her husband's debts. Issue was taken as to the debt covered by the first mortgage, and, though the wife testified that she got no part of the proceeds of the said debt, yet it did not appear very clearly that the trustee did not, nor in fact whose debt it was, nor what was the consideration. As, however, under the view I take of the case, it is wholly immaterial whether it was the debt of the wife or the husband, it is unnecessary to go into that question.

The sole question in the case is whether, under such a deed, it is competent for a married woman, under the laws of Georgia, to pledge the estate granted for her husband's debts. By the terms of the deed it was to be free from the contracts, debts, and liabilities of the husband, except such liens and incumbrances as they might jointly, in writing, agree to place upon it. This language can have but one meaning. It is an exception to the clause of the deed which declares the property was not to be subject to the debts, etc., of the husband, and the inference is almost conclusive that the intent was to say, unless these debts, etc., are by the written direction of both husband and wife, by special lien or incumbrance, made such a charge thereon. It has been argued that this provision was inconsistent with the grant, and therefore void; but it is well settled that such restrictions on a separate estate to a married woman are not to be construed like restrictions on a legal estate to persons *sui juris*. The wife has only such power as the deed gives her, and the whole deed is to be taken together. An inconsistency, to be void, must be totally inconsistent,—must destroy the estate: if it only fetter it or qualify,

it is still good. 2 Story, Eq. Jur. §§ 1382-1384, and the cases there referred to. See, also, *Kempton v. Hallowell*, 24 Ga. 52. And this is the law of Georgia, even of legal estates to persons *sui-juris*. Section 2697, Code 1873. So that this case must turn, as I think, solely on the special provision of the Georgia Code of 1873. That Code, in substance, provides, first, that, to create a separate estate in the wife, no words of separate use are necessary; the appointment of a trustee, or any words sufficient to create a trust, is enough. Section 2307, Code 1873. Hence, under this deed, a separate estate would be created, although no words of separate use are used. The Code also provides as follows, (Code, § 1783:)

"The wife is a *feme sole* as to her separate estate, unless controlled by the settlement. Every restriction on her power must be complied with. But, while a wife may contract, she cannot bind her separate estate by any contract of securityship, nor by any assumption of the debts of her husband; and any sale of her separate estate to a creditor of her husband in extinguishment of his debts shall be absolutely void."

It may be added that the supreme court of Georgia, before the adoption of the Code, had established the doctrine that, however general the words of a deed to a married woman were, yet if it provided, as does this, that the estate was to be free from the debts, contracts, etc., of the husband, these were words of restriction upon the wife, and she could not pledge her estate for her husband's debts. Taking these decisions and the provisions of the Code together, it is contended that, admitting the words of this deed to be a power to so pledge, yet nevertheless the power does not exist, because such a power is illegal, contrary to the statutes, and therefore void. It is claimed that, whatever may be the words of the deed, however strong the language of the grantor, it is illegal, and therefore impossible for him to make it one of the terms of the grant that the grantee, if she be a married woman, shall have power to pledge the estate for the debt of her husband. It is claimed that the statutes plainly indicate it to be contrary to the policy of the law that a married woman shall, under any circumstances, have such a power. Without question, if she be restricted by the terms of the deed, or if the deed be general, she would not have that power. But here is a case where the power is expressly declared. There is first a separate estate created in the wife, and this is plainly upon condition on the part of the grantor that he and the wife may put liens upon it to secure his contracts and liabilities. This property belonged to the husband. Of his own free will, and for the love he bore his wife, he gives it to her on these terms. Did she ever get any estate except according to these terms and with this power? What was the intent of the statutes? Plainly, to protect the wife in the estate granted; to provide that, if anybody saw fit to give a married woman an estate with the expressed intent that it should be for her benefit, she should neither be "kicked nor kissed" into an appropriation of it, and to declare that any separate estate coming to her other than by deed, or in any unqualified way, shall not be capable of being used by her to secure her husband's debts, or to discharge them. This

clause, however, it will be noticed, does not declare that a deed granting an estate to a married woman may not qualify that grant by declaring that she shall have power so to pledge it. It is perhaps wise enough that the law should restrict her when the deed is silent, or when she becomes the unqualified owner of a separate estate. It is fair enough to infer that, if one intends a married woman to have an estate, she shall not be subject to the influences of her husband for its appropriation to the security or payment of his debts. But, if the grantor expressly says that she shall have such power, is not the inference that she cannot exercise that power a most shocking one? The mistake is in supposing that it was the intent of the law to protect the wife,—to establish a rule of domestic or marital economy that under no circumstances shall a "Georgia" wife be in such a position as that she shall be capable of using an estate for the payment of her husband's debts, even if the grantor of that estate so expressly declared, or even if that be one of the terms of the deed in which the grant is given. To lay down such a rule would, as I think, be a great wrong to married women. Many a husband would be willing to settle property on the wife, provided she had the power to come to his relief on proper occasions, who would refuse to do so if in such a contingency she was to be powerless. Many a father-in-law would be willing to settle property on his son's wife, provided she had such power, who would decline to do so if she was to be powerless in case of pecuniary trouble on the part of the husband. And this view of the meaning of this section is in harmony with the history of separate estates and with several other instances in the law of disability put upon persons for the performance of otherwise legal acts. At common law, a wife could make no contracts, sell no land, could not even make a will; yet it was always held that, if the instrument creating an estate gave such a power, even a married woman might execute it. So, too, an infant may, by a deed creating an estate in his favor, be clothed with power to dispose of it by will before he becomes capable of making a will generally. Indeed, it may be stated as a general rule that, if an instrument creating an estate provide for some specific mode of its disposition, it not only must be disposed of in that way, but that it may be sold and disposed of in that way although the person to whom the power is given, would not, under the general law, have a capacity to do such acts. And this proceeds in the idea that the owner of property has power to dispose of it, or provide for its disposal, at his discretion.

The contention that this provision of the Georgia Code is intended to declare it to be the policy of the state that under no circumstances shall a married woman have such a power seems to me far-fetched, and calculated to place an unnecessary and unnatural restraint upon the disposition of property to married women. The Code is, in my judgment, intended, not to protect the wife, but to protect the estate granted to her; to carry out either the expressed or the presumed intentions of the grantor, and, generally, to say, if she have an estate to her separate use, she shall not dispose of it to pay her husband's debts. This is a different thing entirely from the case at bar, where it is distinctly provided, if the

wife see fit,—if she and her husband concur in writing,—that such a power shall exist. She only gets the estate on these terms, and to say that she shall not exercise the power thus expressly granted is to confer on her an estate never contemplated by the grantor. Nor, as it seems to me, is there any analogy between a case like this and the case of a limitation over contrary to law or to public policy, as conditions in the restraint of marriage, and the like. These cases, as their history shows, turn upon the public evils growing out of such limitations and restrictions, while the history of this provision shows an intent to protect the estate of the wife, and not to establish such a rule of the marital relations as would say that it shall be illegal for a grantor to put the wife in any such situation. Upon the whole, therefore, I am of the opinion that the original deed conferred upon the wife the power here complained of, and, that being the case, the mortgages are good, even though they be securities for the debt of the husband.

Something was said in the argument to the effect that, as a second mortgage was made to secure a past-due debt of the husband, it was therefore without consideration; but, if this was his debt, it comes within the scope and intent of the deed, whether then due or merely then contracted. The husband made the deed on these terms, and, if this was his debt, the deed gives her power by joining in a written request to secure it.

Ordered that a decree of foreclosure for the amount due be entered upon the minutes of the court.

In re MONTGOMERY et al.

(District Court, D. New Jersey. January 19, 1893.)

1. EMINENT DOMAIN—CONDEMNATION FOR USE OF UNITED STATES—PLEADING.

Under Act Cong. Aug. 1, 1888, authorizing officers of the government to condemn lands for the use of the United States, a petition for condemnation must affirmatively show that the officer is authorized by congress to acquire the lands, and that in his opinion it is "necessary or advantageous" to proceed by judicial process; and these facts cannot be inferred from an allegation that such officer has requested the attorney general to institute such proceedings.

2. SAME—EXERCISE OF RIGHT BY UNITED STATES—CONSTITUTIONAL LAW.

Act Cong. March 3, 1891, authorizes the secretary of war to modify existing plans for the excavation of Petty's island and the adjacent shoals, in the Delaware river, but declares that the title to any additional lands required for this purpose shall be vested in the United States without charge. *Held* that, in view of this latter provision, the United States has no constitutional power to acquire the lands by condemnation proceedings.

In Equity. Petition for the condemnation of lands belonging to Thomas Montgomery and others, for the use of the United States. Heard on motion to quash the petition for appointment of commissioners. Petition dismissed.

W. C. Hannis, for motion.

H. S. White, Dist. Atty., *J. Warren Coulston*, *Joseph K. McCammon*, and *C. V. D. Joline*, *contra*.

GREEN, J. By an act of the congress of the United States, approved April 24, 1888, entitled "An act to facilitate the prosecution of works projected for the improvement of rivers and harbors," it was enacted that the secretary of war may cause proceedings to be instituted in the name of the United States in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors, for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted: provided, however, that when the owner of such land, right of way, or material shall fix a price for the same, which, in the opinion of the secretary of war, shall be reasonable, he may purchase the same at such price without further delay: and provided further, that the secretary of war is hereby authorized to accept donations of land or materials required for the maintenance or prosecution of such works. By another act, entitled "An act to authorize condemnation of land for sites of public buildings, and for other purposes," approved August 1, 1888, it was further enacted that in every case in which the secretary of the treasury, or any other officer of the government, has been, or hereafter shall be, authorized to procure real estate for the erection of a public building, or for other public uses, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so; and the United States circuit or district courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the attorney general of the United States, upon every application of the secretary of the treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation within 30 days from the receipt of the application at the department of justice. And by said act it was provided that the practice, pleadings, forms, and modes of proceedings in causes arising under the provisions of this act shall conform as near as may be to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding. By another act, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1889, and for other purposes," approved October 2, 1888, it was, *inter alia*, provided that for the removal of Smith's island and Windmill island, in the state of Pennsylvania, and Petty's island, in the state of New Jersey, or such parts of them and the shoals adjacent thereto as may be required, and for the improvement of the harbor between the cities of Philadelphia, Pa., and Camden, N. J., the sum of \$500,000 should be appropriated: provided, that no part of said sum should be expended until the title to the lands forming said islands should be acquired and vested in the United States, without charge to the latter beyond \$300,000.

000. of the sum appropriated. By another act, approved March 3, 1891, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirteenth, eighteen hundred and ninety-two, and for other purposes," it was enacted that for improving harbor at Philadelphia, Pa., and continuing the improvement, and for the removal of Smith's island and Windmill island, Pennsylvania, and Petty's island, New Jersey, and adjacent shoals, \$300,000 were appropriated: provided, that the plan for the improvement may be modified by changing the line limiting the excavation on Petty's island to such position as the secretary of war may consider desirable, and the material to be removed from said islands and shoals under this appropriation and appropriations heretofore made, shall be deposited and spread on League island, and to the extent of the cost of such deposit and spreading the said appropriations are hereby made available: provided further, that the title to any additional lands acquired for this purpose shall be vested in the United States without charge to the latter.

Under the various acts above referred to, the present proceedings were begun by way of petition to this court upon the request of the secretary of war, and by direction of the attorney general, to obtain possession by condemnation of the lands, right of way, and material set out and described in the said petition for the purpose of improving the navigation of the river Delaware at or near the city of Philadelphia. The petition, reciting the acts hereinbefore set forth, alleges that the secretary of war, under the provisions of the act last above referred to, had approved modifications of the project for improving the harbor of Philadelphia by changing the line of excavation which had previously been adopted by the department in making said improvement, which modifications necessitated the acquisition by the United States of about 23 acres of land, parcel of Petty's island, in addition to that theretofore acquired; that, to acquire said lands, the secretary of war had requested the attorney general of the United States to commence these proceedings in condemnation according to the acts in such case made and provided, and that the petitioner, by its duly-authorized officials, had elected to conform said proceedings on condemnation to those authorized by the act of the legislature of New Jersey entitled "An act to authorize the formation of railroad corporations, and to regulate the same," approved April 2, 1873. The petition also described by metes and bounds the lands so required for the said improvement, and the names of the persons having an interest, as owners or otherwise, therein. The prayer of the petition was, that notice of this application should be given to the persons who were therein named as interested in said lands, and for the appointment of a particular time and place when and where the court under seal would designate three disinterested, impartial, and judicious freeholders, residents of the county of Camden, N. J., within the limits of which county said lands were alleged to be situate, to be the commissioners to appraise said lands, and to assess the damages to be paid by the United States therefor. Upon the filing of said petition an order was made to show cause why the prayer of the petition should not be granted, and

upon the return-day of said order those who were interested in said lands as owners, by their counsel appeared and moved to quash the said petition, and set aside any proceedings that might have been had thereunder, for the following reasons: (1) The petition fails to show upon its face that the secretary of war had been authorized to acquire the additional lands mentioned in the petition for public use. (2) The petition fails to show that, in the opinion of the secretary of war, it is necessary or advantageous to the United States that the land in question should be acquired by condemnation under judicial process. (3) The petition fails to show that any provision had been made by law to compensate the land-owners for the value of their land, and the damages they might sustain by this appropriation.

It cannot be denied that the petition, as it was originally filed, is open to criticism for the manner in which jurisdictional facts are stated therein. In the case of *In re Rugheimer*, 36 Fed. Rep. 369, which was a proceeding to condemn lands for a public building, it is held by the court that all three of the allegations which it is alleged this petition omits to make are necessary, and must affirmatively appear on the face of the petition for the appointment of commissioners, or the petition will be quashed. A strict criticism of this petition, using the opinion of the court in the case just cited as a criterion, would undoubtedly produce a similar result in this case. There certainly are no distinctive averments in the petition, as originally framed, that the secretary of war had been authorized in law to acquire these lands by condemnation, or that, in his opinion, it was necessary and advantageous to the United States that they should be so acquired. It is true, the petition alleges that the secretary of war had requested the attorney general of the United States to commence these proceedings; and it was argued that such request, made, as it was alleged to be, under the act of August 1, 1888, would carry with it the presumption that he was of opinion it was both necessary and advantageous to the United States to acquire the lands in the manner pointed out by that act; for the only possible authority to make, or justification of, such request, is to be sought for and found in the act referred to, and that act prescribes with precision when and under what circumstances the power of eminent domain is to be called into action at and by his request. As conditions precedent to such request for the institution of condemnation proceedings, the secretary of war must determine affirmatively both the advantage and necessity to the federal government of the possession of the lands sought to be condemned; and, as it is always to be presumed that every officer acts strictly within the limits and upon the lines of his delegated power, it would follow that the request made by the secretary, as stated in the petition, is evidence, presumptively at least, that all conditions precedent to the lawful making of such request have been complied with. This argument is plausible, but unsound. It is a well-settled principle that when the exercise of a special authority, delegated by statute to a particular person or to a special tribunal, is dependent upon conditions precedent, all preliminaries which show fulfillment of such conditions, and which confers upon

such person or tribunal power to act, must clearly appear upon the face of the proceedings. The proper practice is to state affirmatively and with certainty all facts upon which, in such case, jurisdiction depends. Intendment and presumption should not be resorted to for the justification of any judicial proceedings, in derogation of private rights. But it is not necessary, in the present state of the petition, to consider the effect either of this or of the first objection made to it. By consent, and after the argument, the petition was amended by adding averments, substantially meeting these objections, and curing the alleged defects, and setting forth as well the very important and necessary fact, until then omitted, that the federal government had been unable to agree with the owners of the lands for the purchase thereof. These amendments relieve the cause at bar of much embarrassment, and take out of the discussion objections which were pressed upon the court at the hearing with great vigor and ability. They are referred to now only to call attention to the deficiencies in the petition as originally framed, and to guard against the adoption of it as a precedent.

The other objection relied upon is, the petition fails to show that any provision has been made by act of congress, in terms, for the just compensation of the owners of the property sought to be appropriated and taken. I am doubtful whether this objection, stated as it is, should be held valid. There is a series of cases which seem to hold otherwise. The conclusion at which the courts in those cases arrived appears to be founded upon this argument: The proceedings were instituted by the sovereign government by virtue of the right of eminent domain, inherently possessed; not by an individual or a private corporation to whom the right of eminent domain had been delegated by the sovereign. Eminent domain is the supreme dominion the sovereign power has in and over all property within its jurisdiction, coupled with the absolute right to appropriate such property, against the consent of the owner, for the promotion of the general welfare, or as public necessity may require. It pertains as a necessary, constant, and inexhaustible attribute to sovereignty, and therefore does not depend upon constitutional recognition or legislative enactment. And so it has been determined that the clause in the federal constitution providing that private property shall not be taken for public use without just compensation is no part of the right itself, but only a limitation upon the exercise of the right. In other words, the right or power of eminent domain is as supreme now, in its initial operation, as it was before the amendment to the constitution, providing for just compensation was adopted. The amendment simply mitigates the harshness and severity of the final operation upon the interests of the property owner by endowing him with an indefeasible right to just compensation for his property taken and appropriated against his consent. Now, it will be noticed that this clause of the federal constitution differs from similar clauses in state constitutions in this: that it does not require just compensation to be made before the taking of the property. It simply provides for just compensation. The time of the making of the compensation is not fixed or determined. That it need

not be made, necessarily, before the taking, in cases where the sovereign power itself is the taker, has been repeatedly held by the courts. These adjudications go upon the ground that when the sovereign power—that is, the federal government, the state, or the municipality as agent of the state—has provided a remedy by resort to which the property owner can have his compensation duly assessed, adequate means are afforded for its satisfaction, since the whole property of the sovereign or of the state or of the municipality is a fund to which he can resort without risk of loss. That is to say, the compensation which becomes inalienably the owner's at condemnation becomes at the same time, and is, a public charge. The good faith of the public is pledged for its payment, and all resources of taxation may be, by the owner, called into action in raising and obtaining the amount. Hence the mere fact that a special fund for the compensation of the owner whose property was to be taken and appropriated by the sovereign power was not designated or fixed in the act authorizing the taking and appropriation, would not necessarily invalidate the act itself. While these cases to which I have referred are undoubtedly well considered, and the conclusion seems apparently justified by the argument, it is not necessary to consider the present case as standing upon such narrow ground. An examination of the statute of March 3, 1891, discloses an objection to these proceedings which must be fatal. The act not only fails to provide compensation, but in terms actually forbids the making of any compensation to the land-owner by the United States for the lands to be taken. The words of the act of March 3, 1891, are as follows:

“For improving harbor at Philadelphia, Pennsylvania: Continuing improvement by the removal of Smith's island and Windmill island, Pennsylvania, and Petty's island, New Jersey, and adjacent shoals, three hundred thousand dollars: * * * provided, further, that the title to any additional lands acquired for this purpose shall be vested in the United States without charge to the latter.”

In other words, this act, if it, as it has been argued, authorized condemnation proceedings to be taken for the purpose of acquiring the land needed for the improvements mentioned, would have to be read this way: That the secretary of war is authorized, for the purpose of continuing the improvement of the Delaware river at or near Philadelphia, and within the limits of the state of New Jersey, to expend the sum of three hundred thousand dollars; that for the purpose of acquiring possession of the lands necessary therefore he may, if, in his opinion, such lands are necessary and advantageous to the United States, institute proceedings to condemn such lands in a court having jurisdiction thereof, but with the express stipulation that under no circumstances whatever shall the United States make any compensation to the land-owner for the property so taken by them.

The distinction between such legislation and the legislation which fails in itself to provide the compensation for the benefit of the land-owner is readily seen. The omission in the one case to provide the compensation where the sovereign power is the condemning party, does not deprive the

land-owner of any right whatever. As Judge Cooley says in his treatise on Constitutional Limitations, the public faith is pledged to compensate him; all public property is subject to his claim, and his property cannot be taken without such compensation being awarded to him. But in the act now under consideration there is not only an omission to provide for compensation, but actual, positive, and direct legislative interdiction of the making of any compensation to the land-owner at all. In other words, the secretary of war is authorized by it, if these proceedings are to be justified, to deprive the land-owner of his property, and at the same time to notify the land-owner that under no circumstance will he be compensated therefor. Such an act would be clearly within the interdiction of the constitution. It is perfectly apparent from the reading of this act that the legislative power of the United States never intended that condemnation proceedings should be begun and proceeded with to obtain possession of this property. By the true construction of the act in question it contemplates the acquisition of the land necessary for the improvements in question, not against the will of the owners, and by condemnation, but by the voluntary conveyance from the owners, or from some one who may purchase the same from the owners, and who would thereupon transfer the title to the United States; and in that case the United States agreed to expend the sum of \$300,000 in the excavations and the removal of obstructions to navigation which the proposed improvements contemplate. In fact, the only circumstance under which the secretary of war is authorized to make the improvement and expend the appropriation is the free gift of the lands to the United States. My reading of the acts in question compels me to the conclusion that congress never intended to authorize the acquisition of these lands by the exercise of eminent domain. Their possession by the federal government was to depend upon voluntary conveyance alone. It follows that the petition must be dismissed.

UNITED STATES v. STROBACH.

(Circuit Court, M. D. Alabama. May Term, 1888.)

1. PRESENTING FRAUDULENT CLAIMS AGAINST THE UNITED STATES—DEPUTY-MARSHAL'S INDICTMENT.

Under Rev. St. U. S. § 5438, denouncing the offense of knowingly presenting for payment or approval to any officer in the civil, military, or naval service of the United States any false or fraudulent claim against the United States, an indictment averring the presentation of such a claim to "G. T., then late marshal of the United States, he being then and there an officer in the civil service of the United States," is not insufficient or repugnant, since a marshal, after the expiration of his term, is still an officer for the purpose of serving process then in his hands, and for settling his accounts with the government.

2. SAME—SUFFICIENCY.

An averment that the accused, claiming to be a deputy-marshal of the United States, presented a claim against the government of the United States, "purporting to have been for services rendered and payments made by said deputy-marshal" in a criminal proceeding mentioned, before a certain United States commissioner, sufficiently shows that the services were performed and payments made for the United States, in the defendant's capacity as deputy United States marshal.

3. SAME—REPUGNANCY.

An averment that such claim, alleged to have been presented to "G. T., the late marshal," etc., was a claim "in favor of the said G. T., the then late marshal," etc., does not render the indictment bad for repugnancy, since the court will take judicial notice that the accounts of deputy-marshals are habitually presented to the government in the marshal's name, and the money therefor is paid to him, and by him paid to his deputies.

4. SAME—PRESENTING TO MARSHAL.

As the statute makes it an offense to present the claim to "any person or officer" in the civil service, etc., it is immaterial that the marshal is not expressly authorized by law to approve a deputy's account. The fact that he is required to incorporate the deputy's account into his own, and to swear that the items therein charged are correct and legal, is sufficient to show that he must pass upon it, within the meaning of the statute.

5. SAME—PRESENTING TO JUDGE.

Although the act of a federal judge, in passing upon the accounts of a United States marshal in open court, as required by Act Cong. Feb. 22, 1875, is, in a sense, the act of the court, yet, as his decision is subject to revision by the accounting officers of the treasury, it is only *quasi* judicial, and therefore a presentation to him is a presentation to an officer in the civil service of the United States, within the meaning of section 5438.

At Law. Prosecution of Paul Strobach for presenting a false claim against the United States. On demurrer to the indictment. Demurrer overruled.

W. H. Smith, U. S. Atty., and *Samuel F. Rice*, for the United States.
David Clopton, *George Turner*, and *George H. Patrick*, for defendant.
 Before Woods, Justice, and BRUCE, J.

WOODS, Justice. The defendant is indicted under section 5438 of the Revised Statutes. So much of the section as refers to the charges against him is as follows:

"Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining, or aiding to obtain, the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, * * * any person so offending in any of the matters set forth in this section shall be punished," etc.

The defendant is charged in an indictment containing four counts.

The first count alleges that the defendant, claiming to be a deputy-marshal of the United States, did present for approval, on a day mentioned, to George Turner, then late marshal of the United States, he being then and there an officer in the civil service of the United States, a false, fictitious, and fraudulent claim against the government of the United States, with intent to defraud the United States, which claim was an account purporting to have been for services rendered and payments made by said deputy-marshal in the case of *U. S. v. Hart*, in a criminal proceeding before W. H. Hunter, commissioner of the circuit court of the United States, dating from January 19 to January 25, 1880, inclusive, and in favor of the said George Turner, the then late marshal, as aforesaid, which claim was false, fictitious, and fraudulent in the follow-

ing statements and entries therein contained. (Here follows a recitation of the alleged false, fictitious, and fraudulent entries.) The count then proceeds: "The defendant well knowing the same to contain the said false, fraudulent, and fictitious entries."

The second count charges that the defendant did use a false affidavit of the correctness of the claim mentioned in the first count, for the purpose of aiding to obtain the payment of said claim, knowing the same to contain false, fraudulent, and fictitious statements and entries, as follows, to-wit. (Here follows a copy of said entries, identical with those contained in the first count.) The count then proceeds as follows: "He, the said Paul Strobach, deputy-marshal, as aforesaid, well knowing the same to contain each and every false, fraudulent, and fictitious statement and entry aforesaid."

The third count charges that the defendant, claiming to have been a deputy-marshal of the United States, did cause said George Turner, then late marshal of the United States, to present to and for approval by the district court of the United States for the middle district of Alabama, in open court, at the May term, 1880, the Honorable JOHN BRUCE, judge of the United States district court for the middle district of Alabama, then and there presiding, as well as to and for the approval of said Hon. JOHN BRUCE, district judge, presiding as aforesaid, he being then and there an officer in the civil service of the United States, a false, fictitious, and fraudulent claim upon and against the government of the United States. The count proceeds to describe the claim in the same terms as those used in the first count, and concludes with the averment that the defendant well knew said claim to be false, fictitious, and fraudulent in each of the statements and entries aforesaid.

The fourth count is in all respects similar to the second.

To this indictment the defendant filed his demurrer, alleging grounds of demurrer to each count, which we shall proceed to consider.

The law now in force regulating the taxation of costs, and the approval of the accounts of clerks, marshals, and district attorneys, is the act of February 22, 1875, and entitled "An act regulating the fees and costs, and for other purposes." 1 Supp. Rev. St. p. 145. So much of this act as is pertinent to this case is as follows:

"Section 1. That, before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the treasury in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and, in the presence of the district attorney, or his sworn assistant, whose presence shall be noted on the record, prove in open court, by his own oath, or that of other persons having knowledge of the facts to be attached to said account, that the services therein charged have been actually and necessarily performed, as therein stated; * * * and the court shall thereupon cause to be entered an order approving or disapproving the account, as may be according to law, and just."

Previous to the enactment of this law, the matter of the approval of the accounts of clerks, marshals, etc., was regulated by section 846 of

the Revised Statutes, which provided that such accounts should be examined and certified by the district judge of the district for which the officers were appointed, before they were presented to the accounting officers of the treasury department for settlement. The elements of the offense created by section 5438, which it was the purpose of the first and third counts to charge, are as follows: The presentation for approval to any person or officer in the civil service of the United States of a claim against the United States, which the party presenting knows to be false, fictitious, or fraudulent. The elements of the offense prescribed by the statute, which it was the purpose of the second and fourth counts to charge, are as follows: The using, for the purpose of aiding to obtain the payment of a false, fictitious, or fraudulent claim upon or against the government of the United States, of a false affidavit, knowing the same to contain any fraudulent or fictitious statement or entry. If the counts of this indictment charge against defendant, as required by the rules of criminal pleading, an offense against the United States, they will be good and sufficient in law. We shall therefore consider the counts, and look into the particular grounds of demurrer, to ascertain whether this has been done.

It is alleged as ground of demurrer to the first count that it does not sufficiently charge that Turner, to whom the account was presented for approval, was an officer in the civil service of the United States, because it is alleged that when the account was presented he was the "late marshal." There is, however, besides the averment that he was the late marshal, a distinct averment that he was then and there an officer in the civil service of the United States. Now, if a marshal whose term has expired can by law still be an officer in the service of the United States, then that fact is well averred, and there is nothing repugnant between the two averments. A marshal whose term has expired is, for the performance of certain duties, still an officer. Section 790 of the Revised Statutes declares that every marshal, or his deputy, when removed from office, or when the term for which the marshal is appointed expires, shall have power to execute all such precepts as may be in their hands, respectively, and the marshal shall be held responsible for the delivery to his successor of all prisoners who may be in his custody, etc. A marshal is appointed for a period of four years. When his time is out, it is true he does not hold over until his successor is appointed or qualified, but, by the provisions of the section just cited, he is still an officer for the performance of the duties therein specified. After his term of office expires, it is also his duty to settle his accounts with the government, and to do this he must necessarily receive and pass upon the accounts of his deputies. He discharges this duty under the sanction of his official oath, and the obligation of his official bond. When, therefore, the first count of the indictment described Turner as late marshal, and averred him to be, when the account was presented, an officer in the civil service of the United States, the description was accurate and pertinent, and not repugnant. We are of opinion, there-

fore, that it is sufficiently averred that the account was presented to an officer in the civil service of the United States.

It is next stated as ground of demurrer to the first count that the services alleged to have been performed, and payments alleged to have been made, by the defendant, are not charged to have been services and payments for the United States, or that the services were performed and payments made by defendant as deputy-marshal, so as to show that the marshal was the proper officer to whom said claim should be presented for approval. But we think it is sufficiently averred that the services were performed for the United States. The claim is alleged to be a claim against the United States. It is alleged to be for services purporting to have been performed by said deputy-marshal in a criminal proceeding before the United States commissioner, in which the United States was the plaintiff, and that it was a claim in favor of the said Turner, late marshal, and against the United States. These averments make it perfectly apparent that the account was for services rendered the United States by a deputy-marshal, and that the marshal was the proper officer to whom his deputy should present the account for allowance.

It is next alleged that the first count is repugnant, because that it avers the claim was presented to George Turner for his approval, and also avers that the claim was in favor of George Turner. The method of procedure prescribed by law for the settlement of the accounts of marshals, of which the court takes judicial notice, and which it is, therefore, not necessary to aver, makes it apparent that there is no ground for this objection to rest on. The law authorizes the appointment of deputy-marshals, (Rev. St. § 780,) and prescribes their oath of office, (Rev. St. § 782,) in which they are required to swear that they will take only their lawful fees. In all cases, except where specially provided by statute, a deputy-marshal has the same powers, and may perform the same duties, as the marshal. To prevent a multiplicity and complication of accounts, the fees of the deputies are presented to the government for allowance through the marshal, and in an account made out in his name, of which the verified account of the deputy for his services forms a part. The money collected on this account is paid in the first instance to the marshal, who pays the deputy his share. The accounts of the deputy are made out against the United States, and in favor of the marshal. It may, therefore, well be averred that the account of a deputy-marshal in favor of the marshal, and against the United States, was presented to the marshal for his approval. There is nothing absurd or repugnant in such an averment.

But it is contended by defendant that the marshal is not an officer authorized by law to approve a deputy-marshal's account. It will be observed that the section on which the indictment is based makes it an offense to present a false claim for approval to any person or officer in the civil, military, or naval service of the United States. The presentation need not be to an accounting or auditing officer. It need not be to an officer at all. It may be to any person in the civil, military, or naval

service of the United States. The approval meant by the statute is not, therefore, confined to the passing of the claim by the accounting officers of the treasury, or its approval by a court or judge. When a deputy-marshal presents his itemized account for his fees and costs, verified by his oath, to the marshal, who is expected to incorporate it in his own account against the United States, and to make it one of the vouchers to sustain it, and to swear that he believes all the items therein charged are correct and legal, and the amounts thereof are justly due to him as therein stated, the deputy may well be said to present, within the meaning of the statute, his account to the marshal for approval. The marshal adopts the verified accounts of his deputies, swears to his belief in their correctness, and demands pay for them from the United States. He may, therefore, well be said to approve them. Without such approval, the deputy could not take a step towards the collection of his claim against the government out of the treasury.

There are other grounds of demurrer to the first count, but they are either covered by what we have said, or allege defects or imperfections in matters of form only, which do not tend to the prejudice of the defendant, and are therefore not matters upon which the count can be held to be insufficient. Rev. St. § 1025. In our opinion, the count avers with all requisite certainty the presentation by the defendant for approval to an officer in the civil service of the United States, with intent to defraud the United States, of a false, fictitious, and fraudulent claim against the government of the United States, he well knowing the same to be false, fictitious, and fraudulent. This covers every element of the offense described in the statute. It gives the defendant, as well as the court, notice sufficiently specific of the charge against him, and is sufficiently definite to enable him to plead his conviction or acquittal should he ever again be indicted for the same offense.

It is alleged as ground of demurrer to the third count, in addition to the grounds urged against the first count, which we need not again particularly notice, that the presentation of the claim alleged in that count was a presentation to the district court of the United States, and to the Honorable JOHN BRUCE, district judge therein presiding, neither of which allegations are within the statute, because the district court is not a person or officer in the civil service of the United States, and the Honorable JOHN BRUCE, district judge, is not an officer to whom the claim in this count described can be lawfully presented for approval. It is a presumption of the law that congress legislates with intelligent purpose, and in view of the existing statutes. Before the passage of the act of February 22, 1875, heretofore mentioned, the accounts of marshals were required to be examined and certified by the district judge before they were presented to the accounting officers of the treasury, (Rev. St. § 846;) and, if the deputy-marshal presented a fraudulent claim against the United States to a district judge for his approval, he would have been liable to the penalties in section 5438, on which the indictment is founded. It is claimed, in behalf of defendant, that by the passage of the act of February 22, 1875, congress intended that deputy-marshals

should present their claims in open court for approval, and that the act allows them to present false, fictitious, and fraudulent claims with impunity. We cannot believe that such was the purpose of this legislation, but that, on the contrary, it was to provide additional guards against the presentation of false claims.

The contention of the counsel for defense is that the law only punishes the presentation to a person or officer in the civil service of the United States of a false claim, and that when a false claim is presented for approval to the district court of the United States, in which the district judge is presiding, that that is not a presentation thereof to an officer in the civil service of the United States; in other words, that a United States judge in vacation, and when not engaged in the discharge of his usual duties, is an officer in the civil service of the United States, but when engaged in holding a term of court, he ceases to be an officer in the service of the United States, and his identity as such is lost, and he is only a court, or a member of a court. We think that a United States judge is at all times an officer in the civil service of the United States, within the meaning of the statute, and that when a claim is presented to a court of which he is the presiding officer, it is presented to an officer in the civil service of the United States. The act of approval or disapproval required of the court is not a judicial, but only a *quasi* judicial act, for it is expressly made, by the act of February 22, 1875, subject to the revision of the accounting officers of the treasury.

We think an examination of section 1 of the act of 1875 will show, by its own terms, that when an account is presented to the court for approval, the judge acts as an officer in the civil service of the United States, as well as a court. The section is somewhat disjointed, but it declares, in substance and effect, that before any bill of costs in favor of clerks, marshals, and district attorneys shall be taxed by a judge or other officer, it shall be presented to the district or circuit court, and that before any account in favor of the same officers, payable out of the treasury, shall be allowed by an officer of the treasury, it also shall be presented to the district or circuit court for approval. The taxing of a bill of costs is synonymous with approval of a bill of costs. By the express terms of the section under consideration, when a bill of costs is presented to a court, the judge taxes it. Now, if the contention of counsel for defendant is sustained, when an account in favor of the marshal, which is, or at least may be, a bill of costs, is presented for approval to the same court, the court alone acts, and the judge does not; so that this absurd result follows, that: when a claim against the government is called a bill of costs, if it is a fraudulent bill, it is an offense against the law to present it for allowance; but if the same identical bill, no matter how false and fraudulent, is called an account, it may be presented to the court for allowance with impunity. A construction of the statute which leads to such a result cannot be sound.

Our conclusion is that section 1 of the act of 1875 was not intended to relieve from the penalties prescribed by section 5438, on which the indictment is based, any person who should present for allowance to a

district or circuit court of the United States a false and fraudulent claim against the government, and that a presentation to the court, under the act of February 22, 1875, is, within the meaning of section 5438, a presentation to an officer in the civil service of the United States.

It is contended by counsel for the defendant that the account of a deputy-marshal for his fees is not a claim against the United States; but in the first count the account presented to the marshal for approval, and in the third count the account presented to the district court for approval, are both averred to be accounts in favor of the deputy-marshal.

The grounds of demurrer to the second and third counts of this indictment are identical; the counts themselves being in all respects similar. All the grounds except one are based on the alleged uncertainty of the counts. Without going into a discussion of them, we are of opinion that the counts aver with requisite certainty all the elements of the offense which they are intended to charge. They aver, in the language of the statute, that the deputy-marshal, as aforesaid, for the purpose of aiding to obtain the payment of the claim aforesaid, which had been particularly described in the previous counts, did use a false affidavit of the correctness of said claim, he knowing the same to contain false, fraudulent, and fictitious statements and entries, which are set out *in hæc verba*.

The remaining objection to the counts under consideration is that they do not aver that the said false claim was ever presented for payment to or by any person or officer in the civil, military, or naval service of the United States. This ground of demurrer we are of opinion is not well taken. The words of the statute upon which these counts are based, of themselves, fully, directly, and expressly, without uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. The counts under consideration aver all these elements with a requisite certainty and particularity. It is not, therefore, necessary to make any other averments. *U. S. v. Carll*, 105 U. S. 611. Section 5438, on which all counts of this indictment are founded, is a broad and comprehensive enactment. It is intended to punish the presenting for approval or payment of any false and fraudulent claim against the United States to any person or officer in any branch of the service of the United States, or the use of any false receipt, voucher, account, certificate, and affidavit, to obtain, or aid in obtaining, the approval or payment of any false and fraudulent claim.

The elements of the different offenses described in the statute lie within narrow limits. We are of opinion that the several counts of this indictment sufficiently describe these offenses, and sufficiently charge the defendant. Our conclusion therefore is that the demurrer to the indictment and the several counts thereof should be overruled; and it is so ordered.

BRUCE, J., concurred.

RICHMOND v. ATWOOD.

(Circuit Court of Appeals, First Circuit. February 2, 1892.)

1. PATENTS FOR INVENTIONS—NOVELTY—COMBINATION—USEFULNESS—BOX-HINGES.

Letters patent No. 378,861, issued March 6, 1888, to Benjamin S. Atwood, for a duplex box-hinge, to be placed inside the box, and consisting of two flanges jointed to a connecting plate, bent at right angles at distances from the joints equal to the thickness of the side and cover of the box, so that, when applied, a smooth face, flush with the outer surface of the box, is presented, and the cover, when open, turns completely over, and rests against the side, are void for want of novelty in the component elements and new and useful results in the combination.

2. SAME—PRIOR USE.

The feature of allowing the cover to fall back against the side of the box is found in the old Smith and Paine double-hinge; and, though the leaves of the latter were straight and applied to the outside of the box, they could be applied to the inside by the simple mechanical device of bending the shanks, the result being substantially the same as that obtained in the Atwood patent.

3. SAME.

The feature of applying the hinge so as to present a smooth face, flush with the box and cover, was anticipated by the Lovett double hinge, which embodied the principle of the Smith and Paine hinge, and could be inserted in the same way.

4. SAME.

The feature in the patent of having the cover-leaf press against the connecting plate when the box closed, so as to prevent the cover from moving backward, does not make the combination patentable, because bearings are old, and the prior Smith and Paine duplex hinge shows a bearing against the inside of the link, producing the same result.

5. SAME—INFRINGEMENT.

If the combination should be considered patentable because of the bearing, it is not infringed by a hinge in which, owing to differences of structures, the bearing is obtained in an entirely different manner.

47 Fed. Rep. 219, reversed.

In Equity. Suit by Benjamin S. Atwood against Charles C. Richmond for infringement of a patent. The patent was sustained below, and an injunction and accounting ordered. Defendant appeals.

Frederick P. Fish, William K. Richardson, and James J. Storrow, Jr., for appellant.

Payson E. Tucker, for appellee.

Before COLT, Circuit Judge, and CARPENTER and ALDRICH, District Judges.

COLT, J. This suit is brought for infringement of letters patent No. 378,861, granted to Benjamin S. Atwood, March 6, 1888, for improvements in hinges for boxes and chests. The object of the invention, as set out in the specification, is the production of "a hinge which, when applied to a box or chest, will present a smooth face, flush with the surface of the box or chest, with no part of it projecting beyond the surface." The hinge is composed of two leaves, attached to the inside of the box and cover. Portions of these leaves are turned at right angles, the parts so turned being equal to the thickness of the cover or side of the box to which the hinge is applied. At the ends of the bent parts of the leaves are the knuckles, which lie in places cut in the side of the box and of the cover. The two parts of the hinge are united by a plate having a knuckle at each end, and by pins which pass through the knuckles

on the leaves and plate, and so form a double hinge. The plate is so constructed as to permit the leaf on the cover of the box to bear against its inner side when the box is closed. When the box is open the cover will turn completely over and lie against the side of the box. The claim is as follows:

"A box-hinge, composed of the parts *d* and *e*; to be placed, respectively, on the inside of the box and of the cover, provided with end-pieces turned at a right angle to their main portions, having knuckles *f f*, fitting, respectively, into places in the side of the box and of the cover, and united by the plate *g* and pins *h h*, said plate *g* being placed on the outside of the box, and so arranged as to furnish a bearing to the cover when it is closed, and to permit the cover to be removed entirely from the top of the box when it is open, substantially as above described."

The answer sets up several defenses, but only two are relied upon, namely, want of invention, and non-infringement.

In analyzing the Atwood patent in the light of the prior state of the art, we find that every element which enters into the combination set forth in the claim was old and well known at the date of the invention. Single hinges, composed of leaves, knuckles, and pin, were old. Duplex or double hinges, composed of leaves, knuckles, pins, and a plate uniting the two parts, were old. The bending of the leaf to conform to the size of the edge of the box or cover was old. It is also abundantly shown, by an examination of the many forms of hinge put in evidence, that in the details of construction, such as turning the knuckles one way or another, or turning the plate in any particular way, there would be no invention, and the Atwood patent does not seek to cover any particular form of construction in these respects. It is also admitted that bearings were old, and that there was no invention, considered by itself, in the bearing of the cover-leaf against the plate when the box is closed. The prominent feature of the Atwood hinge consists in turning the leaves at right angles, as described in the patent. But, in our opinion, there was no patentable novelty in merely bending the leaf of a hinge to conform to the edge of the cover or back of a box, because this feature is seen in the old single hinge and the old Lovett double hinge. If there is any invention in the Atwood device, it must lie in the combination of elements described in the claim of the patent considered as a whole, whereby some new and improved result is accomplished.

It is contended that the Atwood hinge, considering the combination of elements as a whole, does embody certain improvements: *First*, it enables the cover to be turned way over on the back of the box; *second*, the hinge can be set flush with the cover and back of the box, thus avoiding the projection which is found in the single hinge, and making the box more secure and of a more pleasing appearance; *third*, by having the cover-leaf press against the plate, a bearing is obtained which holds the cover and prevents its moving backward when the box is closed.

As to the first improvement mentioned in the operation of the Atwood hinge by which the cover is made to swing through three-quarters of a circle, it may be observed that this same feature is found in the old

Smith and Paine double hinge, with which Atwood admits he was familiar. The leaves in the Smith and Paine hinge were straight and applied to the outside of the box, but it had the same capacity of permitting the cover to fall clear back as the Atwood hinge. Indeed, if you bend the shanks of the Smith and Paine hinge so that they may be attached to the inside of the box and cover, you have substantially the patented device. And, such bending being old in the art, it would naturally suggest itself to any skilled mechanic who desired to construct a hinge where the leaves were to be attached to the inside of a box.

With respect to the second feature of the Atwood hinge,—that it presents a smooth face, flush with the box and cover,—it is admitted that the prior Lovett double hinge, which embodies the principles of the Smith and Paine hinge, could be inserted in the same way. In dealing with the duplex hinge, as distinguished from the single hinge, it would seem, owing to the general form of such hinge, to be a matter of detail in construction, or of the mode of applying the hinge to the box, whether or not it should be put in flush with the wood.

The remaining advantage of the Atwood hinge relates to the bearing of the cover-leaf upon the connecting plate when the box is closed, by means of which the cover is firmly held, thereby making any backward movement impossible. Much importance is attached to this point by the complainant. But bearings are very old, and an examination of prior duplex hinges, such as the Smith and Paine hinge, shows that when the cover is closed there is a bearing on the inside of the link, which prevents the cover from moving backward; and it is for these reasons, we presume, that complainant's expert admits that the bearing alone in the Atwood patent is not a feature of patentable novelty. But, if we should assume that there is patentable novelty in the form of bearing in the Atwood hinge, taken in connection with the whole mechanism, an examination of the defendant's hinge shows a different bearing. The broad connecting plate with knuckles thereon, which characterizes the Atwood hinge, is not found in defendant's hinge, but instead thereof there is a straight piece of metal turned in the opposite direction to the link of the Atwood patent, and standing at right angles to the bent part of the cover-leaf, instead of parallel with it, as in the Atwood patent; and the link, therefore, has no knuckles rolled over its extremities, but simply holes bored through to receive the pins. Owing to this difference in construction, it is apparent that in defendant's hinge the broad face of the link could not come to a bearing against the cover-leaf, and that the only bearing is between the thin edge of the leaf and the straight part of the cover-leaf; and this is the same bearing which is found in the old Lovett hinge.

But it is urged by the complainant that in the construction of the Atwood hinge it is necessary that the cover-leaf should lie in a different plane from the link in order to obtain the Atwood bearing; that such construction is an important mechanical feature, and that it is embodied in the defendant's hinge. It is true that the defendant's hinge is so constructed, but it is also shown that this form is not necessary to the practical operation of the hinge, because, by cutting the slot in the cover-

leaf, where the bearing takes place, a little deeper, the leaves and the link may all be made in one plane. While one particular form of attaching the leaf to the plate may be essential in the Atwood hinge in order to obtain the Atwood bearing, the defendant only uses that form to obtain a different bearing.

Upon the whole, we have grave doubt whether there is anything patentable in the combination claim of the Atwood patent, but if the so-called "bearing feature," in combination with the other elements of the claim, is sufficient to sustain the patent, then there is no infringement shown, because the defendant's hinge is constructed with a different bearing. On the question of patentable novelty, it is somewhat significant that the application for the Atwood patent was filed in the patent-office, April 4, 1884, and that the patent was not granted until March 6, 1888; that the application was three times rejected by the patent-office on reference to the Jenness patent of 1873, and that the evidence goes to prove that it was finally granted by an examiner who had not previously dealt with the application, and to whom the matter was new.

This case is pending in this court upon an appeal from an interlocutory decree of the circuit court of the United States for the district of Massachusetts, granting an injunction. In the opinion of this court, the complainant is not entitled to an injunction, and the decree of the circuit court is accordingly reversed.

NATIONAL FOLDING BOX & PAPER CO. v. AMERICAN PAPER PAIL & BOX CO.

(Circuit Court, S. D. New York. January 15, 1892.)

PATENTS FOR INVENTIONS—CONSTRUCTION—RES JUDICATA.

The construction of a patent in an action is conclusive in another action by the patentee against a third person, where no new defenses are interposed.

In Equity. Suit by the National Folding Box & Paper Company against the American Paper Pail & Box Company for infringement of letters patent No. 171,866, granted January 4, 1876, to Reuben Ritter, for an improvement in paper boxes. Heard on motion for a preliminary injunction. Granted.

Walter D. Edmunds, for complainant.

Billings & Cardozo, (R. Bach McMaster, of counsel,) for defendant.

LACOMBE, Circuit Judge. The patent sued upon was construed by this court in *Box Co. v. Nugent*, 41 Fed. Rep. 140. For the purposes of this motion, that construction is to be accepted; especially in view of the fact that no new defenses are interposed. The patent was limited to a locking device, which operated by the engagement of a hooking device with a slot, not at a single point of contact, but where the hook and slot

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were so arranged as to be brought in contact, straight edge to straight edge. The defendant's box, shown in Exhibit A, operates, and seems devised to operate, in that way, as much as did the one made by Nugent, and before the court in the former suit. The projection does not sink down to the end of the slot, and there hook over the material in which the slot is cut, as in so many other devices, but engages with the edge of the slot itself at several points, successively or continuously, as the pressure upon the parts varies. Complainant may take a preliminary injunction.

THE WILLIAM BRANFOOT.

HAMILTON v. THE WILLIAM BRANFOOT.

(District Court, D. South Carolina. January 15, 1892.)

1. SHIPPING—LIABILITY FOR PERSONAL INJURIES—DEFECTIVE APPLIANCES.

A ship is liable in damages to one of a stevedore's gang who is injured while unloading cargo by the unexpected falling of a stanchion because of defects in the fastening not observed by him, and not apparent to the eye.

2. MEASURE OF DAMAGES—PERSONAL INJURIES.

By an accident on a vessel, for which the ship was liable, a stevedore's laborer received a comminuted fracture of the bones of his leg, and had his leg amputated below the knee, being treated in a free hospital. He was between 30 and 35 years old, and earned \$1.25 a day, or \$375 a year. *Held*, that he would be allowed \$500 for sufferings, and it would be assumed that his earning capacity was reduced two-thirds, and that his life-interest in the capitalized value of his income was worth one-half the amount thereof, on which theory he was entitled to recover \$1,786, or \$2,286 in all.

In Admiralty. Libel by John Hamilton against the British steamship William Branfoot for damages for personal injuries. Decree for libellant.

Northrop & Mamminger, for libellant.

Trenholm & Rhett, for respondent.

SIMONTON, J. This libel is for personal injuries received on ship-board. Libellant was one of a stevedore's gang employed in discharging pyrites from the British steamship William Branfoot. While he and others were working in the lower hold, an iron stanchion supporting the between-decks fell and broke his leg. Amputation became necessary. The leg was cut off about six inches below the knee. The stanchion was on the starboard side of the main hatchway, midway. It was 18 feet high, and weighed 660 pounds. It rested on an iron tank at the bottom of the hold, and had two flanges at its lower end, through each of which was an iron bolt, riveting it to the tank. The top of the stanchion was riveted to the iron beam, upon which the between-decks rested. This was by a sort of flap pierced with two holes for rivets. After the stanchion had fallen, its upper end was examined. The concurrence of testimony is that one of the rivets originally in this part of

the stanchion had broken off, and disappeared. At all events, it was not in place at the time of the accident. The other was worn,—presented the appearance of an old break, which extended, some say one-half, others two-thirds, through the rivet. There is great divergence of testimony as to the bolts at the base of the stanchion. Libellant's witnesses say that they exhibited old breaks. Those for claimant say that one exhibited a fresh break throughout. The other may have been broken in part. The stanchion fell without warning, unexpectedly. The discharge of cargo was by means of a patented automatic. A rope was passed over a crane some 50 feet above the vessel, to the end of which was attached, by hooks, an iron bucket, weighing about 400 pounds. The bucket was let down into the hold; was disengaged from the hook by one man, who had no other duty but to disengage the buckets as they came down, and to put on the hooks when they were loaded; was rolled on its wheels to the cargo; was loaded by the other hands, rolled back under the hatch, and attached to the hooks. Loaded, it weighed 2,700 pounds. Upon signal the steam-hoisting apparatus was set in motion. The tub moved up slowly at first, then very rapidly, traversing the distance up in 10 seconds. The theory of the claimant is that the hooks had been attached to a full tub before it got under the hatchway, and that the hoisting apparatus was prematurely set in motion. The heavy tub, thus dragged along the bottom of the hold, was dashed against this stanchion, tearing it from its rivets, and causing it to fall. For this negligence upon the part of the gang the ship is not liable; the stevedore having been selected and engaged by the charterer. There were several eye-witnesses to the accident;—the foreman of the stevedore, who personally superintended the gang; the man in the hold, whose duty it was to unhook and hook the buckets; the man on deck at the hatchway, whose duty it was to give the signal to the engineer of the steam hoist; and the men in the gang in the hold. All of these swear that the tub did not strike the stanchion. On the other side there is but one person who was at the place of the accident when it occurred. He did not see the tub, but just at the time he heard a noise which he concluded was caused by a blow of the tub on the stanchion. All the rest of the claimant's testimony on this point is theory. The positive evidence does not support it. The conclusions of fact are: The libellant, lawfully at work in the hold of this vessel, was injured by the unexpected fall of the stanchion; that it fell because of defective fastenings, certainly at its upper end, probably at its base, also; that these fastenings had become worn and broken from wear and tear, and were possibly originally imperfect. These defects were not visible except in one respect,—the absence of one upper rivet.

This action is for negligence,—the absence of that care which it was the duty of the respondent to use. It proceeds upon the idea that there existed an obligation upon the part of the respondent to libellant to use care, and of a breach of this obligation to the injury of the libellant. Such an obligation did exist in this case. Cooley, Torts, p. 550; *Gerity v. The Kate Cann*, 2 Fed. Rep. 241. Libellant has proved the fall-

ing of a stanchion of the vessel, the cause of injury to him, the insecurity of some of its fastenings, and that this insecurity was not immediately perceptible. Does this require respondents to prove care on their part? When an unusual and unexpected accident happens, and the thing causing the accident is in one's exclusive management, possession, or control, the accident speaks for itself, is itself a witness. *Res ipsa loquitur*. And, in a suit by any one having an action therefor, the fact of the accident puts on the defendant the duty of showing that it was not occasioned by negligence on his part. *Kearney v. Railroad Co.*, L. R. 5 Q. B. 411; on appeal, L. R. 6 Q. B. 759; approved in *Gleeson v. Railroad Co.*, 140 U. S. 449, 11 Sup. Ct. Rep. 859. In *Scott v. Docks Co.*, 10 Jur. (N. S.) 1108, on appeal, 3 Hurl. & C. 596, the court say:

"There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the action arose from want of care."

In *Transportation Co. v. Downer*, 11 Wall. 134, this case is approved.

In *Mullen v. St. John*, 57 N. Y. 568:

"When plaintiff proved that the building fell into the street, and injured her, she had made out a case, in the absence of any explanation on the part of the defendants, as buildings do not usually or necessarily fall; and that it is for the jury to say, under all the evidence, whether that explanation on the part of the defendants is reasonably made."

The rule is thus stated in 1 Add. Torts, § 33:

"When the accident is one which would not, in all probability, happen, if the person causing it was using due care, and the actual machine causing the accident is solely under the management of defendant, * * * the mere occurrence of the accident is sufficient *prima facie* proof of negligence to impose upon the defendant the *onus* of rebutting it."

In our case the respondent rests on the theory that the blow of the bucket caused the fall of the stanchion. There is no evidence of any inspection of the stanchion at any time by any one. The mate speaks of a cursory examination made by him at some undefined time. This cannot be called an inspection. It is very clear that neither the master nor the mate had any suspicion that one of the rivets on the upper end of the stanchion had disappeared. There is no evidence whatever as to what care was exercised, if any care was exercised at all. The witnesses, it is true, speak of a board lashed to this stanchion about midway in its height, and to a stationary iron ladder leading into the hold. If this was done because of some weakness discovered in the stanchion, the liability of the respondent would be fixed, both because this betrays knowledge of the defect and the very insufficient means taken to correct it.

The ship must respond in damages. The amount of damages is the next question. Libellant is an able-bodied man between 30 and 35 years of age. a laborer, earning, when he has work, \$1.25 per day. He has been in a public hospital,—a free patient. That he suffered pain goes without say-

ing. He had a compound comminuted fracture of the lower bones of his leg. He must be compensated for his pain, and for his impaired capacity for labor. He is by no means helpless, or unable to make a living. Counsel for libelant press upon the consideration of the court tables, prepared by insurance agents, showing the expectancy of life at various ages,—35 years if libelant is 30, and 32 years if he is 35,—and ask that he be allowed the sum of his daily wages for this period. This would be securing for libelant compensation for a certain period when we are dealing with the most uncertain thing in the world,—human life. I have no confidence in, and less respect for, these tables made up by insurance agents, in which, of course, large allowance must be made for heavy commissions, expenses, and profit. Nor can any safe guide be had from decided cases. Circumstances in each case sway the minds of judges as well as jurors. We can compensate him for his pain. Following Mr. Justice BRADLEY in *Miller v. The W. G. Hewes*, 1 Woods, 367, I allow him \$500. His disability is for life, but for life only. Assuming—and it is beyond the mark—that he can get for every working day \$1.25, his income would be \$375 per annum. This would be the income at 7 per cent. on a capital of \$5,357. But, as he would be entitled to such income only for his life, a decree giving him this sum in fee would clearly be improper. In South Carolina (*Wright v. Jennings*, 1 Bailey, 277) the value of the life-estate as compared with the fee is as 1 to 2; that is, $\frac{1}{2}$. The one-half of \$5,357 is \$2,678. This would be the award were the libelant rendered absolutely helpless and incapable of work. But his capacity to labor is diminished, not destroyed. Assume that it is diminished two-thirds. Allot him two-thirds of \$2,678; that is, \$1,786. Let a decree be entered for libelant in \$2,286, and costs.

THE MASCOT.*

ROSE BRICK CO. v. THE MASCOT.

(District Court, S. D. New York. December 30, 1891.)

TOWAGE—OBSTRUCTION—GENERAL KNOWLEDGE OF—DEPARTURE FROM CUSTOMARY COURSE.

A tug, on taking a tow up a canal, ran the tow upon a rock which the tug claimed was an unknown obstruction, but it was shown that there was general knowledge of some obstructions there, and a customary and well-known course to go on one side of the canal, which the tug on this occasion departed from without cause. *Held*, that the tug was liable for the injury to the tow for departing from the customary course.

In Admiralty. Suit to recover damages for negligent towage. Decree for libelant.

Wilcox, Adams & Green, for libelant.

Carpenter & Mosher, for claimant.

*Reported by Edward G. Benedict, Esq., of the New York bar.

BROWN, J. About noon on the 11th of April, 1891, the libelant's barge Roseton, loaded with brick, in tow of the steam-tug Mascot, on a hawser, while going up the artificial canal which runs to the southward and eastward from Newtown creek, was run upon a sunken rock a little to the eastward of Stag street, and from 55 to 65 feet off from the southerly side of the canal. Subsequent examination showed that this rock was a sharp peak, rising up about 15 inches above the level of a flat rock, about 9 feet long by 8 feet wide, which was situated a few inches only below the muddy bottom of the canal. Another rock near by, but probably somewhat further off from the southerly shore, had been well known to navigators, and was removed in December previous. The claimant contends that the rock removed was the only rock known, and that the tug is not liable, because the rock on which the Mascot struck was previously wholly unknown. If I were satisfied that the tug had pursued the usual course in going up the canal, I should hold her not liable. The clear weight of evidence, however, is that all boatmen knew that it was necessary to keep upon the southerly side of the channel-way, and that when, as in this case, a schooner was moored at the bulk-head off Stag street, the usual course was to go as near to the schooner as possible. Had the Mascot pursued this usual course, the evidence leaves no doubt that the Roseton would not have been harmed. Schooners were very frequently moored there, and the Roseton, and other barges drawing quite as much water, had been frequently taken past such schooners without injury. On this trip, moreover, the tide was at high water, so that everything was most favorable. These facts, with the evidence as regards the position of the rock, satisfy me that the Roseton struck the rock because the tug did not pursue the customary course, and go near the schooner that was lying there, but went at least 10 feet off from the schooner, instead of only 3 feet, as the tug's witnesses contend. The customary practice was binding upon the Mascot. No reason for departing from it is suggested. In case of accident from obstructions while departing from the customary course, it certainly is not incumbent upon the libelant to show that the tug or other boatmen had positive knowledge of the precise reasons for the custom, or of the exact location of each particular rock or obstruction, whatever it might be. It is enough in this case that the necessity of going very near to any schooner that might be moored at the bulk-head was known; and the invariable custom of passing so near, viz., within two or three feet, or even grazing the schooner, as the witnesses testify, is sufficient evidence of the necessity, and of some obstructions that required such navigation. The defendants, in effect, confirm this by their testimony that they did go within three feet of the schooner, though I find them mistaken on this point. The general knowledge that a certain course was the proper course to take in consequence of some obstructions, and that it was the custom uniformly to adhere to that course, is sufficient to put upon the tug the risk of departing from it without reason. *The Mary N. Hogan*, 35 Fed. Rep. 554.

Decree for the libelant, with costs.

THE PROTOS.¹

CANNON v. THE PROTOS.

(Circuit Court, E. D. Pennsylvania. December 11, 1891.)

1. INJURY TO EMPLOYE—NEGLIGENCE.

To leave a small trimming hole in the lower deck of a vessel, a short distance from the main hatch, open and unguarded, when the vessel was unloading, and the between-decks, where it was to be expected the stevedores discharging the cargo would necessarily go, was dark and unlighted, is negligence, for which the ship is liable. *The Helios*, 12 Fed. Rep. 732, followed.

2. SAME—CONTRIBUTORY NEGLIGENCE.

A stevedore engaged in unloading a vessel went between-decks to get his overalls and change his clothes preparatory to going to work in the lower hold. The between-decks was dark, and he fell through a "feeding hole." It was the ship's duty to keep the "feeding hole" closed. *Held*, he was justified in believing the hole closed, and was not guilty of contributory negligence.

3. SAME—LIABILITY OF VESSEL.

A vessel is responsible for an injury happening to a shoveler employed by the stevedore that she employed to unload the vessel, when such injury occurs through her own unsafe condition.

In Admiralty. Appeal by respondent below, the steam-ship *Protos*, from a decree of the district court awarding \$1,250 as damages for injury to person of libellant, Frank Cannon, incurred while unloading the cargo. Affirmed.

John Q. Lane, for appellant.

John F. Lewis and *John T. Murphy*, for appellee.

ACHESON, J. After a careful consideration of all the proofs, I am entirely satisfied with the conclusions of the district court, both as respects the facts and the law of the case. I find the facts to be as follows:

1. The libellant was a laborer under a head stevedore, who was employed by the master of the steam-ship *Protos* to unload her cargo of china-clay at the port of Philadelphia. The libellant was engaged on the vessel, as a shoveler, at this work, on Saturday, February 9, 1889; and, the discharge of the cargo not being completed on that day, he was told to return the next Monday morning.

2. When he quit work on Saturday, he left his overalls in the between-decks. Returning on Monday morning, the libellant, about 7 o'clock, went down the ladder of the main hatchway, used for storing and discharging of cargo, and got off at the between-decks, to get his overalls, and make the usual change of clothing preparatory to going down into the lower hold, where the clay yet to be discharged was; and, while thus engaged in getting on his overalls and changing his clothes, he fell through a small feeding or trimming hole down into the lower hold, breaking his arm, and otherwise injuring himself.

3. Feeding or trimming holes are used for trimming the cargo as it settles down. The one through which the libellant fell was about 3½ feet long by 2 feet wide, was about 20 feet in from the main hatchway,

¹ Reported by Mark Wilks Coblet, Esq., of the Philadelphia bar.

in a dark place, and was flush with the deck. Upon this occasion, it was uncovered, and was not guarded by a railing or otherwise; neither was there any lamp or other light burning near it; nor was any warning given to libelant to avoid the danger.

4. It is usual and proper for the shovelers engaged in unloading a cargo to put their overalls in the between-decks, and there, also, the drinking water for the men is kept. Daniel Brew, the foreman of the head stevedore over the workmen who were engaged in unloading the cargo of the *Protos*, was called as a witness for the respondent, and upon his examination in chief thus testified:

"*Question.* In discharging the cargo that day, had the men employed by you in the discharge of that duty any business to go between-decks? *Answer.* Well, the hold had the clay in, and the men had to go between-decks to put their clothes there. They had no place else to put their clothes, because the clay was in the hold."

The fact was as thus stated by the witness.

CONCLUSIONS OF LAW.

Undoubtedly, it was negligence for which the vessel is answerable to leave this small trimming hole open and unguarded in a dark place, where it might be expected the shovelers would go to put on their overalls and change their clothes, and where they had a right to go for this purpose. *The Helios*, 12 Fed. Rep. 732. The fact that the master had hired a head stevedore to unload the cargo did not relieve the vessel from liability for the injury the libelant sustained by reason of her unsafe condition.

I am of opinion that the evidence does not show contributory negligence on the part of the libelant. As the learned district judge well said, "he was justified in believing the passage safe, not only because of the respondent's duty to have it so, but also because he had found it safe on Saturday." It is true that since the appeal, and two years and six months after the accident, two of the respondent's witnesses, being recalled, testified that the small feeding holes in the between-decks of the *Protos* were open on the Saturday before the libelant was hurt. But, if these witnesses are to be understood as saying that they remember to have noticed that the particular feeding hole here in question was open on Saturday, it by no means follows that the libelant observed that it was uncovered.

The commissioner appointed to ascertain the libelant's damages seems to have proceeded carefully and intelligently, and his award was approved by the district judge. Taking into consideration the serious character of the libelant's injuries, his suffering, and the physical condition in which he was left, together with loss of time, the allowance of \$1,250 does not strike me as excessive. The decree of the district court must be affirmed, and a decree in favor of the libelant entered in this court for the sum of \$1,250, with interest from the date of the decree in the district court, together with the costs in that court and the costs in this court. Let such a decree be drawn.

NORDAAS v. HUBBARD *et al.*¹

(District Court, S. D. Alabama. December 12, 1891.)

1. SHIPPING—PLACE OF LOADING—CHARTER-PARTY.

A charter-party providing that the vessel shall load at Mobile a cargo not exceeding what she can reasonably carry does not compel the shipper, after he has loaded her to the draught of the river at the city, to furnish her more at the deeper anchorage in the bay of Mobile, 30 miles from the city.

2. SAME—DUTIES OF MASTER.

It is the peculiar business and duty of the ship-master to know what ports his vessel can enter and what anchorages are safe.

3. SAME—COST OF LIGHTERAGE.

If a vessel, in order to earn greater freight, gets the shipper to furnish at a deeper anchorage cargo in addition to what he had furnished at the agreed place of loading, the cost of lightering must be borne by the vessel. Delivery to the lighter is delivery to the vessel.

4. CUSTOM—EVIDENCE OF USAGE.

While evidence of usage is inadmissible to contradict, it is admissible to explain, a contract where otherwise the intention of the parties cannot be ascertained.

5. SAME—APPLICATION TO CHARTER.

When a custom is certain and general, although not so notorious or so acquiesced in as to have the force of law, it will be carried out as to a point where the contract is silent, when the charter-party provides that the custom of the port is to be observed in all cases not especially expressed.

In Admiralty. Libel *in personam* by owner of vessel for extra expenses of finishing loading his vessel in the lower bay of Mobile, 30 miles from the city of Mobile. The facts are stated in the opinion.

G. L. & H. T. Smith, for libellant.

Pillans, Torrey & Hanaw, for respondents.

TOULMIN, J. The charter-party out of which this suit has arisen, and upon the construction of which the rights of the parties thereto are to be determined, in substance provides:

"That the vessel chartered shall proceed to Mobile, and there load from the charterers, at such anchorage or dock as they may direct, (where the vessel can be afloat, * * *) a full and complete cargo, to consist of sawn pitch pine deals under and upon deck, not exceeding what she can reasonably stow or carry, * * * which cargo the charterers agree to ship, and, being so loaded, shall proceed to Rio de Janeiro, * * * at the rate of \$15 per one thousand superficial feet," etc.

It seems to me clear from the terms of the contract that it was the intention of the parties that the vessel was to load at Mobile, and not partly at Mobile and partly in the lower bay, as she did do, owing to her heavy draught, and especially in view of the principle that it is the peculiar business and duty of the ship-master to know what ports his vessel can enter and what anchorages are safe. *The Gazelle*, 11 Fed. Rep. 431. Under the terms of the charter-party, the ship was not bound to load a part of her cargo at Mobile, and then take on board, outside the bar of Mobile, a part of the cargo she could not safely load at Mobile and cross the bar with. She could have loaded such a cargo as she could

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

cross the bar with, and no more, without being compelled to complete her loading outside the bar. She had the option to load a part at Mobile, and to complete the cargo outside the bar; but by the terms of the contract she was not bound to do so. *Scrut. Char. Part. 72, 75.* If, in order to earn more freight, she desired to complete or take on more cargo outside the bar, and required the charterers to furnish her such additional cargo, I think the vessel was chargeable with the difference in the expense of delivery at Mobile and in the bay outside the bar. A delivery to the lighter at Mobile was a delivery to the vessel. *Bulkley v. Cotton Co., 24 How. 386.* But, if I am in error in thus construing the contract, and it is necessary to consider any custom of the port in reference to the loading of vessels of like draught with the vessel in question, in order to ascertain what the intention of the parties was, let us see what the evidence shows upon the subject. Evidence of usage is not admissible to contradict a contract, but is admissible to explain a contract, where otherwise the intention of the parties cannot be ascertained. *Robinson v. U. S., 13 Wall. 363.* Besides, there is a provision in the charter-party that the custom of the port is to be observed in all cases where not especially expressed. The evidence shows that there is a custom at the port of Mobile for a vessel to load a part of her cargo at Mobile, and to take on board outside the bar the part of the cargo she could not safely load at Mobile, when she is of such heavy draught as to be unable to cross the bar with a full and complete cargo; and uncontradicted testimony in the case satisfies me that the custom in such contingency is for the vessel to pay the lighterage to the lower bay, in the absence of any express stipulation on the subject in the contract. There is no stipulation in the charter-party under consideration providing for such expense. Such case, then, not being expressly provided for by the terms of the contract, the custom of the port is to be observed. The evidence on the subject does not show that the usage has become so notorious or been so acquiesced in as to have the force of law, but it does show that there was a custom, certain and general, for the vessel to pay the lighterage to the lower bay when there is no stipulation in the contract to the contrary.

My opinion, therefore, is that, under the terms of this charter-party, the vessel was chargeable with the lighterage, irrespective of any custom, and that, according to the custom of the port, she was so chargeable. In either case the libellant is not entitled to recover, and the libel must be dismissed at his cost.

THE SCHIEDAM.¹

MILLARD v. THE SCHIEDAM.

(District Court, S. D. New York. December 14, 1891.)

1. SALVAGE—TOWING DISABLED STEAMER.

The machinery of the steam-ship Schiedam had been disabled, so as to compel the vessel to anchor some 15 miles east of Sandy Hook, and about 4 miles from the Long Island shore. The weather was hazy. The powerful tug Evarts came up, and agreed to take her to her dock in Hoboken for \$1,000. The Evarts was the only tug in sight at the time. She towed the steam-ship to her dock as agreed, with some assistance from other tugs met on the way, some of which had been sent by the agents of the ship. The Schiedam and cargo were worth \$185,000; the Evarts was worth \$30,000. Held, that the amount agreed on was reasonable, and should be awarded.

2. SAME—CONTRACTS FOR AGREED AMOUNTS.

Salvage, viewed as a reward, is not properly the subject of a binding contract in advance. Courts of admiralty fully examine into the circumstances of the service in the interest of the property saved, and award no more than a reasonable sum, and are not bound by the amount agreed on beforehand.

In Admiralty. Suit to recover salvage. Decree for libellant
Wilcox, Adams & Green, for libellant.
Wing, Shoudy & Putnam, for respondent.

BROWN, J. The compensation awarded in a court of admiralty for salvage services is not given as a mere *quantum meruit* for the work and labor done, but on grounds of public policy, in the interest of navigation, and for the safety of property and life, and as an encouragement and reward for the readiness, promptitude, and energy necessary to secure those ends, both in the conduct of the salvors personally, and for the vessels and other appliances previously provided for such service. Viewed as a reward, therefore, salvage is not properly a subject of any binding contract in advance, except as a limitation of the salvors' demands. In cases of present distress and peril the very necessity for salvage service presupposes that the parties do not stand upon equal terms as respects any contract they may make on the subject, any more than a captured prisoner in stipulating with brigands for his ransom. While a sum agreed on in advance and in the presence of danger may, therefore, limit the salvor, it has little or no binding effect upon the other party. All courts of admiralty freely examine into the circumstances in the interest of the latter, and award no more than a reasonable sum, without regard to the amount agreed on. See *Chapman v. Engines, etc.*, 38 Fed. Rep. 671, 672, and cases there cited. The Code of the Netherlands, to which country this vessel belonged, like the Codes of several other maritime countries, expressly provides (section 568) that any agreement as to salvage compensation made at sea before the danger is over "can be modified or annulled by the judge."

In the present case the Schiedam had become wholly disabled in her machinery, so as to be compelled to anchor some 15 miles to the east-

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

ward of Sandy Hook, and about 4 miles from the Long Island shore. The weather was hazy. She was of the value of about \$60,000, and her cargo of the value of about \$125,000; in all, about \$185,000. The libelant's tug Evarts came to her between 2 and 3 o'clock in the afternoon. No other tugs were then in sight. If she did not accept the services of the Evarts, it was quite probable that in the hazy weather she might not be discovered by any other tug in time to be taken into port before the next day, and in that case she would incur the chances of the weather in the mean time. It is to the interest of commerce and navigation that reasonable encouragement should be given to cruising beyond the limits of the port by vessels capable of rendering salvage service to those who are in need of succor. The Evarts was a powerful tug, adapted to this business, costing \$38,000, and at this time worth \$30,000. In view of all the circumstances and of the value of the Schiedam and cargo, I do not think the sum of \$1,000, which was the sum contracted for, is any more, to say the least, than I should have allowed for the services of the Evarts as the first tug that had come to the steamer's aid. The three other tugs, subsequently met, added their services, and have been paid at towage rates. The first was met about an hour after the Evarts had begun her towing; the other two were sent down from New York by the agents of the Schiedam, after news had been received by telegraph of her need, and were met not far from Sandy Hook at about half past 5 p. m. Early the next morning the Evarts resumed her work, and took the Schiedam to the dock at Hoboken, as had been agreed, with the aid, however, of the Goodwin, which the agents of the vessel sent to assist, and which was necessary, at least in docking. It is clear, however, from the libelant's evidence that any additional assistance in docking would have been provided by one of their own tugs, had not the respondent's agent volunteered to send the Goodwin. Before making this proposal, the agent was informed of the libelant's contract to take the steamer to the Hoboken dock for a thousand dollars. As this sum is all that is claimed, and does not exceed what this court would award for the Evarts' services, without reference to the additional help that the master and the agent thought it judicious to employ, it is not necessary to consider further any questions relating to the other tugs, as it is clear that they were not employed on the Evarts' account.

Decree for \$1,000, and costs.

THE G. W. JONES.¹

NEW YORK & C. MAIL S. S. Co. v. THE G. W. JONES.

(District Court, S. D. New York. January 12, 1892.)

1. SALVAGE—NECESSITY FOR AID—POWER OF MASTER TO CONTRACT.

In an emergency the master of a ship is not required to obtain special authority from his owners before entering into a contract to pay an agreed amount for salvage aid.

2. SAME—ENFORCEMENT OF CONTRACT—REASONABLE AMOUNT.

An admiralty court, however, will look at the reasonableness of the amount agreed on before enforcing a salvage contract.

3. SAME—TOWING VESSEL OFF BEACH—CASE STATED.

A steam-ship, in getting under way from her wharf at Progresso, broke her anchor, and the wind caused her to strand on the beach. She could not get off by her own efforts, but was in no danger unless a northerly storm should spring up. It being deemed dangerous to allow her to lie there overnight, a written contract was made by her master with libelants' tug, the only one at Progresso, to get her off for \$2,500, with \$500 additional in case the tug or her hawser should receive any damage. The tug thereafter got the ship off uninjured. On suit brought to enforce the contract, the answer of the ship averred that the contract was signed under duress, and that the master did not communicate with his owners, as he might and should have done. The ship and cargo were worth \$107,000; the tug \$25,000. The latter was not hurt, but incurred some danger of injury. The time of her service was short. *Held*, that the tug should receive \$2,000 for her services.

In Admiralty. Suit to recover salvage award.

Carter & Ledyard, for libelants.

Butler, Stillman & Hubbard, for claimants.

BROWN, J. In the afternoon of November 1, 1890, as the steam-ship G. W. Jones was getting under way from the outer end and the westerly side of the main wharf at Progresso, the fluke of her anchor, on which she was heaving, broke, and, a strong wind from the north-west catching her upon the starboard bow, she swung off, and stranded broadside upon the beach. Repeated efforts were at once made, by heaving upon the lines leading to the wharf, to pull her off the beach, but without success. Her winches were stranded, and several lines "of the best manilla rope" were broken. The sea was choppy, the wind fresh, and it was near high water. There was no danger of wreck unless a northerly storm should come up, but the master deemed it dangerous to leave the vessel in that condition overnight, lest she should work higher up on the beach and deeper in the sand. After some negotiation, a written contract was made with the master of the libelants' tug M. Moran to haul her off the beach to a safe anchorage place for \$2,500, with \$500 additional in case the tug should suffer damage to her hull, engines, rigging, or hawser. This agreement was made about 7 P. M. The tug procured hawsers, got at work upon the steamer at about 8 P. M., and at 9 succeeded in getting her afloat, and thereafter took her about three miles out into good anchorage ground, completing the service at about 1 A. M. the

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

same night. The next day being Sunday, the master of the steamer on the day following gave a draft on New York for \$2,500, the sum agreed on, which was not accepted or paid, and the above libel was filed to enforce the contract for the salvage service.

The answer admits the service, but avers that the ship was not in a dangerous position; that the so-called agreement "does not constitute a contract, in that the captain of said steam-ship was compelled to sign said paper by duress and compulsion, and in that he had no authority from the owners of said steam-ship and cargo to sign it, and in that he did not communicate with the owners, which he might easily have done." It does not aver that the amount was unreasonable or excessive. The testimony of the master, as well as the libel, shows that he feared that the steamer might be driven up further on the beach during the night, unless she was immediately hauled off. The circumstances show that this apprehension was justifiable. It was his duty, therefore, to procure any aid at hand that could be reasonably procured for the immediate relief of the steamer. His authority as master to secure this at once, without communication with the owners, is plain. The circumstances did not admit of delay, nor is there any rule of the maritime law that would require the master to obtain special authority in order to secure relief of this kind in an emergency. *The A. D. Patchin*, 1 Blatchf. 414.

The evidence does not justify the defense of duress or compulsion. The master was not at sea, but in port, and had the option of procuring any different kind of relief that *Progresso* afforded. The tug was maintained there for special service, but this circumstance worked no constraint upon the steamer. On the other hand, it is a consideration of some importance in determining what is a reasonable compensation. The steamer and her cargo were of the agreed value of \$107,000; the tug, of the value of \$25,000. The witnesses for the tug testify that in rendering the service she necessarily encountered some danger, in working her engines to the utmost capacity, of straining both the boat and the machinery, and also of running upon the steamer's anchor. She received no injury, however, and the steamer was got off without suffering any damage whatsoever, and sailed for Boston on the second day after.

I cannot attach much weight to the evidence of the witnesses at *Progresso* that the steamer was not in peril. Doubtless she was not in immediate peril of being wrecked, but the witnesses do not say that it was not perilous to leave her on the beach in her stranded condition, without attempting immediate relief. As above stated, I agree entirely with the opinion of the master, as expressed at the time, embodied in the contract, and repeated by him in his testimony. Although the answer does not deny the value of the services, yet a court of admiralty would not enforce a contract of this nature, either against the owners or against their property, in a suit *in rem*, any further than it appeared to be reasonable. *The Adirondack*, 2 Fed. Rep. 387; *The Hesper*, 18 Fed. Rep. 692; *The M. B. Stetson*, 1 Low. 119; *The John Ritson*, 35 Fed. Rep. 663; *The Schiedam*, 48 Fed. Rep. 923. Considering that the tug was by the contract to receive \$500 additional if she incurred any damage to her

machinery or hawsers in rendering the service, and that this risk was covered by that stipulation, I think that, inasmuch as no such injury was received, and the service was comparatively short, \$2,000 will be a sufficiently liberal compensation, and a proper one, in the present case; certainly not more than the courts of England, to which this ship belonged, are accustomed to allow for similar services. See *The Accomac*, Law Rep. [1891,] Prob. 349. As no offer or tender of payment has been made, the decree should be for that sum, with costs.

THE P. I. NEVIUS.¹

THE WIDE AWAKE.

ALBERTSON v. THE P. I. NEVIUS AND THE WIDE AWAKE.

(District Court, S. D. New York. January 9, 1892.)

1. CONTEMPT—RESISTANCE TO PROCESS OF COURT.

Where the marshal had served process on the vessel-owner, who had read enough of the paper handed him to know its meaning, and who thereafter refused to obey the orders of the officer as to where he should go, and who, when the officer stepped ashore to call a keeper, steamed away with his vessel, *held*, such acts constituted a resistance and evasion of the process of the court, subjecting the vessel-owner to the penalties of a contempt.

2. SAME—FINE—AMOUNT—MARSHAL'S EXPENSES.

As it appeared possible, however, that the vessel-owner might not have understood the character of his act, the court would only impose as a fine the actual expenses incurred by the marshal in searching for and retaking the vessel.

In Admiralty. On motion to punish for contempt.

Alexander & Ash, for libellant.

Owen, Gray & Sturges, for the P. I. Nevius.

Goodrich, Deady & Goodrich, for the Wide Awake.

BROWN, J. Mr. Day, the owner of the Nevius, was regularly served personally with a notice of the attachment and the libel of his tug. The officer, coming on board, handed it to him, and I have no doubt that it was read sufficiently by Mr. Day to know its meaning, as the officer testifies. I am satisfied that Mr. Day refused to obey the orders of the officer to go to the new dock, insisted on going to Hoboken for water and coal; and, when the officer stepped ashore for a moment to call the keeper, who was near at hand, he steamed off up the river. This constituted a resistance and evasion of the process of attachment, which, as against him, had been sufficiently served by the marshal, and subjects him to the penalties of contempt of process of the court. *In re Higgins*, 27 Fed.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

Rep. 443; *In re Sowles*, 41 Fed. Rep. 752. As it seems quite possible, however, from Mr. Day's statement, that he may not have understood the character of his act, I shall impose no fine beyond the actual expenses incurred by the marshal in hiring a tug to search for and retake the vessel. An order for the payment of that amount may be entered.

END OF VOLUME 48.